

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)

Publication of submissions

Submissions will be published on the Attorney-General's Department website. Please advise if you wish all or part of your submission to remain confidential.

Please prepare your submissions in this template and submit in Microsoft Word format (.doc or.docx) to familylawunit@ag.gov.au. Use of the submission template assists in meeting the Australian Government's commitment to enhancing the accessibility of published material.

The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.

Please also note that it is an offence under section 121 of the *Family Law Act 1975* (Cth) to disseminate to the public or to a section of the public by any means any account of any proceedings under the Act that identifies:

- a party to the proceedings;
- a person who is related to or associated with a party to the proceedings or is otherwise concerned in the matter to which the proceedings relate; or
- a witness in the proceedings.

Your details

Name/organisation:

Family Law Practitioners Association of Western Australia (Inc)

Contact details:

[contact details redacted]

Confidentiality

Submissions received will be made public on the Attorney-General's Department website unless otherwise specified. Submitters should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

I would prefer this submission to remain confidential (please tick if yes)

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?

Yes, see responses to Questions 2 and 3

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

No. Consent family violence orders on a without admission basis and charges should be excluded.. The reference to sections 68B and 114 should be confined to non-molestation injunctions made after a defended hearing.

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. Include convictions of one party for indictable offences of family violence in relation to the other party or an immediate family member

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?

It should apply to both circumstances, and consideration should be given to banning parties aligned with a convicted perpetrator (eg parent or spouse)

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?

The court's discretion should not be limited and all parties should be permitted to seek leave, and the court should be able to grant leave by its own motion.

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.

The proposal to appoint a person who is not a legal practitioner is inefficient and inappropriate. Legal aid should be funded for victims of family violence. This proposal is a poor substitute to representation and advice for FDV victims.

A McKenzie friend or non-lawyer advocate is not appropriate as they do not have sufficient training, insurance, objectivity and are not subject to the rigorous regulation as legal practitioners are. Court employees should not be appointed to this role as their neutrality must be maintained.

A better model is for the judicial officer to receive and put the questions to the witness as occurs in proceedings under the Restraining Orders Act 1997 (WA).

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

The person should be a legal practitioner so as to be able to formulate the questions the self represented person wants asked, in a way that will comply with the rules of evidence, such as the rule in *Browne v Dunn*, the hearsay rule, negotiation privilege, litigation and client legal privilege.

The person should have high level training in identifying family and domestic violence, specifically systems abuse, and strategies to avoid collusion with the alleged perpetrator.

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

Yes, if the amendments are made. With the high proportion of self represented litigants in this jurisdiction, access to justice will be improved by the legislation educating the community about the court-appointed person's qualifications and role (similar to the family consultant role).

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.**

Yes, by means of explanatory notes and examples, such as those used in the Child Support legislation, or the Family Courts' guidelines for Independent Children's Lawyers

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

Yes, provided the person is qualified or experienced as provided in the Act, and is has no personal acquaintance with any of the parties or witnesses in the proceedings

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

Yes. Many. This is a micro-law which fails to address the systemic problems in the family law system. It is a poor substitute for adequate legally aided representation. It does not do enough to protect the fundamental right to test the evidence, if an issue should be further explored or if an answer contradicts earlier evidence.

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?

No. Please see the response to Question 5. The Parliament and the Court should be mindful of the possibility of the alleged victim's consent being procured by duress or the anticipation of further violence, and the provision or withholding of consent by the alleged perpetrator being a further opportunity for the perpetrator to engage in systems abuse.

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?

No. It goes without saying that cross-examination is harmful to any witness, and courts do not have the expertise to determine in advance if a victim will be harmed by cross-examination. The appropriate baseline from which the courts should operate is to protect witnesses from harm.

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?

No. It is obvious that a self represented person will be less able to testify when questioned by the alleged perpetrator, or to conduct cross examination than a skilled legal practitioner, even less so when facing an alleged perpetrator.

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

Yes:

- Whether the rules of evidence should be applied strictly
- The factors set out in *Re F: Litigants in Person Guidelines* [2001] Fam CA 348
- Whether the hearing should be adjourned for the purpose of the Court requesting legal aid funding for a litigant in preference to direct cross examination
- Whether the application/request for direct cross-examination was initiated by the alleged victim or the alleged perpetrator.

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 have retrospective effect. Every alleged victim deserves this protection and should not be prejudiced as a consequence of when the proceedings were commenced.

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

Yes. There is insufficient information in the discussion paper and the exposure draft to ascertain who it is proposed the court should appoint to ask the questions, and it is not clear if the court appointed person will be bound by the same duties as other officers of the court.

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. More detail as to the role, duties and qualifications of the court appointed person are required if that model is accepted (which we do not support). It is not clear if the court appointed person is simply to be a conduit, to read out the questions supplied by the self represented person, or to formulate the questions, or to analyse the evidence and craft a case as a legal practitioner would.

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

Yes. More detail as to the role, duties and qualifications of the court appointed person are required if that model is accepted (which we do not support). It is not clear if the court appointed person is simply to be a conduit, to read out the questions supplied by the self represented person, or to formulate the questions, or to analyse the evidence and craft a case as and advocate or legal practitioner would.

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. Consider the scope for systems abuse. See the National Family and Domestic Violence Bench Book for detailed explanation. Also consider the position of the alleged victim, potentially having to explain the story to multiple people in multiple agencies multiple times – this proposal adds yet another, who is not an advocate or assessor who could necessarily add any more value to the forensic process, other than as substitute for adequate legal aid.

21. Any general comments.

This change is better than the current position but still inadequate.

Family law needs a systemic review in light of the overarching principle of protecting vulnerable people, and erring on the side of protection over provision of equal treatment of parties or innocent

until proven guilty. Judicial officers, legal practitioners and service providers have become desensitised to the more subtle forms of family and domestic violence, to the extent that victims are not believed, even when cogent evidence is presented to the court.

The definition of family violence in Section 4AB of the *Family Law Act* 1975 needs further examples added to include:

- Financial abuse
- Emotional abuse
- Systems abuse,

The Notice of Risk/Notice of Child Abuse should be accepted for filing in each circumstance as listed in s4AB.