

Submission to the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017— Public Consultation on Cross-examination Amendment

Your details

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Your submission

Insert your text here and send the completed submission to the Attorney-General's Department at familylawunit@ag.gov.au.

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

No. CSMC believes there should be an automatic ban on direct cross-examination in all circumstances.

Where the safety and well-being of children is the prime concern, we suggest family law courts cannot continue to risk situations where one parent who may have ulterior motives is able to compromise the ability of the other parent to present freely, fairly and fully to the court, any and all matters that may be relevant to the Courts' considerations.

Even in situations where both parties may agree to direct cross-examination, there is sufficient evidence now in the public arena of the coercion exerted in some dynamics that we recommend a blanket ban. Parties who do not need court protection may have already reached agreement or may make a joint statement to the court.

Questions of direct questioning and responses are dealt with in Family Dispute Resolution meetings. These use shuttle mediation where there is evidence of conflict. Where mediators ascertain a risk to a party and the children, they have the option to issue a certificate to take the matter to court.

Given we believe there are avenues to ensure procedural fairness without direct cross-examination, we do not support any direct cross-examination being allowed.

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

Yes, but as part of a comprehensive ban on cross-examination as in 1. above.

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

Yes.

Direct cross-examination is a combative and adversarial approach to issues that does not assist parents accept their responsibility to help the court arrive at the best outcomes for the child/ren. Where there is a history of abuse and intimidation, victims may be too fearful to answer truthfully in front of the perpetrator. Given evidence of the impacts of coercion between intimate parties that may not be visible to the court but may silence or deter a party from proper disclosure, we contend this adversarial approach serves neither the safety of the parties nor does it support the court to fully hear all matters, and consider and determine the best interests of the child/ren and the safety of all parties.

Where parties are engaged in direct cross-examination, their attention is focused on making their point and catching the other party out, and often remains locked in the patterns of their former relationship. Their attention is not where we believe it needs to be, which is working with the court to establish the best ways forward. We consider that even where direct cross-examination is perceived as a legitimate approach to bringing evidence to the Courts' attention, it will continue to disadvantage those parties who:

- lack confidence to face a former partner either as questioner or respondent
- lack the verbal facility to speak confidently in the Court
- Are fearful for their safety or subsequent ramifications.

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

As in all our answers above, we recommend the ban on cross-examination be total and applicable to 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?

CSMC does not believe it is helpful to provide an avenue for the court to grant leave for either party to directly cross-examine the other. We strongly recommend the court not be given such leave.

We submit the following concerns to support our recommendation:

- Allowing the parties to continue in a directly adversarial manner is not conducive to determining the best interests of the child or the safety of all involved
- Where the court determines it is reasonable for some particular questions to be put to either or both parties, we submit this should be enabled through the lawyer of that party or, where there is no legal representation, that any party wishing to ask a specific question/s, may submit their question to the Bench for reading aloud by a court official.

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

CSMC recommends that a person who is self-represented and wishes to ask questions of the other party must submit these questions to the Bench so that a decision can be made as to whether an official of the court will read the questions aloud or, if the questions are more complex and confronting, that the court chooses to appoint a professional to ask these questions in an appropriate manner. Such a professional may be a lawyer, a court employee, or an appropriately trained advocate, any of whom will be protected from liability and may be funded by way of legal aid to act as a "mouthpiece" through which the self-represented litigant could ask questions in cross-examination. This raises the question of the court or legal services commissions having the funds available to ensure no party is disadvantaged through lack of financial means.

CSMC does not support lay people (excepting trained advocates) ever being given the right to ask such questions. They do not have appropriate training and are not protected from liability.

Where no lawyer or advocate is available, CSMC wonders if the judge presiding in the matter could have the power to intervene to ask questions of the parties as is provided for in the UK Family Court practice directions.

