

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)

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Your details

Name/organisation:

Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
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- Queensland Law Society
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Acknowledgement

The Law Council acknowledges that this submission has been prepared by the Family Law Section of the Law Council of Australia. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2600 the Family Law Section is committed to furthering the interests and objectives of family law for the benefit of the community. The Law Council is also grateful to the Law Society of South Australia, the Law Society of New South Wales, the Queensland Law Society, the Law Society of the Northern Territory and the Law Institute of Victoria, for their assistance with the preparation of this submission.

Overview of the issue of cross-examination by alleged perpetrators of family violence and summary of the Law Council's position

The Law Council acknowledges that, for survivors of family violence, the prospect of being cross-examined by a violent ex-partner can cause significant emotional distress and trauma, and discourage them from continuing litigation. The Law Council therefore supports consideration being given to alternatives to direct cross-examination wherever possible.

However, the Law Council is concerned that proposals that preclude, automatically ban or constrain cross-examination are inimical to each of:

- the interests and rights of litigants, whether victim or perpetrator;
- the ability of the court to properly determine issues, including to properly identify and address issues of and arising from family violence;
- the efficient delivery of access to justice;
- the cost-effective and timely delivery of justice in cases involving family violence,

and fundamentally misunderstand the nature and role of cross-examination.

To that end, the Law Council considers that:

- the existing legislative structure provides sufficient power to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to properly protect the rights and interests of both victims and perpetrators;
- the Family Court of Australia and Federal Circuit of Australia have published the “Family Violence Best Practice Principles” which set out how the existing legislative structure will be used by those courts, in particular in relation to vulnerable witnesses;
- legislative amendment to Division 12A of the *Family Law Act 1975* (Family Law Act) could ensure the availability of those powers in all proceedings (rather than just parenting proceedings) where determined to be necessary and appropriate;
- further, and targeted, education of judicial officers and the legal profession will serve to ensure appropriate levels of awareness of the powers and practices available to appropriately protect the interests of litigants; and
- for those small number of cases where no other alternative to direct cross-examination is suitable, the Family Law Act could be amended to allow a judge to request a legal aid commission to provide representation for the unrepresented, alleged perpetrator (and the victim if they are unrepresented). The Law Council suggests that the proper administration of justice requires that such a lawyer be engaged for the whole trial, not just the cross-examination. If legal aid commissions effectively become a measure of last resort in this context, they should be provided with additional Commonwealth funding to effectively perform the role.

The reasons underpinning this position and the views summarised above are elaborated upon below.

The nature of family law proceedings and the existing tools available to manage proceedings involving allegations of family violence

Proceedings involving direct cross examination between an alleged perpetrator and victim at trial, whilst raising significant concerns, are of limited number in the family law system. The lack of data

on the exact numbers is acknowledged in the consultation paper. The Law Council welcomes the Government's request that the Australian Institute of Family Studies undertake empirical research on this issue.

Where such issues do arise, there are significant tools available to trial judges in the *Evidence Act 1995* (Cth) to properly protect victims from improper and unnecessary exposure to perpetrators, and are common to many courts. Further, Division 12A of the Family Law Act provides explicit powers to a trial judge in parenting proceedings to directly control the issues permitted to be pursued in proceedings and the mode by which this is to occur, including in respect of cross-examination. Division 12A also permits a court to make any necessary preliminary determination, including as to whether there has in fact been family violence between an alleged perpetrator and victim and the consequences of the same, including in terms of the proper conduct of the proceedings subsequently.

The last point is important as, in affording appropriate recognition and necessary protection to victims of family violence, it is important to be cognisant of the fact that in many (if not most) instances the occurrence of family violence (or not) will itself be a fact in issue but not always an issue relevant to the proceedings. It is not in the interests of litigants nor the court system that resources be committed to determining issues which are either irrelevant to those before the court or involve separate (and potentially extensive) preliminary proceedings.

The central issues to be determined in most family law cases are what parenting arrangements are in the best interests of children, or what division of property is just and equitable. Whilst a litigant may be a victim of family violence, the violence itself may not be a significant focus of the case. A complete ban on cross examination would mean that, whilst a victim is not cross-examined about the violence, they are also not cross-examined about a range of other facts that are likely to be significant issues for determination by the judge. The Law Council does not consider that an intermediary, as proposed by the amendments, asking a set of questions on behalf of a party to be 'cross-examination'. Nor is it an adequate means of assisting a court to reach important determinations about what is in the 'best interests of a child', or about what form of property division is 'just and equitable'.

Proceedings under the Family Law Act are essentially adversarial in nature. While Division 12A provides for greater powers, some of an inquisitorial nature, in parenting proceedings, such proceedings along with financial proceedings remain fundamentally adversarial in nature. Fundamental to any adversarial system of justice and the right of a party to a fair trial is the right to cross-examine the other party and the witnesses she or he may rely upon.

