

# 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](mailto: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](mailto: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The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.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)

InTouch Multicultural Centre Against Family Violence

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

GPO Box 2905

Melbourne

## 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](mailto:familylawunit@ag.gov.au).

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

Yes, in circumstances of a perpetrator of family violence cross-examining a victim of that violence. Also, a victim of family violence be offered legal representation for the purposes of cross-examination of a perpetrator.

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

Yes

**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. Cross-examination should be banned in interim as well as final hearings in family law proceedings by a perpetrator of violence of the victim of that violence.

It should be banned when Notice of Risk alleges violence, when there is an interim intervention order or if final intervention order is in place. An intervention order does not need to apply to "both parties" as s 102 NA (1)(c)(ii) suggests as it normally applies only to one party.

**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?**

Band should apply to perpetrator of violence and a victim of violence as a victim cannot cross-examine effectively a perpetrator without a lawyer nor should she due to the nature of violence and the power imbalance.

**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?**

Alleged perpetrator should not have a right to make such an application.

There should not be a discretionary power.

The prohibition for cross-examination should be in legislation and if the perpetrator has no lawyer to represent him/her in court than no cross-examination be allowed of the victim ie similar prohibition to the one in the family violence jurisdiction in Victoria.

**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.**

No person without law degree and years of experience in family law jurisdiction should be allowed to ask questions and be appointed by the court to ask questions. Lawyers are bound by ethical obligations and will not ask questions of the victim that are not relevant or the questions that are harassing. Only lawyers have the skills to ascertain the relevance of questions to the issues in dispute, understand the court process and rules of evidence.

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

Law degree, minimum of 5 years of experience at the bar with expertise in family law jurisdiction, be on the High Court roll ie admitted to practice in any federal court.

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

Yes. Requirements are : law degree with minimum of 5 years of experience at the bar with expertise in family law, be on the High Court roll ie admitted to practice in any federal court.

**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, all of the above be included in the legislation. A person appointed by the court should be present in court for the whole of the proceedings. A person appointed should not be asking all the questions that a perpetrator requests to be asked as some of them would be harrasing and irrelevant.

The court can disallow certain questions and the court has such power now.

Court appointed person should maintain his/hers impartiality to avoid unnecessary appeals.

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

Should **not** be allowed because if that person would like a choice then he/she should be financing it themselves not the taxpayers.

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

Potentially, unsatisfied party may raise an issue of conflict of interests between the role of the court and the role of the court-appointed person and raise an issue of procedural fairness. Such dissatisfied party may appeal which will transpire into the victim of violence needing to participate in appeal and needing to repeat their stories.

**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 direct cross-examination should be allowed and such ban should be in legislation. Asking for consent would put more pressure on the victim and may subject victim to "the system 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. Judicial officer's expertise is not in the area of assessing "harmful effect on the party", court are not designed to make those assessments and their roles are different.

**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, there should be complete ban on cross-examination of a victim by perpetrator. There should be complete prohibition of a victim needing to directly cross-examine the perpetrator as well.

**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 not appropriate to leave this up to the discretion of judicial officers. We are advocating for complete prohibition of cross-examination of victims by perpetrators.

**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?**

Those amendments should apply for proceedings that 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?**

Both parties be granted access to court appointed lawyers for the final hearing.

**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?**

There should be analysis of the law undertaken.

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

Access to court appointed lawyers at final hearings as a minimum requirement when family violence is alleged will go towards ensuring that courts make informed decisions.

**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?**

Draft legislation be released for consultation which will ensure that no unintended consequences are achieved. Consultation with stakeholders will be advantageous to avoid any unnecessary consequences.

**21. Any general comments.**

Ongoing funding of community legal centres for family lawyer matters, particularly the ones that work with culturally diverse clients, will ensure that clients who do not fit the restrictive eligibility criteria for legal aid funding will have their rights protected and will ensure that safe arrangements are made for the children. Funding should be made available to community legal centres to engage barristers for clients in final and interim defended hearings.

Cultural competency training will also be beneficial for all family law practitioners, family report writers and judges to ensure that CALD people are participating effectively in the court process. Training for interpreters in legal jargon is necessary as well as increase in the pool of available interpreters. Female victims of violence should have access to female interpreters who speak the same dialect as their clients. For example, Arabic is spoken in 22 countries and many countries have different dialects which may transpires at times into an Arabic interpreter not being able to communicate in a dialect that client understands.

Thank you for consulting.