7. What qualifications, if any, should the court-appointed person have?

- Sufficient legal or advocacy training to understand the operations and purpose of the Family Law Act and Courts
- Demonstrable skill and qualifications in appropriate questioning techniques in situations of unequal power (such as those used in family dispute resolution, psychology, counselling etc.)
- Demonstrable understanding of family violence that is at the least, in accord with material in the National Domestic and Family Violence Bench Book
- Professional indemnity insurance.

8. Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?

9. Should any further information about the scope of the role of the court-appointed person be included in the Family Law Act? For example:

- **how the court-appointed person obtains questions from a self-represented party**
- **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
- **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
- **what discretion the court-appointed person can exercise (if any) in relation to asking the questions they have been provided by a self-represented party**
- **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination**
- **whether they are under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer appointed in a case, and**
- **the intersection between the court-appointed person's role and that of the judicial officer.**

CSMC considers that all matters relating to the scope of the court-appointed person should be included in the Family Law Act. In particular we support trained para-legal advocates with some counselling or mediation skill and training in Family Violence being available to assist in hearings. Including parameters

of the role in the Act will ensure that all advocates understand them.

In relation to the points above we suggest that:

- the court-appointed person receive the questions from a self-represented party through submission of these to the bench.
- There is minimal/no engagement between a court appointed person and the self-represented party. This model should not be seen as an avenue for a self-represented party to become represented. When questions are submitted to the bench, they should be assessed for clarity before being provided to the court appointed person who is there to ask the question/s and seek clarification of the answers if necessary, but not to engage in full cross-examination.
- The court-appointed person be present only for the relevant questioning.
- The court-appointed person be directed at the outset to ask the questions in a courteous and inquiring tone and to press only for clarification (as necessary) in the answer. This then obviates the need for discretion in asking questions beyond this clear parameter. We oppose any further discretion. As indicated in the point above, that the court-appointed person be able to ask for further clarification if the answer does not, on a reasonable basis, make sense. This clarification, like the original question, should also be asked in a courteous and inquiring tone with no hint of interrogation, intimidation or demeaning of the person being questioned.
- While the court-appointed person as we imagine them, has a limited role, we support them being under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer

We are not able to offer comment on the final point relating to the intersection between the court-appointed person role and the judicial officer beyond our surmise that:

- They take their initial instructions from the judicial officer
- They should follow normal protocols in relation to the judicial officer and,
- We acknowledge the possibility as we have suggested in question 6 above, that the judicial officer may in some instances themselves ask the question and be the court-appointed person.

10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?

Only in so far as the person meets our suggested skills and experience AND there is no objection from the other party.

We reiterate that we do NOT support a lay person being appointed. We consider that family members, friends and associates of the self-represented litigant are unlikely to bring a measured and impartial tone to any questioning.

11. Do you have any concerns about the court-appointed person model?

We have a number of concerns:

Skill: We understand lay people are under consideration and we oppose this.

Costs: Given that the legal system is under such pressure that many people cannot afford or obtain legal representation, we are unsure about whether there is any proposal to pay for good, court-appointed people or from where such funds would be drawn.

Distraction: As outlined earlier (see question 3), CSMC is concerned that having any party involved in direct cross examination or commissioning direct cross examination keeps their attention entirely focused on their version of events. We understand that in conflicted cases and particularly where there has been violence between the parties this is already a risk, but we also know of instances where hearing their issues mediated through the questioning of a skilled and compassionate lawyer has enabled some parties to hear the response differently and to have their attention re-directed to something they had not truly absorbed previously, such as their responsibility as a parent and/or the future well-being of the child.

Risks: The Family Law Council (FLC) stated in its 2016 final report on Families with Complex Needs and the Intersection of Family Law and Child Protection that over 50% of children's matters in the family law courts involve family violence and other safety concerns for children.¹ In these cases, there are often other serious issues such as such as substance misuse and parental mental illness that can have an adverse impact on

¹ FLC Final Report: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16-17.

the safety and well being of the children². We introduce these points here to underline the very great risks if we get the wrong model in place.

