

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The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.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 (if you are providing a submission on behalf of an organisation, please provide the name of a contact person)

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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?

No – All state intervention order legislation enacted or amended in the last 10 years have created a class of protected witnesses who cannot be cross examined by the perpetrator. This trend has been followed by the proposed amendments.

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

Yes – The proposed s102NA(1) protects witnesses when a court has already made a finding of likelihood of abuse. In each circumstance mentioned in s102NA(1) a court has heard, and found there is a question of risk and an element of danger. The objective of the legislation is to protect victims of interpersonal violence and it seems contrary to the stated purpose to allow cross examination in such situations.

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.

Where there are allegations of child maltreatment and a Notice of Risk/Notice of Child Abuse has been filed, this is similar to making of allegations of abuse in state based intervention order application. In most intervention order legislation there is no requirement of a previous finding of abuse. The protection from direct cross examination is given once the allegation has been made. This principle should be followed.

In the NT the court has discretion and the request is not mandatory.

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?

Only the alleged perpetrator should be banned from directly cross examining. The purpose of the amendment is not to stifle evidence, but rather to provide protection for victims of family violence.

In most jurisdictions, cross examination can still occur, however most require indirect cross examination with the questions to be put through a third party. For example, in the NT the questions can be put to a court appointed person (Domestic and Family Violence Act 2017 s 114(2)). In WA, the questions will be asked by the judicial officer (Restraining Orders Act 1997 s 44C). In some jurisdictions, the court may allow the affected party time to seek legal representation to conduct the cross examination. For example under the Family Violence Protection Act 2008 s 70 in Victoria.

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?

No, it should be at the court's discretion or by application by the alleged victim only. In a survey conducted by Women's Legal Services Australia in 2015, respondents commented that they did not feel the court protected them¹. Allowing the alleged victim the power to request such protections may provide more of a sense of protection. It would also make the federal legislation consistent with most state intervention order legislation. The purpose of the amendments is to protect alleged victims. Given the purpose of preventing direct cross examination is to protect the victim of further abuse, there seems little reason to give the perpetrator the right to make such an application.

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.

In both Victoria and Queensland family violence legislation requires that the self represented person to either engage a lawyer, or to withdraw from cross examination. SA and the new ACT Family Violence Bill also propose the option of putting the question to the court to ask. In WA and the NT, questions are submitted and asked by the court. In WA specifically, they are put through the Magistrate or Judicial Officer hearing the matter. There seems to be no uniform standard to draw from across jurisdictions in this matter. In jurisdictions where it is the court employees who ask the questions, they are not allowed to ask any questions beyond those submitted and cannot provide legal advice. There is more to communication than words alone, with tone, pace, and body language all playing important parts in verbal communication. A court always has the duty to be fair to the perpetrator either if questions are put to the perpetrator by the judicial officer or a third party.

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

This question is perhaps dependent on what the court appointed person is doing and what their role is. This question is discussed more fully at Question 9

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

See answer to question 9

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.**

¹ Loughman, J., 'Protection Vulnerable Witnesses in Family Law,' *LSJ* February 2016, 26 @ 27

Bowden, Henning and Platter² discuss three alternative models of intermediaries for vulnerable witnesses. The required qualifications depend on the model. For example, in South Africa the intermediary's role is to explain to the vulnerable client in appropriate language what is going on. A similar model is used in WA with child witnesses already. These intermediaries do not require as high a level of qualifications as the Norwegian model. In the Norwegian model, the intermediary is a "Well Qualified" person trained in best practice procedures for eliciting complete and accurate evidence"³. Such a person is not merely asking the questions put to them, but actively seeking evidence. They also require a higher level of qualification.

Is the role of the court-appointed person to seek evidence or to just ask the questions? Legislation would suggest the latter but then this must surely raise questions of fairness. Under the Norwegian model, the intermediary sits with the vulnerable person in a separate room from the court. To address concerns of bias, the room is connected to the court house via CCTV. The Intermediary can put forward questions from the court room however the judge, prosecution and defence do not engage directly with the witness and the witness cannot see what is going on in the court. Such a model is something of an expansion of provisions already set up in WA for child witnesses. Their models are of course an alternative to the model where questions are put through the judicial officer who actively asks as an arbiter of what questions are proper.

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

The self representing person has the opportunity of choosing their lawyer. They also have the choice whether or not to self litigate. This would seem unnecessarily onerous and costly on the court which has an overarching duty of ensuring that the parties are treated fairly.

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

No

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?

The consent of the victim is a requirement in most jurisdictions (the big exception being Tasmania which does not have any special protections). It would seem strange for the Commonwealth legislation not to require this. Requiring the perpetrator's consent could lead to abuse of process. No state allows the perpetrator the option to not be cross examined as the purpose of the legislation is to protect the victim.

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?

Of the states that have included provisions around cross examination in their relevant legislation, nearly all, with the very notable exception of Tasmania, take the potentially harmful impact into

² Bowden, Henning, and Platter (2014) "Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?", in *Melbourne University Law Review* 37(3)

³ Ibid at 555

account. For the court not to consider this would make the Commonwealth legislation out of step with most state legislation. Whether leave should only be granted when this has been considered would make the provision similar to Queensland and NT legislation. Most states, however, have moved to the presumption that cross examination should not happen unless it can be shown that it won't cause harm. In the case of the proposed amendments, the situations when this section will become relevant are when a matter has been taken to court and substantiated. These are not mere allegations, they are substantiated claims. This is also the Family Court. It is not in the criminal jurisdiction where the accused can be deprived of their liberty if they lose the case. It is not in the interest of justice for the victim to satisfy the court they will be harmed. This should be presumed.

- 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?**

See answer to question 13

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

No. It is our view that the sole issue is the protection of the victim.

- 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?**

Given the purpose of the amendments is to protect victims of family violence, yes they should apply to all proceedings, including those that begun before the enactment of the amendments. The protection of victims is the primary concern of the amendments.

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

Perhaps there can be express requirement that the court can intervene in cross-examination to protect the victim and to ensure the fairness to all parties.

- 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?**

See answer to question 17

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

See answer to question 17

- 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?**

No

21. Any general comments

No