Balancing the importance of cross-examination with the needs of those who may have experienced family violence

The role of cross-examination is two-fold. It is to test and challenge the evidence of the other party and his/her witnesses. It is also to put the case they are facing to them in order to obtain their response. The significant aspects of a party's case must be put to a witness to satisfy the rule in *Browne v Dunn* (1893) 6R67. It is through cross-examination that the truth or otherwise of an allegation is established, by the testing of the credibility and the veracity of the witness. Effective cross-examination requires the cross-examiner to be present throughout the giving of the other party's evidence and the evidence of his/her witnesses.

The reason the cross-examiner needs to be aware of all the previous evidence given in the court is expressed by Hunt J in *Allied Pastoral Holdings v FCT* (1983) 70FLR447:

It has been in my experience always been a rule of professional practice that unless notice has already clearly been given of the cross-examiner's intention to rely upon matters, it is necessary to put to an opponent's witness cross-examination on the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inference to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

Cross-examination is not merely asking a set of prepared questions. It requires also listening to the answers and then asking further questions to challenge or test these. As such, the cross-examiner needs to be able to take detailed instructions from the party s/he represents. Failure to allow a party to properly cross-examine renders the judgment ultimately made unreliable and subject to appeal. This is because the right to cross-examine is central to the adversarial trial process. It is only through cross-examination and the testing of evidence that findings may be made as to such matters as the best interests of the child, factual issues relevant to the assessment of each party's contributions or future needs to determine a just and equitable property division, or the truth of allegations of family violence.

The importance and role of cross-examination was considered *inter alia* by the Australian Law Reform Commission (ALRC) in February 2006 and the subject of the report Uniform Evidence Law (ALRC Report 102). Without repeating the detailed content of that report, from paragraph 5.70 the ALRC considered "Constraints in the cross-examination of vulnerable witnesses" and reviewed the then existing legislative provisions on both a Commonwealth and state basis. The work done by the ALRC (in conjunction with the NSW Law Reform Commission and the Victorian Law Reform Commission) provides a valuable basis for further consideration of any proposals and, importantly, a benchmark from which the reforms thereafter implemented can be assessed.

The Law Council recommends a review by the ALRC, as part of its forthcoming review of the family law system, of the subsequent amendments and reforms before a legislative response to the current issue is formulated and implemented. The Law Council is particularly concerned with the adoption of the proposal in this Bill which:

- precludes entirely the right of a party to ask questions of relevant witnesses, including a victim of family violence, without that person being offered the assistance of a legally aided lawyer; and
- seeks to impose an uninstructed intermediary to undertake such role. Examples of such an "uninstructed intermediary" might be a lawyer appointed to "assist the court" (but not to act on behalf of the alleged perpetrator or alleged victim) or a person who is not a lawyer (and who is not bound by the ethical duties that a lawyer has to the court).

The above is not to prevent a judge, in an appropriate circumstance, from filtering and posing questions on behalf of a vulnerable witness. As to the first matter, for the reasons outlined, it is considered inconsistent with the existing system of justice to prevent cross-examination. As to the second matter, an intermediary who is not retained and instructed by the party, is unable to properly discharge their duty both to the court and to the party for whom they appear. Denied a source of instruction, and a role as a representative, there is no proper basis for such an intermediary to effectively advance the case in relation to relevant issues, including in challenging evidence where necessary and appropriate.

The Law Council considers that the identified issues can be properly and appropriately addressed by the use of existing powers, complemented by:

- the provision of further information as to the availability of such provisions, directions and arrangements;
- the formulation of standard practice directions and complementary Rules directed to determining at an appropriate stage whether vulnerable witness issues arise and how they are to be addressed;
- associated further education of judicial officers, legal practitioners and support services; and
- in cases where a judicial officer makes a finding that no reasonable alternative is appropriate, legislative amendment be made to enable that judicial officer to request a legal aid commission to offer the alleged perpetrator representation (and the alleged victim if they are unrepresented). If a litigant refuses such an offer of aid, they could be banned from directly cross-examining their former partner. The Law Council notes that agreement would need to be reached with National Legal Aid for such an arrangement, with appropriate funding being offered by the Commonwealth. The Law Council also suggests that provision be made in the legislative amendments to enable the legal aid commission to undertake cost recovery where the litigant has the means to contribute to those costs,

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

- 1.1 The Law Council does not support an automatic or mandatory ban on direct cross examination. The Law Council believes that the judicial officer conducting the proceedings is in the best position to identify who is a vulnerable witness and to assess the various options available to protect a vulnerable witness, and that the discretion of the judicial officer should not be fettered by a mandatory ban. The circumstances in which allegations of family violence are made in family law cases vary widely. The nature, frequency and impact of family violence is different in each case. The vulnerability of a witness who has been a victim of family violence also differs and the dynamics of fear, power and control between parties vary considerably. A mandatory ban would treat all alleged victims and alleged perpetrators the same, and is inappropriate.
- 1.2 An alternative to an automatic ban, could be a provision which requires a judge to consider the form or method of cross examination that should take place in specific circumstances. Those circumstances might include some of the factors contained in the proposed s102NA(1)(c). Another alternative would be a rebuttal presumption that cross examination not take place in specific circumstances.

