

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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- a party to the proceedings;
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- a witness in the proceedings.

Your details

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

Family Law Practitioners Association of Tasmania Inc.

Contact details (one or all of the following: postal address, email address or phone number)

[contact details redacted]

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Your submission

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

The Family Law Practitioners Association of Tasmania recommends the following in addition to any changes around rules relating to cross-examination:

- A. Prior to the trial the trial Judge should directly raise with the parties whether or not allegations of family violence are made in the proceedings.**
- B. If "yes" then the trial Judge must direct that the parties provide the other with interrogatories or specific questions for the other party to answer on oath prior to the trial.**
- C. The Independent Children's Lawyer should also have the opportunity to deliver interrogatories or specific questions.**

This approach should limit and focus cross-examinations.

- Cross-examination should not be automatically banned.
- There should be a rebuttable presumption that cross-examination will be banned if certain circumstances exist.
- The Judicial Officer should be left with a discretion to direct, control and manage the conduct of proceedings and to determine whether or not the presumption has been rebutted.

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

- The Family Law Practitioners Association of Tasmania (FLPT) does not support cross-examination being automatically banned.

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.

- There should be no circumstances where there is an automatic ban on cross-examination, even if family violence is referred to in a Notice of Risk.
- The Judicial Officer ought to maintain the discretion to direct, control and manage proceedings.
- The contents of the Notice of Risk may be relevant to whether or not the presumption is rebutted.

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?

- A ban on direct cross-examination ought to apply to all 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?

- It is submitted that a presumption against cross-examination should apply, however, any discretionary powers relating to cross-examination should be exercised on the application on either party or on the Court's motion or on application of the Independent Children's Lawyer.

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.

- Ideally the self-represented person should be allocated a Legal Practitioner for the entire trial if questions are going to be asked on behalf of the self-represented person.
- It is inconceivable that a Legal Representative would be able to only be engaged for the purpose of asking limited questions in a limited area for a limited purpose.
- Cross-examination is a nuanced task requiring skill. It is not to simply act as a “parrot” for the party who is cross-examining. A Legal Practitioner would be unable to simply restate questions sought to be asked by the self-represented party and discharge their duties to the Court as an officer of the Court and comply with Legal Professional standards of conduct.
- If the court-appointed person is to simply ask questions for a limited purpose as prepared by the self-represented person, then that person ought to be a Court employee who effectively acts as the “mouth piece” or “puppet” for the self-represented person.
- In essence that person will simply repeat the questions that the self-represented person has already prepared. This person would not be a Legal Practitioner.

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

- If the court-appointed person is a Legal Practitioner (engaged for the entirety of the trial) then that person ought to be Legal Practitioner with at least 5 years’ experience in Family Law matters.
- If the court-appointed person is a Court employee who is simply a “mouth piece” or “puppet” of the self-represented person then that person need only have training to undertake that task.

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

- Any requirements regarding who the Court can appoint and their qualifications should be included in the Family Law Act and/or the relevant Rules.

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**
 - If a Legal Practitioner is appointed then the self-represented party may provide the questions in writing beforehand but ultimately the questions asked ought to be left to the discretion of the Legal Practitioner as cross-examination is a nuanced skill that relies on the cross-examiner listening to the answers to the questions and adapting the next question in response to the answer provided.
 - If the court-appointed person is not a Legal Practitioner then that person should just simply “parrot” the questions that the self-represented party wants asked and those questions ought to be provided in writing beforehand or at least provided verbally to the court-appointed person before the cross examination so the questions can be asked in an ordered way.
- **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
 - If the court-appointed person is a Legal Practitioner then that person will engage with the self-represented party from the commencement until the end of the hearing in the usual way which requires the full level of the Legal Practitioner’s skill and attention.
 - If the court-appointed person is simply a “parrot” for the self-represented party than that person should do no more than receive the questions to be asked and repeat the questions, otherwise they may effectively take on an advisory role.
- **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
 - If the court-appointed person is Legal Practitioner then they should be there for the entire hearing.

