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.

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- 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:

Hume Riverina Community Legal Services
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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 the introduction of an automatic ban on cross-examination of victims in the specific circumstances envisaged under the proposed section 102NA(1).

However, we submit that the ban on direct cross-examination under s102NA(1) should also apply in the following additional circumstances:

- Where any family violence protection order applies (whether interim or final) between the examining party and the witness party,
- Where any family violence protection order has been made in the past between the examining party and the witness party,
- Where there has been an allegation of family violence made in the Notice of Risk / Notice of Child Abuse, Family Violence or Risk of Family Violence filed with the Court, where the allegation is made against the examining party or the witness party.

The circumstances in the proposed subsection 102NA(1) are too narrow. It is well known that victims of family violence often do not report violence to police or take action to get protection orders[1], particularly within indigenous communities[2], so if the ban were limited only to circumstances where a final order had been made, police charges had been brought, or an injunction had been made, then many other victims of violence would be left unprotected.

We also submit there is no basis for excluding parties with an interim family violence order or whose protection order has lapsed from the automatic ban, given the possibility of re-traumatisation through cross-examination of victims who have experienced family violence, even though there may not be a current risk of violence.

We submit that the automatic ban should apply in the specific circumstances (with additions as submitted above), without the need for further inquiry by the Court. We are concerned that if additional risk assessment is required of an alleged victim, before the ban is applied, it would potentially cause further delays to the Court proceedings. We are also concerned that if additional Court events are required of the parties in order to make an assessment of these issues (such as requiring the parties to meet with a family consultant or registrar), it would create further difficulties for those living in regional areas. Court attendances are already difficult to manage for those living in the country, given the additional time and costs required (including travel costs, accommodation costs and alternative child care arrangements) for people who live a significant distance from the Court, and who have to travel to attend Court. It is also noted that many Federal Circuit Courts in regional areas do not have Registrars or Family Consultants employed within their registry who might be available to assist.

We support the current framing of the proposed s102NA (2) and (3) to the extent that it states direct cross-examination must not occur unless leave is granted. We agree that it should not be a requirement of the legislation that a victim must apply to have the court make an order preventing personal cross-examination. The onus and responsibility to enliven the ban should rest with the Court.

We support the option of direct cross-examination proceeding with the leave of the Court provided the stipulations are met as envisaged under s102NA(3), ensuring choice is still available to the victim should they still seek to proceed without the ban being applied. This strikes a balance between not re-traumatising the victim of family violence whilst still ensuring the right to a robust examination of the evidence. However we submit s102NA(3)(c) should also state "and decided that it would not have a harmful impact", in line with the wording in the Family Violence Protection Act (Vic) section 70(3)(d). We also submit that the option for the victim to consent to direct cross-examination would need to be carefully managed (for example through the introduction of safeguards such as a requirement for the victim to obtain independent legal advice before consenting), otherwise this could open up the possibility of pressure being applied to the victim (including potentially by the alleged perpetrator or their legal representative, or even by the

[1] See for example NSW Bureau of Crime Statistics and Research: A survey of victims attending domestic violence services
[2] See for example Australian Institute of Criminology: Non-disclosure of violence in Australian Indigenous communities

judge) to allow the direct cross- examination to proceed in order to avoid delays. Should a victim be required to obtain independent legal advice under the legislation, then appropriate funding would need to be provided to Community Legal Centres and Legal Aid Commissions to ensure the victim is actually able to access legal advice in practise. The shortage of the availability of free legal advice in regional areas is discussed in more detail in our response under Questions 6 and 21.

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

See response under Question 1.

We also endorse the response to this question by Women's Legal Services Australia about the problems with limiting direct cross-examination to only the circumstances set out in the new proposed subsection 102NA(1).

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.**

See response under Question 1.

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?**

We submit that if there is going to be a ban on direct cross-examination it should apply to both parties equally regardless of whether they are the alleged perpetrator or victim, in order to protect the victim. Being cross-examined and having to conduct the cross-examination are both potentially re-traumatising for a victim, and impact on the victim's ability to robustly examine the evidence due to issues such as intimidation and fear.

It is also not always clear which of the parties is the victim and which is the perpetrator (and in certain cases there is sometimes a history of violence where both have been a victim of violence by the other). Having a ban on either party being able to do direct cross-examination would overcome the need to make such an assessment.

We also endorse the response to this question by Women's Legal Services Australia.

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?**

We submit that the discretion of the Court to impose a ban on direct cross-examination should be able to be exercised not only independently by the Court, but also upon application by either party.

This is because it is not always clear which of the parties is the victim or perpetrator, and the Court should not have to make preliminary findings about these issues.

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 submit that a legal practitioner is the most appropriate person to ask questions on behalf of the self-represented person, as is the model under the Family Violence Protection Act (Vic). We also submit that the legal practitioner should not be prohibited from giving legal advice or acting for the person during parts of the proceedings if they wish. In many cases, the self-represented person will be opposing a legally represented other party who has the full benefit of their lawyer's assistance. There is no purpose to be served by requiring the legal practitioner conducting the cross-examination to be independent, and the legal practitioner would be operating within their duty to the court and the administration of justice.

However, should the review recommend some other person be appointed by the Court (other than a legal practitioner) then in this instance, we would submit that the person would need to be required to act independently.

We submit it is not appropriate for lay persons or other professionals to be appointed. There is a risk that the appointment of a lay person rather than a legal practitioner would inhibit the proper conduct of a matter before the Court, and be more likely to put the questions ver batim without reinterpreting them. We would also be concerned if a support worker or other professional working with the self-represented person were appointed to act, as this is not their role. A legal practitioner is best positioned to understand their role in the proceedings, as well as the roles of the parties, other representatives and the Court, in order to facilitate the process.