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

- 2.1 If the Government pursues an automatic ban, the Law Council considers there to be considerable difficulties with the adoption of the specific circumstances set out in s102NA(1)(c) as the triggers for that automatic ban. The Law Council suggests that the criteria set out in the proposed subsection will not ensure that all vulnerable witnesses are protected from direct cross examination because some will not fall within those criteria. In addition, the criteria will apply to a cohort of litigants who would not, on any proper assessment, be vulnerable witnesses. The Law Council considers that the specific circumstances listed in the subsection are unreliable indicators of whether a person has been a victim of family violence, or whether they are vulnerable witness who would be traumatised by direct cross examination.

Subsection (c)(i) – either party has been convicted, or is charged with, an offence involving violence between the examining party and the witness party

- 2.2 The Law Council suggests that the existence of a criminal conviction or charge does not, of itself, mean that the witness is a vulnerable witness and not capable of being (or willing to be) cross examined. For example, the conviction may have occurred a considerably long time before the family law proceedings and the witness has had the benefit of counselling and support since that time. The victim (or alleged offender) may be able to answer questions, or ask questions, via one of the methods provided for in the existing laws and guidelines.

Subsection (c)(ii) – a family violence order (other than an interim order) applies to both parties

- 2.3 State and territory family violence orders exist in a high proportion of family law cases. The circumstances in which the orders are made vary widely. They may be made by consent or without contest for various reasons. The defendant may not have had access to legal advice or representation or was unable to appear (eg. due to remoteness). The final order may have been made by consent, but without admission by the alleged perpetrator of the facts alleged

by the victim. Such orders are commonly consented to by parties in order to avoid the expense and delay of a contested hearing. A much smaller proportion of final orders are made following a contested hearing. In some circumstances, family violence applications are made for reasons outside the scope of their intended purpose and may not have a proper basis. The existence of a final family violence order does not, of itself, mean that there has been a finding by a court that family violence has occurred or that the person to be protected by that order is a vulnerable witness.

The Law Council is concerned that an automatic ban on cross examination in family law cases if a final family violence order has been made will lead to significantly more litigation in state and territory courts. Defendants to those applications are less likely to consent to the making of a final order, without admission, if it means that they will not be able to cross examine the other party and test the evidence against them in family law litigation.

- 2.4 The exclusion in the Bill of interim family violence orders may also be problematic. In some relationships, the interim order may be the first order made following separation despite a significant history of family violence. There may be a delay in finalising the application for a family violence order, because, for example, the alleged perpetrator is interstate or in custody, or there are backlogs of cases awaiting final hearing in the state or territory court. In some cases, applications for family violence orders may be made whilst family law litigation is on foot, but not finalised before a trial in the family law matter.
- 2.5 There are likely to be other family law cases where family violence orders have been made between the parties, but which are not in force at the time of the family law trial, and yet the victim of family violence would still be traumatised by being directly cross examined by the perpetrator. For example, many family violence orders are made for a period of 12 months. Many victims do not apply for an extension of those orders, because, for example, they have taken other practical steps to ensure their safety, or they do not wish to start further litigation against the perpetrator. The significant delays in the listing of trials in the Family Court and Federal Circuit Court means that in the vast majority of cases where the family violence order has been made at around the time of separation, such family violence orders will have expired by the time of the trial.

Subsection (c)(iii) – an injunction under section 68B or 114 applies to both parties

- 2.6 Injunctions under the Family Law Act may be made to prevent a range of behaviours or actions by one or both parties that are entirely unrelated to allegations of family violence. For example, injunctions may be made in parenting matters in relation to schooling of children, the place of residence of each parent, or the medical treatment of children. Injunctions might be made in financial cases in relation to access to bank accounts or other assets. The majority of such injunctions are made on an interim basis, with the consent of both parties, or if made by a judge following an interim hearing, without any testing of the evidence by cross examination. It would be inappropriate for the existence of such injunctions to automatically lead to one or both parties being prevented from cross examining the other at trial.
- 2.7 Where such injunctions are related to allegations of family violence, they may have been entered into as mutual injunctions by consent and on a “without prejudice” or a “without admission” basis as a means of progressing the case. The Law Council suggests that if the consequence of consenting to such an interim injunction is the automatic ban on cross examination, there will be fewer litigants inclined to consent to such orders, leading to

further litigation at the interim stages of cases. Not only will this have an undesirable impact on those litigants, it will also contribute to longer delays for all other litigants.

- 2.8 In relation to both the proposed subsections (ii) and (iii), the Law Council suggests that the wording “applies to both parties” is not clear. Those words could be interpreted as meaning that a family violence order or injunction must have been made against both parties for the subsection to be triggered. The Law Council presumes that is not the intention of the Government, and that the word applies is intended to mean that both parties were parties to the case in which the family violence order or injunction was made.

