

Submission to the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

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The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.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

Joshua Mark Day

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

[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.

Question 1

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

It should not be banned at all. The option to personally cross-examine (or to appoint a legal counsel to do so on your behalf) one's accuser should be considered a legal right.

Question 2

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

No.

Question 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.

No.

Question 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?

No. Cross-examination should be available always to both the accused and the accuser.

Question 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 should never be exercised. And never by request of the alleged victim.

Question 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 legal counsel of the accused. Or the accused themselves.

Question 7

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

That appropriate to legal counsel.

Question 8

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

The accused shall choose their own legal counsel. The court shall only appoint legal counsel that is acceptable to the accused.

Question 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.**

Only the accused or the legal counsel they have chosen should be allowed to cross-examine their accuser

Question 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, their legal counsel.

Question 11

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

Yes, concerns about bias. Especially bias against the accused.

Question 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. An alleged victim shall have no say in whether they are to be cross-examined. Willingness to be cross-examined ought to be a requirement for filing an accusation.

Question 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. The purpose of the court proceeding is to determine the guilt or innocence of the accused. Claiming a 'harmful impact' is equivalent to assuming the guilt of the accused. Thus it is an unreasonable argument.

Question 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?

Cross-examination shall be a right of both the accused and their appointed legal counsel. Consideration of 'adverse affect' is not possible without assuming the guilt of the accused. The determination of which is the point of the trial.

Question 15

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

No.

Question 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?

They should not be passed. But if they are, only after.

Question 17

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

The proposed amendment denies the accused a fair hearing. Do not pass it.

Question 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?

Denying the right to cross-examine one's accuser is a violation of procedural fairness.

Question 19

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

This amendment removes one of the best means for determining the innocence or guilt of the accused.

Question 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?

This amendment presupposes the 'victim' is telling the truth and the accused is guilty. Do not pass it.

Question 21

Any general comments.

This amendment is unjust. It grants accusers unfair advantage in trial proceedings. They and their council may cross-examine the accused but the accuser has no (or at best a severely limited) right of response.

The stated purpose of the amendment is to reduce potential trauma of victims of family violence. However as stated above this is the equivalent of claiming to know the accused is guilty before the trial has even commenced. This amendment violates the legal principles of 'right to a fair trial' and 'innocent until proven guilty'.

No just man or woman would pass it.

Should the amendment pass I predict an increase in counter-claims. As only by accusing one's accuser of similar violent activity can the accused guarantee (by the rules of the amendment) something resembling a fair trial. I.e. both parties hampered by the same rules regarding cross-examination. This will in turn reduce the quality of evidence available to those deciding the trial, and increase court costs and trial times.