

8 September 2017

Family Violence Task Force
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: familylawunit@ag.gov.au

Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

Thank you for the opportunity to contribute to the Attorney-General's Department's consideration of this important topic of inquiry, the proposed amendments to the *Family Law Act 1975(Cth)* to address direct cross-examination of parties in family law proceedings involving family violence.

Caxton Legal Centre is Queensland's oldest community legal centre. Caxton Legal Centre's objects are to provide legal and social welfare services to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness, and to educate such people in legal, social welfare and related matters.

Family Law and family violence have been key features of our advice and advocacy work since we first began operating. We have advised both male and female clients in a variety of relationship contexts – including intimate, personal, family and carer relationships. We appear as duty lawyer in the Brisbane Domestic Violence Court, the Family Law Court and the Family and Support Service based in the Family Court of Australia at Brisbane.

Contents of submission

1. *Should direct cross-examination only be automatically banned in specific circumstances?*

Yes.

2. *Should direct cross examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?*

Direct cross-examination should *only* be banned in the circumstances outlined in *s102NA(1)(c)(i)* where there are convictions for, or the perpetrator is charged with, an offence involving violence or a threat of violence by the perpetrator towards the victim. There ought not be an automatic banning in the circumstance alone where there are cross-orders in place (as proposed in *s102NA(1)(c)(ii)*).

3. *Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed section 102NA(1)? For example, in the courts' Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence.*

No. The proposed defined circumstances set out in the new proposed s102 NA{I} is adequate.

4. *Should any ban on direct cross-examination apply to both parties to proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?*

The ban should apply to both parties. This will reduce the risk of any dynamic of power, control, vulnerabilities, trauma and high family conflict affecting the evidence sought or provided, and ensure that all relevant evidence possible is presented to the Court. To ensure procedural fairness, an Independent person should be appointed by the Court for both parties.

5. *Should the discretionary power only be exercised on application by the alleged victim, or by the Courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross examination.*

Discretionary power should be exercised on Application by either the alleged victim or the perpetrator. It should also be by the Court's motion, or by Application by the Independent Children's Lawyer (if appointed). There may be unintended consequences of the legislation if discretionary power is only to be exercised on an Application solely by the alleged victim.

There ought to be defined factors that the Court should take into account in exercising its discretion, including the conditions in the domestic violence order, the nature of the violence alleged, whether there have been any breaches of the Orders, and professional evidence of the impact of the alleged violence on the victim.

Defining the factors the Court should take into account gives recognition to the circumstances in which victims would usually be re-traumatised via direct cross-examination. Providing the Court with the discretion on its own motion will assist to ensure that the victims of family violence in these circumstances are not re-traumatised and are appropriately supported in putting evidence before the Court. It will also assist to improve the capacity of the witness to appropriately and fully answer any questions by reducing fears and anxieties of being confronted by the perpetrator in the Court setting. It will also assist to reduce risks that the witness will be intimidated and/or will withdraw their Application or agree to inappropriate or unsafe Consent Orders in order to avoid being directly questioned by the perpetrator.

This proposal will also assist to prevent the perpetrator from using their self-represented status to perpetrate further abuse to the witness by using the judicial process through the family law system.

6. *Which people would be most appropriate to be appointed by the Court to ask questions on behalf of the self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.*

Serious consideration ought to be given to alternative processes for the appointment of a person to ask the questions on behalf of the self-represented person. The alternative processes should be evidence-based, i.e. derived from other jurisdictions where there is clear evidence that a certain process works to balance the competing needs of the victim being protected from further re-traumatising, and the rights of the perpetrator to natural justice.

7. *What qualifications, if any should the Court appointed person have?
Law/psychology/social work/social sciences/mediation/justice.*

If the process was to be a Court appointed person then the issues that arise are:

1. If the person is to be a lawyer appointed by the Court, or a lawyer appointed by Legal Aid Queensland (at the Court's direction) in a similar process to that of the appointment of an Independent Children's Lawyer, or in criminal Courts where this situation arises, there are serious legal professional practice issues at odds with the nature of this appointment. The appointed lawyer would be expected to be something more than a duty lawyer but something less than a lawyer on the record for the proceedings. The lawyer appointed should be given advocate's immunity (such as it is) as they are performing the role of a barrister, without properly and fully being briefed in the matter.
 2. The person appointed should be a lawyer with experience in domestic and family violence and family law matters, who is bound by the legal professional rules and ethics and who understands the nature, purpose and rules of cross-examination so as avoid the pitfalls associated with lay people conducting cross-examination and the impact on the victim and evidence obtained.
 3. Ideally, the appointed person would have an understanding of the dynamics of domestic violence and participated in a training workshop on domestic violence and trauma/cultural competency.
 4. It is difficult to imagine how a person from another professional background may conduct cross-examination which is a fluid process often involving asking questions based on the previous answers, which lawyers may be skilled at, but skills a lay person does not possess.
8. *Should any requirements regarding who the Court can appoint and their qualifications be included in the Family Law Act?*

Yes, there should be requirements regarding who the Court can appoint and their qualifications be included in the *Family Law Act 1975*.