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.*

- 3.1 The Law Council is concerned about the suggestion of the inclusion of the Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Violence (‘Notice of Risk’) as criteria for banning cross-examination.
- 3.2 The genesis of the Notice of Risk was to act as a form of ‘triage’ for early identification of allegations of abuse or family violence (or allegations of a risk of either), bringing them to the court’s attention at the initial stages of a case and to trigger the provision of information to the court from the child welfare authorities. Further:
- Notices of Risk may be inadequately completed, insufficiently particularised and may not make reference to family violence or family violence orders, despite the existence of either;
 - The allegations made in Notices of Risk are untested allegations only, and neither party is required to file a document in answer to a Notice; and
 - The making of allegations in a Notice does not, of itself, mean that the person who makes the allegation would be detrimentally impacted by being directly cross examined by the other party, nor is it an indicator that the person making the allegations does not want to be cross examined. Given the evidentiary difficulties in proving their case without their evidence being tested, some litigants who make allegations may want to be cross examined so that they can prove some or all of those allegations.

- 3.3 There may be other circumstances warranting the exercise of the court’s discretion to ban cross-examination not contemplated by the proposed Bill. The Law Council notes the courts’ current wide discretionary powers reflect the fact that the circumstances of every matter are unique. There may be a situation where a witness or a cross-examiner is a vulnerable person because of mental or physical illness. The family consultant or an expert appointed by the court may have recommended that in the special circumstances of the case and on the evidence available, direct cross-examination ought to be avoided.

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?*

- 4.1 The Law Council supports the position that any ban on cross-examination should apply to both parties asking questions. Victims of family violence may be re-traumatised by being asked questions by the alleged perpetrator, and also by having to ask questions of the alleged perpetrator. It is also the case that cross allegations of family violence are often made, and that

it is often not a case that one party is only a victim and one party only a perpetrator of family violence.

4.3 The Law Council suggests that a judge also be given discretion to ban other self-represented parties or intervenors in a case from directly cross examining the victim of family violence, where they are aligned with the alleged perpetrator. For instance, the mother or father of the alleged perpetrator may be a party to a parenting case and be firmly aligned with the alleged perpetrator. They may ask questions similar in nature to those that may be asked by the alleged perpetrator, causing trauma to the alleged victim.

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?*

5.1 The Law Council notes that it is unlikely to be controversial that an alleged victim of family violence can make an application to be protected from direct cross examination by the alleged perpetrator of that violence. The Law Council also supports the court being able to make such orders of its own motion to alter the form or ban direct cross examination.

5.2 The question of whether an alleged perpetrator should be able to bring an application to prevent their cross examination of, or by, the alleged victim, is vexed. There is a risk of the alleged perpetrator using this as another mechanism to exercise control over the victim, for example by removing the victim's opportunity to be directly involved in the proceedings if they are otherwise comfortable to do so. If successful, it may lead to the evidence about the violence or other matters not being properly tested.

5.3 On the other hand, in many cases, there will be cross allegations of family violence, so identification of who is the alleged perpetrator and who is the alleged victim may be blurred, at least until the relevant evidence has been tested.

5.4 On balance, the Law Council believes that a judicial officer in any particular case is in the best position to determine any application to alter the form of or ban cross examination. The Law Council does not believe the alleged perpetrator should be prevented from making the 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.*

6.1 The proposed amendments suggest a process in which, in certain circumstances, a court appointed person will "ask questions on behalf of a party for the purpose of cross-examining the other party" and "will not be a legal representative for a party and they will not provide any legal advice to a party".

6.2 It remains the position of the Law Council that this proposed model fundamentally undermines the role and importance of cross examination in the adversarial trial system.

6.3 The role of cross examination in contested proceedings is to test and challenge the evidence of the other party and his or her witnesses and to put to that party the essential elements of the case they are facing, in order to obtain their response. Through cross examination, the truth or otherwise of an assertion is tested, along with the credibility of witnesses. Effective cross

examination requires the cross examiner to have an understanding of all of the evidence and the central issues in the case and for that person to be present to observe the evidence of the other party, their witnesses and the evidence of his or her own witnesses.

- 6.4 Cross-examination requires an understanding of all of the evidence before the court, and for the cross examiner to understand how pieces of evidence (including oral evidence and material produced under subpoena) fit within a case narrative relied upon by their client or the other party. It is a process that extends far beyond merely asking a set of prepared questions and at a very minimum, requires the questioner to be able to listen to answers, to assess how that evidence then sits with other parts of the evidence and to further challenge or explore matters accordingly.
- 6.5 It is usual and essential for a cross examiner to be able to take further instructions from their client as the evidence unfolds and in response to particular answers being given. Cross-examination is a dynamic and at times, organic process. Limiting or restricting the process of cross-examination, as proposed in the amendments, will severely undermine the utility of the process and may ultimately render a judgment unreliable and subject to appeal.
- 6.6 Depending upon the issues before the court, cross-examination in family law proceedings may traverse matters beyond whether or not family violence occurred (or the particular elements constituting an allegation or allegations of family violence). The advocate engaged in cross-examination must accordingly have a full knowledge of all of the issues in the proceedings and of the evidence before the court (noting in family law proceedings the primary evidence is by way of affidavit and the advocate must have read and appreciated the evidence within those affidavits). In most matters proceeding to trial, there are many affidavits relied upon by each party in support of the orders they seek from the court, and often a considerable volume of additional material produced under subpoena.
- 6.7 The right to cross examine a witness is central to the adversarial trial process and creates the foundation for the court to make findings about matters in dispute, including the best interests of children in parenting cases, factual matters about financial contributions and assessment of future needs (in order to determine a property outcome that is just and equitable) and the truth about allegations of family violence.
- 6.8 For example:

Example 1

Cross examination leads to the testing of evidence. It enables the Court to determine, once the evidence has been challenged and tested, whether or not on the balance of probabilities, what actually occurred or what was likely to have occurred.