- If the court-appointed person is simply going to “parrot” the questions of the self-represented party then they can just be simply there for the purposes of asking those questions.
- The Family Law Practitioners Association of Tasmania recommends that as part of any trial plan prior to a hearing that each party to the proceedings where family violence is alleged provide the other with a list of interrogatories or specific questions that are to answered on oath prior to the hearing which may have the effect of narrowing the cross-examination required on this topic at trial and in particularly narrowing the range of questions that might need to be asked by a self-represented party at trial.
- **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**
 - If the Legal Practitioner is the court-appointed person then that person should have full discretion to ask whatever questions they believe should be asked in cross-examination (subject to the overriding discretion of the Judge to regulate the questions that can be asked by a cross-examiner).
 - If the court-appointed person is not a Legal Practitioner then again they will be simply “parroting” the questions to be asked and therefore they will have no discretion as to the questions they will simply be asking on behalf of the 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**
 - If the Legal Practitioner is the court-appointed person then that person should have full discretion to ask whatever questions they believe should be asked in cross-examination (subject to the overriding discretion of the Judge to regulate the questions that can be asked by a cross-examiner).
 - If the court-appointed person is not a Legal Practitioner then again they will be simply “parroting” the questions to be asked and therefore they will have no discretion as to the questions they will simply be asking on behalf of the self-represented party.
- **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**
 - If the court-appointed person is a Legal Practitioner they would deal with an Independent Children’s Lawyer in the normal way as they would have conduct of the matter throughout the entire trial.
 - If the court-appointed person is simply just going to “parrot” the questions to be asked by the self-represented party then they should have no duty to co-operate with the Independent Children’s Lawyer just as a translator would have no such obligation.
- **the intersection between the court-appointed person’s role and that of the judicial officer.**
 - If the Legal Practitioner is the court-appointed person then they will interact with the Judicial Officer in the normal way.
 - If the court-appointed person is simply a “parrot” for the self-represented party they will again be bound to deal with the Judicial Officer who will have the full discretion as to the conduct of the proceedings.

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

- If the court-appointed person is a Legal Practitioner then the self-represented party ought to engage the lawyer of their choice (subject to Legal Aid direction and requirements)
- If the court-appointed person is merely a “puppet” or “mouth piece” for the self-represented person then the self-represented person should have no say as to the appointment of that person.

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

- The Family Law Practitioner’s Association of Tasmania does have concerns about the court-appointed person model. Cross examination is not simply a process of presenting questions (whether pre-prepared or not). It is a process aimed at testing and challenging the evidence of the other party and their witnesses. The party who is cross examining must also at law put their own case to the other party and their witnesses (rule in *Browne v Dunn*). The suggestion that CAP will present questions on behalf of a perpetrator is not consistent with this and casts doubt on that party having the opportunity to effectively cross examine.
- It must also be remembered that you are only permitted to ask questions which are relevant to a matter in dispute.
- There are concerns that this court-appointed person has no legal training or background and, therefore, will lack knowledge as to the relevance of questions that they are requested by the alleged perpetrator to put to the alleged victim. Therefore, how does this person have any knowledge as to the question sought to be put to the alleged victim would be an abuse of court process. How could the CAP have knowledge of the rule in *Browne v Dunn*.
- There may be possible delays during the appointment process and during the trial due to another person being involved.
- It would need to be made clear (possibly in the Rules) who would be ‘eligible’ to be the court-appointed person (CAP). If the object is to provide a way for the victim not to be ‘re-traumatised’, then the CAP should have some understanding of the Rules of Evidence in regards to relevance, the prevention of asking questions that are an abuse of process, offensive etc.
- Difficulties could arise if the perpetrator and the CAP disagree on the content of the question that are to be put to the witness.
- Difficulties may arise during a trial if the perpetrator feels aggrieved or perceives that the process is ‘unfair’ by the possible restrictions being placed on them about the types of questions they can ask or having to have them asked via a CAP?
- We are concerned about resources. If, for example, it is suggested that the duty lawyer is to be the CAP, then there would need to be sufficient funding from the Commonwealth to enable this service to be provided by LACs. There also needs to be appropriate arrangements in place to cater for situations where a conflict of interest may arise.
- If the CAP is the duty lawyer and they are not ‘acting’ for the perpetrator it does raise the question as to whether there is any professional duty owed to them in their role as CAP [ie solicitor/client relationship] and the possible consequences that flow/do not flow from this.
- Difficulties may arise (as touched on above) if the CAP is provided with a set of questions from the perpetrator, but then as a result of the answer, the perpetrator may wish to ask different questions. This may give rise to lengthy discussions between the perpetrator and the CAP and the delays may be unacceptable. You need to be flexible when cross examining a witness and it is arguable that a litigant in person who has a CAP who must follow a script prepared prior to the witness giving evidence is prejudicial to that person and is inconsistent with the notions of cross examination.
- It also raises concern over delay in the conduct of the overall hearing.