It would be important for funding to be available for legal practitioners to be able to fulfil this role. It is noted that the Family Violence Protection Act (Vic) provides that Victoria Legal Aid must provide a practitioner to provide cross-examination for a party. If the relevant Legal Aid Commissions are required to fund practitioners to provide this role, then they must be adequately funded by Government.

There must also be consideration given to issues in regional areas such as conflicts of interest and shortages of practitioners, which may limit the availability of practitioners to provide this role for the Court. The chronic underfunding of free legal services has an even greater impact in country areas, and this is discussed further under Question 21.

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

See response under Question 6. However, should it be determined to proceed with a model that does not involve appointing a legal practitioner, then we endorse the comments by Women's Legal Services Australia about the qualifications that such a person should have.

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

See response to Questions 6 and 7.

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 submit that if the Court-appointed person is required to be a legal practitioner, there is no need to prescribe these details as the Court should be able to rely upon the professionalism and ethical obligations of the practitioner.

Should there be a requirement however for a self-represented party to prepare for court by attending a further Court event to meet with a staff member at Court, this would disadvantage those living in regional areas as discussed above in our response to Question 1.

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 person appointed by the Court to conduct cross-examination is required to be a legal practitioner, then we submit there are no issues with the self-represented person being able to either select their own lawyer, or have someone appointed for them.

If a different model is chosen, then in our view the self-represented person should not be permitted to nominate the person appointed.

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

See answers to Questions 7-10 above.

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 endorse the response to this question by Women's Legal Services Australia.

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?**

We submit this provision should be in line with the Family Violence Protection Act (Vic) which states the leave will only be given if the Court decides there will not be a harmful impact.

However, we submit that the fully informed consent of the victim is also a critical factor in whether to grant leave to cross-examine a party who is the alleged victim of family violence, as discussed in our response to Question 1.

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 set out above under Question 1, the focus of the exercise of such discretion should be on the victim giving informed consent for direct cross-examination to occur, and the Court having decided that there will be no harmful impact on the victim.

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

We have no further comments.

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?**

Yes, in our view the amendments should apply to proceedings 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?**

See answers to other Questions.

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 answers to other Questions.

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

See answers to other Questions.

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?

We endorse the response to this question by Women's Legal Services Australia including concerns about the current drafting of section 102NB and concerns about the need to extend the application of the ban to witnesses other than parties to the proceedings.

21. Any general comments.

We note that the issue of direct cross-examination arises frequently in the family law system, due to the high numbers of people who are required to self-represent in the family law courts as a result of under resourcing of Community Legal Centres and Legal Aid Commissions.

This has an even higher impact in regional areas, where there are a shortage of free legal services available and a shortage of practitioners available to represent people under a grant of aid.

We submit that the most critical underlying issue that needs to be resolved to reduce the numbers of people self-representing (and therefore needing to be protected from direct cross-examination) would be to increase funding to Legal Aid Commissions to enable them to fund a higher percentage of parties in the family law system, and to Community Legal Centres to enable them to assist a higher number of people through advice and representation. We note that the 2014 Productivity Commission report on Access to Justice Arrangements[3] noted that an urgent injection of funding was needed to ensure that those beneath the poverty line were able to access legal aid representation, and we submit that the Government should give consideration to this recommendation as part of this review.

We also submit that if the legislation proposed under this consultation includes requirements about either of the parties being required to seek legal advice, or the appointment of legal practitioners to assist with cross-examination, then additional funding must follow to enable Community Legal Centres and Legal Aid commissions to provide these additional services. This is particularly necessary in regional areas where there are a lack of options that people can access to get free legal assistance, and the reality that people are often left without the opportunity for advice currently, due to high levels of demand upon community legal centres who may be the only service available in their region.

ABOUT HUME RIVERINA COMMUNITY LEGAL SERVICE ("HRCLS")

Hume Riverina Community Legal Service ("HRCLS") is uniquely positioned as a cross border community legal centre. Based in Albury-Wodonga on the Victorian/New South Wales border, the centre receives Commonwealth, Victorian and a small portion of New South Wales funding to provide generalist legal services to a vast catchment area of 17 Local Government Areas (LGA's) in North East Victoria and the Southern Riverina of New South Wales.

ABS statistics from 2011 indicate a total population of 292,497 within the Local Government Areas serviced by HRCLS. In the 2014/2015 year, 62% of our clients resided in Victoria and 38% in New South Wales.

Services provided include legal advice and casework assistance with family law issues (child contact, property disputes, child support and spousal maintenance), family violence, child protection, credit and debt problems, fines, motor vehicle accidents, criminal law issues, consumer law issues, neighbourhood disputes, wills and estates, employment issues and tenancy issues. Clients often have interrelated Victorian and NSW legal problems.

HRCLS focuses on assisting disadvantaged people who are not eligible for legal aid, yet cannot afford to pay for a private lawyer.

HRCLS is funded to deliver several programs assisting clients with family violence and family law issues, and provides services including legal advice, minor assistance, and casework for people going through the family law system, and assistance for those affected by family violence including through a family violence duty service to Wodonga, Wangaratta and Myrtleford Magistrates' Courts.

[3] Productivity Commission: Access to Justice Arrangements

In the 2015/2016 year, HRCLS provided 2119 advices with a total of 2861 problem types, provided over 800 information activities, delivered 51 community legal education sessions, and provided intensive casework to more than 400 people.