This example illustrates the difference between merely asking a question with no follow up and probing more deeply into the contradictions between the evidence and the evidence and observations of other witnesses. Proper testing of the evidence through cross-examination requires the questioner to know all of the evidence in the case in order to put this to the witness.

Mere questioning

The children are not scared of me are they? - Yes they are, they are terrified.

They told the Family Report writer they missed me didn't they? – Only because they knew you would read it.

I was their footy coach and I looked after them on weekends when you went out. How does that make me scary? – You put on a good act. And you only looked after them when your mother was also there.

Proper cross-examination

You say the children are scared of their father? – Yes, they are terrified.

You agree they told the Family Report writer they missed him? – Well they knew he was going to read the Family Report and they were too scared to tell the truth.

The Family Report writer also observed them with the father, didn't he? – Yes

And he saw them when the father entered the room didn't he? - Yes

They hadn't seen their father for 4 months at that stage had they? - No they hadn't.

And they ran into his arms, didn't they? – So it says.

And they hugged him? – Apparently

Sat on his lap and wanted to be physically close to him? – They were excited to see him after so long, that's what children are like.

And the Family Report writer says, "The degree of physical comfort and closeness shows a warm and appropriate bond between the children and their father. The observed interaction evidences a loving and affectionate relationship". That's right isn't it? – Well that's his opinion, but I know what they tell me.

You heard the evidence of Mr. Smith? – Yes

And Mr. Smith you agree lived next door to you for 5 years? – Yes

And he has no reason to lie to the court does he? – Not that I know of, no.

And he has given evidence that most weekends during summer he would see and hear the children playing in the garden with their father? – Yes, he said that.

And they were happy and in his words, "joyful" when playing with him? - Well that's his opinion.

Example 2

In order to test the evidence of a party or witness, any evidence that contradicts their version of events needs to be put to them so that they can respond and justify the contradiction. This is the rule in *Browne v Dunn*. Again, this illustrates the purpose of cross-examination which is to properly test evidence so that findings can be made as to what may actually have occurred. It is not to merely ask questions.

Mere questioning

You are not telling the truth that I punched you two days before we separated are you? – You did.

You didn't call the police did you? – No

And you would have if I hurt you wouldn't you? - I was too scared.

There are no witnesses are there? – No, we were alone at home.

And you went to work the next day like normal? - Yes I did.

Proper cross-examination

You punched your wife two days before she left you didn't you? – No, that's a lie.

That day was your birthday, wasn't it? – Yes

And you had been to the pub to celebrate with your work mates hadn't you? – Yes

You heard one of them give evidence and say by the time you left you had drunk so much they had to help you out, didn't you? – Yes, I heard him say that. I was not that drunk though, and I sobered up on the way home.

You were angry with your wife, weren't you? – Not particularly.

Well the evidence of your work colleague was you swore about her because she hadn't come to the pub too – Well maybe. You expect your own wife to celebrate your birthday.

His evidence was you said, "I'll teach her, that selfish bitch". You said that, didn't you? – I don't remember, I may have said it.

And that's the mood you went home in isn't it? You were going to teach her a lesson for humiliating you and not coming to your birthday party. – If you say so.

Example 3

To establish whether or not family violence occurred can be especially difficult. It generally occurs at home and without any other witnesses being present. Corroboration may occur unexpectedly. In this example, the importance of knowing what is in subpoenaed documents, given these are not before the court unless tendered, is illustrated. Without knowledge of what is in the subpoenaed material that may support a finding of family violence such evidence is not known to the judge.

Mere questioning

You hit me the night before the kids' school play? – No I did not.

You gave me a bruise on my face it was so hard? - Look if I had done that you would have gone to the police or a doctor and you didn't do either. It's a lie.

Proper cross-examination

You hit your wife so hard it bruised the entire left side of her face didn't you? – Never, that's a lie.

You remember the children's school had a play in October? – Yes

And your wife's face was so bruised from your punch that she did not want to go? – That's just not true.

This is from the subpoena to the school. It's in the teacher's notes. "Charlotte was so upset she was crying behind stage. I asked her why and she said her father had hurt her mother." That's because she had seen you punching her mother isn't it? – I don't know what she's talking about.

The notes go onto say, "I saw Charlotte's mother wearing dark glasses. Her face looked swollen. She refused to talk to me about it but tried to comfort Charlotte". She's swollen because you punched her in the face isn't she? – I don't know why, I did nothing.