9. *Should any further information about the scope of the role of the Court appointed person be included in the Family Law Act?*

A Court-appointed lawyer would take instructions from the self-represented person in the usual manner required of a lawyer representing a party to proceedings but recognising that this is a limited retainer. Issues of allegations of professional negligence may be of concern to practitioners who do not have full access to the Court file. There may have to be amendments to lawyer's professional conduct rules.

If the person appointed is a person in another profession/lay person, they would have to meet with the self-represented party and be guided only by that person's list of cross-examination questions. It may be placing too much responsibility on a lay person to act like a lawyer (which is required by virtue of the very nature of the cross-examination process which is fluid, not static) when they are not a lawyer. There would have to be exceptions to the publishing rules if the lay person was to have access to the Court file.

The Court appointed person should be present during the evidence of relevant people i.e. report writer's and other expert witnesses so as to know the evidence that has been given so as to be able to effectively cross-examine the witness.

The Court appointed person is independent to the Independent Children's Lawyer and should be entitled to communicate with the Independent Children's Lawyer so as to clarify any relevant issues with respect to the child and the evidence presented by the Independent Children's Lawyer (i.e. Family Reports).

If the person appointed is a lay person, the self-represented person should not be allowed to appoint the person who is appointed at the Court. However, they should be able to put forward a suitable person for consideration and/or approval by the Court. This would also allow the other parties in the matter to make submissions about the suitability of the proposed questioner. This will ensure that a questioner is not appointed who will be used by the self-represented litigant to further perpetrate abuse upon the witness.

- *How the Court-appointed person obtains questions from the self-represented party:*

Yes - identify how the person obtains the questions from the self-represented party and what the level of assistance is to be provided/constrained to.

- *The level of engagement of the Court- appointed person should have with a self-represented party on whose behalf they are asking questions:*

Yes - identify appropriate level and limit engagement to the cross examination of the other party and to extract information that is relevant to that.

- *Whether the Court- appointed person should be present in Court for the whole of the proceedings or just during the cross examination:*

Yes.

- *What discretion the Court appointed person can exercise (if any) in relation to asking the questions they have been provided by the self- represented party:*

Yes, the Court appointed person can exercise discretion in relation to formulating and asking questions they have been provided by self-represented litigant to safeguard against further trauma or abuse within the Court process and to ensure that the Court appointed person upholds their own ethical and legal obligations.

- *Whether the Court-appointed person can ask any questions of their own (not provided by the self- represented party) during cross- examination?:*

Yes, if the questions are relevant to the case and procedural fairness. This should be discussed with the self-represented, and be done on instructions and in line with professional obligations .

- *Whether they are under duty to cooperate with other parties to the proceedings such as the independent Children's Lawyer appointed in the case:*

Yes –As above.

- *Should the self- represented person be allowed to nominate who is appointed by the court to ask questions on their behalf:*

As above

10. Do you have any concerns about a Court- appointed person's model?

Yes. As per above.

11. Should the Court only grant leave for direct cross- examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly

cross- examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required ?

The Court should use its discretion based on the evidence before it to determine whether to grant leave. Views of the parties should be obtained, but not be the determining factor.

12. Should the Court only grant leave for direct cross- examination to occur if it has considered whether the cross- examination will have a harmful impact on the party that is the alleged victim of the family violence?

The Court should only grant leave for direct cross- examination to occur if it has considered whether cross-examination will have a harmful impact upon the alleged victim of family violence. The Court should consider whether the impact of family violence and trauma has impacted the ability of the victim to give evidence and incorporate a risk assessment model into the Court to assess impact.

13. Should the Court only grant leave for direct cross- examination to occur if it has considered whether the cross- examination will adversely affect the ability of the party being cross-examined to testify under the cross examination, and the ability of the party conducting the cross- examination to conduct that cross-examination?:

Yes

14. Are there any other issues the Court should be required to consider before granting leave for direct cross-examination to occur?

The allegations of violence, the impact upon the victim, the ability of the victim to provide evidence and/or to cross-examine the alleged perpetrator and the effect this will have in the proceedings overall.

15. Should the amendments apply to proceedings started before the law comes into effect, or should they only apply to proceedings started after the law comes into effect?

Yes - They should apply to all family law proceedings, even those commenced prior to the law change.

16. Should any of the changes be made to the proposed amendments to ensure that all parties receive a fair hearing?

Considerations should also be made for ATSI/CA LD communities and support required to ensure a procedural fairness and due process in the context of family violence within those communities.

17. Should any changes be made to the proposed amendments to ensure that the Courts can be satisfied that any cross examination of the parties that occurs through a Court appointed person will enable the judicial officer to accord procedural fairness to the parties?

As per above.

18. Should any of the changes be made to the proposed amendments to ensure that Courts are able to make informed decisions?

The Court should be able to inform itself on issues of family violence to ensure procedural fairness and due process.

19. Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?

As per above.

This submission was prepared by Ms Renea Hart, at the Centre. For further information please contact Renea Heart on [contact details redacted].

Yours faithfully,

McDougall
Director
Caxton Legal Centre