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?

- One option may be each case to be determined on the facts and for there to be an application to the court to be made with notice that the perpetrator seeks to cross examination and the basis for it. This occurs in some criminal jurisdictions (ie in Tasmania it is known as "preliminary proceedings" where the Judge will hear the application and determine whether there can be cross examination prior to a trial).
- There are concerns that the legislation will seek to limit the discretion of a judicial officer in relation to the granting of leave.
- The judicial officer in parenting matters is concerned with the best interests of the children and, therefore, there may be circumstances where the judicial officer considers it appropriate to allow direct cross-examination regardless whether or not the parties are providing consent.
- This causes issues if both the alleged victim and alleged perpetrator are self-represented.
- Judicial discretion should not be limited.
- There is no suggestion in parenting cases that the judicial officer is able to look at whether or not direct cross-examination on a specific issue would be in the best interests of the children.
- The legislation will continue to allow legally represented perpetrators to have Counsel cross-examine an alleged victim. This clearly does not recognise any significant impact upon a victim of being cross-examined by a legal representative.
- The court may have a victim who consents and wants to be empowered within the relative safety of a court room and 'stand up' to the perpetrator versus a victim who may consent under duress (perpetrator may have placed pressure on them prior to proceedings commencing that no one is aware of etc. which is what you do want to avoid). The question of "consent" is not an easy concept at law.

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?

- Each and every case is unique and judicial discretion takes that into account.
- One suggestion is that direct cross examination is allowed. There is capacity for the victim to bring an application opposing direct cross examination and the basis for it. When hearing that application one factor that the court should look at is whether it would be "likely" to have a harmful impact on the victim as opposed to "will" have a harmful impact as it will often be impossible to know prior to the cross examination occurring.
- There may be other reasons for why it is necessary to allow direct cross examination. The court needs the best evidence possible to make a determination.
- Each party must have an opportunity to present their case to the court which includes the right to cross examine for the reasons set out above.

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?

- Possibly however, each party should have the best chance to present their evidence to the court. This includes giving evidence in the witness box and cross examination. Judicial discretion is required in each case to ensure not allowing direct cross examination would not negatively impact the evidence.

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

- There may be other ways to reduce potential harm to a victim. Perhaps it should be incumbent upon all Registries to have the appropriate facilities to enable audio visual links like the Magistrates Courts? This may, in many cases, offer sufficient protection to victims. The Launceston Registry for example is not able to easily access a video link to the court room from a nearby location. The courts need financial resources to improve these facilities for victims.

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 only apply to proceedings commenced after the law comes into effect.
- The amended laws should not have retrospective effect.

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

- Any amendments should ensure that the interests and rights of all litigants whether victim or perpetrator are of equal standing.
- Any proposed amendments should ensure that the court is able to receive the best evidence available to enable a proper determination of the issues in dispute between the parties.
- In the court room, procedural fairness is the requirement that each party is given a reasonable opportunity to present his or her case. That, therefore, applies to both a victim of family violence and perpetrator of family violence. What will constitute a reasonable opportunity for a party in a given situation depends upon the specific facts and whole circumstances. The courts have found that this duty requires that a self-represented litigant does not suffer a disadvantage from exercising his or her right to represent themselves at the trial. Of course, the court's sole duty is not to the self-represented litigant. The obligation is to ensure a fair trial for all parties. That can cause conflicting duties.

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?

- Ultimately the Judge must oversee the process and assess each case on its individual facts and merits.

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

- The changes should not fetter the judicial officer's discretion in an individual case.

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?

- It is difficult to foretell and avoid all unintended consequences. Any amendments should be drafted to ensure the court has enough flexibility to deal with each matter on a case by case basis. There is a natural tension between ensuring a victim feels safe coming to court and feeling safe in that environment and also ensuring the court has the flexibility and judicial discretion to deal with each case and to ensure best evidence and procedural fairness.

21. Any general comments.

- We repeat that the requirement to issue interrogatories on specific questions may assist to limit the impact of self-represented parties cross-examining alleged victims.