Example 4

Matters which are not in affidavit material or in evidence also need to be known in order for the rule in *Browne v Dunn* to be satisfied. If matters are not put to a witness, then they cannot give their version of events. The court is left with untested evidence from which it cannot make findings. If evidence is not in affidavit material or part of a party's case, then it may be that it is "recent invention". Again, a party needs to be challenged on what is missing in the affidavit material so it needs to have been read and thoroughly understood by the cross-examiner.

Mere questioning

I never hit you, did I? – Yes you did, you hit me hard and in the face.

You never had to take time off work, did you? – I did, I often had to take time off from work. You know that, you used to swear at me about it because we needed the money you said.

You never went to the doctor, did you? – I had to go once when you hurt me badly, just before I left you.

Proper cross-examination

It is not true to say that your husband hit you, is it? – Yes it is, and he hit me in the face.

Well if it was in the face that would have shown up, wouldn't it? – Yes, and it did.

So, your work colleagues would have seen wouldn't they? – No. I took lots of days off work. He used to swear at me about it because we needed the money.

You say your husband knew you had to avoid work because of bruising to your face? – Yes

This was never put to him though was it, when he was being cross-examined. He was never asked about you missing work because of injury, was he? – Well it happened.

And it was never mentioned by you in your affidavit, was it? – Well it's true.

You never went to a doctor for any injuries caused by your husband, did you? – I did, just before I left him.

Again, this is not in your affidavit material, is it? – Well it happened.

Your doctor is not being called by you as a witness, is he? – No.

So, the Court has no evidence does it from a witness who could corroborate what you say does it? – I am telling the truth though.

6.9 The Law Council is therefore opposed to the proposal that a court appointed person ask questions on behalf of a self-represented person.

But, even if such a model is pursued, the Law Council notes with some concern that the Bill does not appear to be accompanied by any funding for meeting the costs of a court appointed person, which of itself, is likely to lead to their being a significant difficulty in finding people who would accept such an appointment.

A range of possible classes of people who could ask the questions have been identified in the consultation paper and elsewhere.

Legal practitioners

One suggestion is that legal practitioners could be appointed. Given their skills, experience and understanding of family law litigation, family lawyers are likely to be the best qualified class of people to take on this role.

However, the Law Council considers that that such an appointment may conflict with the legal, professional and ethical obligations that lawyers owe to the court and to their clients. If legal practitioners were to be considered appropriate as the court nominated person, the Law Council suggests that significant safeguards would need to be added to the proposed Bill to ensure that legal practitioners are not at risk of professional disciplinary action against them, and are protected against actions in negligence brought by self-represented persons.

For instance, the conduct rules applying to both solicitors and barristers require that they do not act “as the mere mouthpiece of the client”. It is unclear what the basis of the retainer of a legal practitioner would be. The Law Council suggests that without further clarity in the Bill, a solicitor/client relationship might be implied.

The Bill suggests that the court appointed person would have a limited role of simply repeating questions provided by the self-represented person. This is likely, in many cases, to cause a lawyer significant ethical and legal issues. For instance, a question might be framed in such a way to principally harass or embarrass the witness. A lawyer would be in breach of the conduct rules if they asked such a question. A question might state a fact, which the lawyer knows to be untrue. A lawyer’s duty is to the court, including a duty not to mislead the court. Or a question might not advance the self-represented person’s case, yet a lawyer has an obligation to act in the best interests of a client.

The Law Council suggests that the Government would need to consult with the legal practitioner regulatory bodies and the legal profession insurers in each state and territory to

identify the safeguards that would need to be included in the Bill before those bodies could recommend or approve lawyers accepting such an appointment.

Court employees, such as family consultants

Many court employees are also professionals and must obey the professional codes of conduct of those professions. For instance, psychologists must abide by the APS Code of Ethics. Many social workers would be bound by the AASW Code of Ethics. Registrars must obey the legal practitioners conduct rules. It is reasonably predictable that a self-represented person may ask the court appointed person to ask a question of a witness that would place that person in conflict with their professional obligations and duties.

Family dispute resolution practitioners or accredited mediators

It is noted that some of these people would also be professionals, such as lawyers, who must obey the professional codes of conduct of their profession, and the court appointed role may conflict with those obligations. The Law Council suggests that those practitioners are likely to have limited experience with courts or litigation, and may not be well suited or attracted to this role.

Lay people

The Law Council notes that lay people who are known to the parties are unlikely to be appropriate people to be appointed by the court. The Law Council suggests that it would be very difficult to find lay people who are not known to the parties who would accept an appointment of this kind. The Law Council points to the significant difficulty in finding appropriate people to act as litigation or case guardians in family law litigation.

When litigants have diminished capacity, as the Full Court of the Family Court observed in *Wilshire & Wilshire* [2009] FamCAFC 130, it is a common occurrence to find that no suitable or willing person can be secured to act as case or litigation guardian. The result is lengthy and multiple adjournments in a case. In cases where no person is willing or available, requests are made under the Rules of the Family Court or Federal Circuit Court to the Attorney General to nominate a suitable guardian. In *Salanger & Maxwell* [2011] FamCA 664, the Attorney General failed to nominate a guardian and it subsequently took 5 years and multiple court appearances and adjournments to secure a case guardian. In *Connor & Hulett* [2011] FamCA 196, Murphy J described the futile efforts made to secure the nomination of a case guardian by the Attorney-General, and the tragic impact on the case outcome.