12. 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?

CSMC recommends the court never grant leave for direct cross-examination. We consider the risks that one or the other party may exert pressure on the other to agree to direct cross-examination is too great to risk.

13. 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?

CSMC recommends the court never grant leave for direct cross-examination. It is unlikely the Court will have all the information it may require to make an informed decision about the impact of direct cross-examination on the alleged victim of the family violence and to even attempt to gain such information may seriously re-traumatise someone who is struggling to cope and to present well in order to help achieve the best outcome for the child/ren.

14. 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?

As above, CSMC recommends the court never grant leave for direct cross-examination. It is unlikely the Court will have all the information it may require to make an informed decision about the impact of direct cross-examination on the alleged victim of the family violence and to even attempt to gain such information may seriously re-traumatise someone who is struggling to cope and present well in order to help achieve the best outcome for the child/ren.

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

Yes.

The court should consider, particularly in light of the recently released **National Domestic and Family Violence Bench Book** and commitments to judicial training in the areas of domestic and family violence, that they simply do not have sufficient expertise in the harms and traumas associated with domestic and family violence to make good judgements about the further harm and trauma made possible by direct cross-examination.

CSMC contends that granting leave to allow direct cross examination functions to enable alleged victims to face further harms and alleged perpetrators to receive some implicit vindication of their behaviour. We believe it is entirely inconsistent with broader proposals to enable the Family Law Act and Courts to better respond to family violence.

16. 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?

CSMC prefers to see amendments apply to all current proceedings, regardless of their start time, providing only that the model has had time to be fleshed out with training and funding provided so that there is no suggestion that a premature application of the amendments would jeopardise the safety of any party or complicate matters under court consideration.

We accept however that there may be concerns about procedural fairness in some matters and suggest that this is a good area for judicial discretion to manage.

² Ibid.

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

Yes. CSMC recommends the following changes:

- Direct cross examination does not occur in any circumstance
- The court does not have discretion to allow direct cross examination
- The court appointed model must, if it is to proceed with any option beyond a court employee, be fully and transparently funded
- Who can be an 'appropriate' person needs to be spelled out in legislation and to incorporate demonstrable skills and/or qualifications in respect of the court, questioning and family violence; and to include a requirement for professional indemnity insurance or other suitability liability protection.

18. 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?

Yes. The kind of detail of scope indicated at question 9 along with skills, qualifications and liability protection should be spelled out in the amendments.

19. Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?

The amendments could and should make explicit reference to their intentions to pay attention to the physical, emotional and mental safety and well-being of all parties before the court and acknowledge that the tolls of family and domestic violence are extreme and warrant action in the law and the courts to ensure that the best interests of the child/ren and the safety of all parties are fully served.

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

Yes. Court discretion to allow direct cross-questioning should be removed.

All judicial officers need training in family violence and its impacts and to be supported to realise that:

- this social problem is escalating,
- there are good resources available to improve understanding of these issues, and
- it is part of their duty to be informed about the impacts of partner and family violence to ensure the best interests of the child/ren and the safety of all parties is realised.

21. Any general comments.

Family violence existed in 1975 when the Family Law Act was first brought into being. Over forty years later, we are still struggling to arrive at an agreed approach to dealing with the protection, safety and best interests of the child in contested, volatile and/or allegedly violent family circumstances.

CSMC has been working with and representing single mother families throughout this time and more.

The experience of our members is that the child's best interests are never served when the court, as it has variously done through the years, ignores the best evidence on the occurrence and impacts of family violence through use of its processes (such as direct cross-examination) and however unwittingly, enables and allows covert violence to continue. No child is well served by seeing one parent denigrated or afraid of the other parent's bullying, violent or controlling behaviour.

CSMC is pleased that this issue is under real consideration and appreciates the opportunity to express our views.