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

(Consultation closes **COB 25 AUGUST 2017**). Please send electronic submissions to familylawunit@ag.gov.au*)*

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Your details

Name/organisation (if you are providing a submission on behalf of an organisation, please provide the name of a contact person)

Djinda Services (Women's Law Centre of WA)
(Perth Aboriginal Family Violence Prevention Legal Service)

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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?**

We support an automatic ban on direct cross-examination in matters involving allegations of family violence, however would recommend that the prohibition be as broad as possible to properly ensure victims and survivors of family violence are protected and not exposed to further unnecessary trauma.

In our experience where there has been family violence perpetrated against our clients, the fear of cross-examination does stop a number of them from commencing Family Court proceedings or following through with proceedings once commenced.

It is our further experience that unfortunately a number of perpetrators do use the existing process as a means of ongoing abuse and introducing such a ban will cut this out at an earlier stage.

We believe it is important for discretion to be included allowing the court to grant leave for cross-examination directly as proposed. Many victims of family violence are stripped of their "voice" and allowing them to have a say in how proceedings are to run is important in acknowledging what has been done to them.

In the event a broad ban is not imposed we would propose an additional amendment be allowed for the court to have discretion to ban cross-examination where a person can demonstrate there has been family violence outside of the specific circumstances listed, and that not banning cross-examination would be harmful.

This could be shown by way of a general risk assessment conducted by a family consultant or other appropriate court staff member. Or alternatively it could be shown by a statutory declaration (or affidavit) from a victim setting out the circumstances regarding family violence and possible effects it will have on the person if they were to be cross-examined. If that is not enough an additional statutory declaration from a support person/medical professional on behalf of the victim could be provided. Such a provision would be in keeping with the federal family violence migration regulations.

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

We agree that direct cross-examination should be banned in each of the specific circumstances set out in the new proposed s. 102NA(1) but do not believe it should be dependent on one of the circumstances in s. 102NA(1)(c) being satisfied.

The circumstances in s. 102NA(1)(c) as proposed are too narrowly defined. The current circumstances must be made broader and additional circumstances provided for.

For example it should be expanded to include actual or threatened violence not only to the other party, but to persons related to the other party. This need not necessarily be a familial relationship, actual or threatened violence to a friend or colleague of the other party should also be considered.

Subsection 102NA(1)(c) also heavily relies upon the victim having instigated legal proceedings, such as pressing charges or applying for some sort of injunction and, as such, are too constricted.

Interim orders should not be excluded from s. 102NA(1)(c)(ii). An alleged victim should not be placed at risk of re-traumatisation simply because a final order has not been made. There may be circumstances where, for instance, a respondent to an interim order makes an objection such that proceedings are prolonged.

Likewise there are many reasons why women may not instigate legal action at all. These include, but are not limited to, fear of retaliation, isolation, diminished self-esteem, embarrassment, not wanting the perpetrator arrested, the violence being non-physical or a lack of evidence, etc.

The current narrow scope of circumstances has the potential to disadvantage Aboriginal and Torres Strait Islander people, particularly in regional areas, who are less likely to access the legal system for a family violence response. For example, research indicates that Aboriginal women are less likely to apply for a restraining orders than non-Aboriginal women. There are varied and complex reasons for this, including a stronger sense of identity and loyalty to community rather than to individual rights and a hesitation to use a legal instrument which might cause divisions in their community.

In addition Aboriginal and Torres Strait Islander people often have a distrust of Police and the justice system generally. This is compounded by real and perceived racism from Police, such that complaints aren't taken seriously or people fear this will be the case.

It will also disadvantage culturally and linguistically diverse communities who are less likely to obtain a legal response to family violence due to cultural and language barriers. Along with physical family violence, victims are subjected to non-physical forms of abuse, such as emotional abuse and economic abuse. Whilst legislative changes and shifts in community attitude have improved how abuse is perceived and understood, including how non-physical forms of abuse are also family violence, it remains difficult to obtain legal responses (such as a conviction or restraining order).

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.**

As previously noted, we believe the ban should extend broadly and so would agree the ban on cross-examination should extend to matters involving a Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence.

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?**

From our experience it is just as hard for a victim to cross-examine a perpetrator as it is for them to sit through a cross-examination themselves. Therefore we would support a ban on cross-examination applying to both parties involved in the proceedings.

Given the rules of evidence on cross-examination, and in particular, the ability of the cross-examiner to ask leading questions, there is real potential for a cross-examination to become heated or even verbally abusive. The alleged perpetrator's answers could cause serious distress to an alleged victim.

Fear of reprisal is also a contributing factor when a victim is cross-examining a perpetrator and because of that fear and the stress associated with it, it is possible that a victim will not cross-examine as thoroughly as their case requires.

Ultimately, it would be unfair if a perpetrator was able to have someone else cross-examine the victim due to a ban on direct cross-examination but the victim was not. This would in effect leave

the victim to fend for themselves. Additionally, if the perpetrator was appointed a legally trained or other person to cross-examine the victim, this could prove beneficial to the perpetrator's case.

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?**

Given the qualifications which must be satisfied in the proposed s. 102NA(3) for a court granting leave for cross-examination, theoretically either party could apply. However, our experience is that there are some judicial officers who do not fully appreciate the impact of family violence. We would be concerned the considerations in s. 102NA(3)(b)(i) and (ii) and s. 102NA(3)(c) may not be given the proper weight by the court and decisions could be made to allow cross-examination where it is not appropriate.

Therefore we would recommend discretion only be exercised upon the application of the victim.

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.**

We have a unique situation in Western Australia during cross-examination in Violence Restraining Order Trials where the Magistrate repeats the question accurately to the person to be examined. This process has proven to be quite effective and we would be supportive of the judicial officer being the appointed person.