The Law Council notes that the problem of finding willing lay people to be appointed would likely be significantly more difficult in regional areas.

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

7.1 If a lawyer is appointed, s/he should have signed the High Court of Australia Register of Practitioners and be able to appear in courts exercising federal jurisdiction.

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

8.1 Any requirements about who may be appointed by the court and their qualifications should be included in the Family Law Act.

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.**

How the court appointed person obtains questions from a self-represented party

- 9.1 The provision of a simple “list of questions” by the self- represented party to the court appointed person, would limit the utility of the “cross examination” process. The provision of questions, one at a time, would most closely approximate cross-examination, but is likely to be very time consuming. A process whereby the self-represented party is able to provide additional or follow-up questions as the questioning process unfolds and in response to answers given by the witness party is fundamental to assist the court to assess the evidence, and to provide fairness and natural justice to the unrepresented person in advancing their case.
- 9.2 Provision would also need to be made for questions from the self-represented party to be provided to the court appointed person orally, to accommodate those who are not literate. Additional challenges will arise for people of culturally and linguistically diverse backgrounds and the provision of translation services will be required (at additional cost). The Law Council suggests that there may be cases where a judge determines that the self-represented person should not be in the same room as the other party. In those cases, sufficient resources would need to be available to allow the self-represented person to participate by video link.

The level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions

- 9.3 The person should not engage with the self-represented person in any capacity, other than to ask the questions of the witnesses provided to them by the unrepresented person. To do otherwise will be to create a hybrid and confused role for the court appointed person. That person should not provide legal advice or act as liaison between the self-represented person and the court. The expansion of the role would create risks that the self-represented person believed the court appointed person was acting to advise them as to process and the law. The expansion of the role might encourage litigants to be self-represented in order to obtain the assistance of the court appointed person at no cost.

However it may be necessary to set up a process which would allow the court appointed person to meet the self-represented before the trial, depending on the method adopted for the provision of questions. The Law Council suggests that information about the court appointed person's role in the litigation, including the limitations of that role, would need to be conveyed to the self-represented, either in writing or at an earlier court hearing by the judge.

Whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination

- 9.4 In the event the recommendations of the Law Council are adopted such that the court may request the appointment of a legal practitioner to act on behalf of the self-represented party, that legal practitioner should be engaged for the duration of the trial.
- 9.5 If the court appointed person/intermediary model is adopted, that person would not need to be present for the entire final hearing.

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

- 9.6 A court retains broad discretion to direct, control and manage proceedings and to disallow questions asked in cross-examination and that discretion should continue to apply. A court appointed person, within the limited scope of their engagement and without an understanding of all of the evidence, is unlikely to be able to assess, and potentially exclude, questions proposed by the self-represented party. Nevertheless, it could be reasonably anticipated that a court appointed person may receive questions from the unrepresented person which they would prefer not to ask of the witness. For example, if they are a legal practitioner, a question or questions might be harassing or factually incorrect. If the questioner is another professional, for example, a family consultant, they may be concerned about the psychological impact of a question on a witness. Or if the questioner is a lay person, they may be uncomfortable with the subject matter or tone of a question. The Law Council suggests that there are many situations where the court appointed person will find themselves in a legal, moral or ethical dilemma about the questions posed.

Whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination

- 9.7 Given the matters addressed previously, it would not be appropriate for a court appointed person to have discretion to ask questions of their own. However the Law Council suggests that it is inevitable that a witness will sometimes not understand the question, only answer part of a question or there is some uncertainty about an answer given. These common realities of the process of cross-examination underline the significant practical limitations of the model proposed. It may be a natural reaction of the court appointed person to seek to clarify or re-word a question, or to press a witness for a fulsome answer to a question. However to do so, would risk that person becoming an advocate for the self-represented person. The Law Council is concerned that if court appointed people stray in their conduct beyond that contemplated by the legislative amendment, this may lead to more appeals from decisions of trial judges. Obviously it would not be in the best interests of victims of family violence to be at risk of further litigation, include re-hearings following successful appeals, as a result of the conduct of the court appointed person.

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

- 9.8 If the court appointed person is to undertake a limited role only, the conduct of the proceedings is between the self-represented party, and other the party or parties and legal representatives.

The intersection between the court-appointed person's role and that of the judicial officer

- 9.9 The court appointed person should be required to comply with the directions of the judicial officer, who retains discretion in the management of the trial and court process generally. The court appointed person should not have a role interacting with the judicial officer, beyond responding to directions given by the judicial officer during the questioning.

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

- 10.1 If the court appointed person model is adopted, the Law Council recommends that the self-represented party should not be at liberty to nominate or in any way control who is appointed to that role. However, there could be a provision to enable all parties, including the self-represented person, to make submissions to the court about who should be appointed.