Regardless of who is appointed specifically, we stress the importance of alleged victims from Aboriginal and Torres Strait Islander communities being appropriately represented by a person with a proper understanding not only of family violence, but of how family violence specifically affects various Aboriginal and Torres Strait Islander communities.

This understanding should not relate merely to Aboriginal and Torres Strait Islander persons in general, but to specific regions, country and communities. Where the person being cross-examined is from a specific Aboriginal or Torres Strait Islander community, it will be essential that the appointed person has an adequate and appropriate understanding of the unique differences in the ways in which members of that particular community may receive questions, give evidence or communicate normally.

More generally, an appropriate person should have some understanding of court processes and rules of evidence so a cross-examination can be properly carried out. We do not think this person should necessarily be a legal practitioner, but a foundational understanding would seem important so the evidence can be properly adduced and tested.

However, for the sake of impartiality we do believe the person should be employed by the court directly and not seconded from another service provider.

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

We do not necessarily have a firm view on what specific qualifications a court-appointed person should have, provided they have an understanding of the points we outlined in answer to Question 6.

We see a number of clients who are reluctant to engage in the Family Court system to resolve parenting disputes because of the court's lack of understanding of Aboriginal and Torres Strait Islander specific issues, such as family structures related to specific regions and language groups, the strength of family and community ties, intergenerational trauma effects post-colonisation and the potential detrimental impact on children who are already overrepresented in the Care and Protection system.

Family violence is a complex and multifaceted problem that is further complicated by these issues. If Aboriginal and Torres Strait Islander victims are to obtain justice and be effectively supported through the court system, then all court staff need to have relevant, regionally specific Aboriginal and Torres Strait Islander cultural training. In particular, this training will need to explore the differences in the context and nature of family violence amongst Aboriginal and Torres Strait Islander peoples, as well as its prevalence.

An understanding of how family violence differs amongst Aboriginal and Torres Strait Islander communities will be essential for court staff to apply discretion in regards to the proposed amendments.

In addition to the above, family violence training must be continued over the long term rather than as a 'one off' session in order for key concepts to be reinforced and current issues to be addressed. As noted above, family violence is highly complex and it is unlikely that either sufficient understanding of the issues involved or attitudinal shifts would result from 'one off' training sessions.

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

Subsidiary legislation or guidelines would seem a more appropriate space for these requirements to be set out. These could be determined by a statutorily appointed agency or authority, and altered or adjusted without the need for a lengthy parliamentary process.

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.**

We think it is important that the scope of the role is detailed in the Act so that good and consistent practice is observed across the various jurisdictions. However, much of this detail would be dependent on which category of appointed person is engaged for an intermediary in cross-examination.

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

Provided the appointed person is properly trained on family violence issues, trauma informed practice, cultural competency, etc., a self-represented person should get the appropriate assistance required for the task of cross-examination and so a nominated person would not be necessary.

It is also important for the sake of procedural fairness that the person be independent. A nominated person may be someone who actually aggravates the situation.

If the law makers are intent on allowing a self-represented person to nominate an appointed person then specific criteria would need to be developed that would ensure impartiality and sufficient understanding of the issues involved. There criteria would need to be satisfied prior to the appointed person being permitted by the court to assist the self-represented person.

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

Again this is heavily dependent on the particular court-appointed person model implemented and we cannot provide further comments until such time as a model has been chosen.

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?**

We think it is important here that consent is not only informed, but can be withdrawn at any time, including during the cross-examination. In obtaining informed consent there should be minimum requirements for situations in which this is accepted.

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?**

Although an extremely relevant consideration we do not consider it appropriate for this to be the only consideration for determining whether to grant leave for cross-examination.

We recognise that victims must be supported to exercise their voice and to cross-examine a perpetrator if they choose to do so without unnecessary interference by the court.

If the court does have concerns about a victim making an informed decision on whether they wish to consent to cross-examination, a victim could be required to seek independent legal advice before a court will make a final decision about whether to allow cross-examination. Particularly, where they the court thinks cross-examination will have a harmful impact on the victim.

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?**

Again, although this is a relevant consideration, to ensure procedural fairness to both parties, we do not believe it should be the only consideration taken into account.

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

Where victims of family violence are concerned, we believe it would be appropriate for the court in exercising their discretion to take into consideration information and advice from external sources, such as support or psychological services working with a party. Such information and advice would include information on the person's ability to conduct cross-examination and on the harm that might be caused to them if they were to be cross-examined.

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?**

The amendments should definitely apply to all proceedings in the Family Court, including those started before the law comes into effect.

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

At this point in time we have nothing further to add than what has already been set out in this submission.

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?**

Again this will be dependent on the model implemented, however we would encourage that judicial officers be consulted when drafting any additional regulations or guidelines setting out the role of the court-appointed person.

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

At this point in time we have nothing further to add than what has already been set out in this submission.

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?**

Whilst we are supportive of the court having discretion to ban cross-examination in circumstances where the ban is not automatic, we would like to see further guidance provided on what the court must be satisfied by in exercising such discretion as the proposed sections are currently silent on this.

21. **Any general comments.**

Our experience in the Family Court of Western Australia is that they already face issues of understaffing and overcapacity and we have concerns this will worsen following the introduction of these amendments.

Obviously we do not want a lack of resources being a reason for these amendments not being implemented and so we would encourage Government to allocate additional resources and funding to the courts so that court users are able to properly access and engage in the court process.

Lastly, we would welcome any opportunity to provide further submissions and feedback once some of the current unknowns about the model for implementing the proposed amendments are determined by Government.