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

- 11.1 As discussed above, the Law Council is opposed to the proposal that a court appointed person ask questions on behalf of a self-represented person. The Law Council suggests that the court appointed model is likely to lead to longer trials, than the model it proposes.
- 11.2 If the self-represented person is to be afforded procedural fairness, they must be given the opportunity to require the court appointed person to ask follow up or additional questions, as the evidence unfolds. That process will be time consuming and is likely to interrupt the ordinary flow of a trial.
- 11.3 If a lawyer is appointed to act on behalf of the person, then properly briefed for the whole trial, the process of cross examination is likely to occur in a more time efficient manner. Lawyers are trained to identify the facts in dispute that are relevant and which need to be explored, and those that don't. Properly briefed, they are aware of the factual background and the evidence led by all parties in their affidavits, they have had the opportunity to confer with their client about the issues in dispute, and are much less likely to require adjournments to obtain further instructions.
- 11.4 If a lawyer is appointed to act on behalf of a person, they are also trained to explore opportunities for settlement, including by advising their client of the deficiencies in their case. The Law Council notes that involvement by lawyers in family law litigation leads to greater settlements.

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?

12.1 The proposed Section 102NA(3) deals with when a court may grant leave for the mandatory ban on direct cross-examination contained in section 102NA(1) to not apply. It proposes that there be two limbs to consider when granting such leave. The first limb (s102NA(3)(a)) is that both parties must consent. Consent is not a mere factor to be taken into account in the exercise of the discretion; it is a mandatory threshold requirement.

12.2 The Law Council is of the view that courts already have significant powers to limit, control and direct the nature of cross-examination. A mandatory ban ought only be imposed as a measure of last resort in the specific circumstances of the case, and once:

- the judicial officer has, in his or her discretion, made a determination that direct cross-examination is inappropriate;
- the judicial officer has considered all of the other options currently available to protect a vulnerable witness from trauma;
- the judicial officer has made a determination that none of the other alternatives are appropriate and has caused the litigant(s) to be offered legally-aided representation; and
- the litigant has refused representation from a legally-aided lawyer.

12.3 Given that the judicial officer has already turned his or her mind to the question, the capacity to grant leave to depart from the final mandatory ban is not required.

12.4 If the proposed model in s102NA(3)(a) is the one finally preferred, the Law Council is of the view that whilst in practice, both parties' consent would be a highly significant factor, constraining judicial discretion may lead to injustice in some cases. For instance, a judge might assess that the consent given by a victim of family violence is not real or informed consent, or is a form of gratuitous concurrence. In our view consent ought not be elevated into a mandatory threshold requirement, but ought be one of the factors to take into account in the exercise of discretion.

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?

13.1 The Law Council considers it would be appropriate for a court to consider the impact on the alleged victim of family violence when exercising that discretion. In some cases this may require the victim to lead evidence from an expert about the impact that direct cross examination is likely to have on them.

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?

14.1 The Law Council considers it would be appropriate for a Court to consider these factors.

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

15.1 The Law Council considers that a Court should first take into account whether other forms of protection could be put in place to protect the victim from further trauma, such as those set out in the Family Violence Best Practice Principles and Division 12A of the *Family Law Act*.

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?

16.1 If the model proposed in the Bill is accepted, then the Law Council believes that the amendments should only apply to proceedings started after the law comes into effect. In addition, given that the terms of section 102NA relate to criminal proceedings, family violence proceedings and to earlier family law proceedings, and that a person may have plead guilty to a criminal charge or consented to an order, the Law Council believes that the amendments should not apply retrospectively. It would be unfair for a person to automatically be banned from cross examination because, for example, there is a family violence order made by consent in force, if the person against whom the order was made could not have been aware, at the time of giving their consent, that the effect of the order in the future would be to ban them from cross examination in family law proceedings.

16.2 However if the Law Council's proposal is adopted, the amendments could apply to family law proceedings already on foot. That is because a judge, in exercising their discretion about the proceedings generally and the form of cross examination to take place, can take into account a range of factors, including the circumstances in which a family violence order was made, or family law injunction or a criminal conviction recorded.

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

17.1 In addition to changes detailed earlier, the Law Council suggests that further amendments should be considered to resolve:

- Whether an application can be made part-way through evidence being given. A proceeding may be part-heard, with some direct cross examination having already been undertaken, when a family violence order is made.
- Whether the court can re-exercise discretion (having already exercised such discretion at an interlocutory stage) to allow cross-examination at a later stage in the proceedings.
- An amendment to Note 2 in ss 102NA and 102NB, to provide that an 'intervening party' includes any person who was materially involved in the alleged family violence (such as a witness) or who is otherwise aligned with the alleged perpetrator.

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?

18.1 The Law Council refers to its earlier comments.

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

19.1 The Law Council suggests that the proposed amendments undermine the courts' capacity to 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?

20.1 The Law Council suggests that the proposed amendments may contribute to further delays in family law proceedings and also in family violence order applications in state and territory courts. Delays will directly affect the victim in each case, and indirectly affect victims in other cases awaiting hearing.