

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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- 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)

New South Wales Bar Association
Alistair McConnachie

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

[contact details redacted]

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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?

The NSW Bar Association is of the opinion that there should be no automatic ban on cross-examination in any circumstances.

We are of the opinion that any constraint on the ability of a party to challenge evidence in proceedings and the means by which this may or may not occur should remain, at all times, a matter for the discretion of the court in each individual proceeding.

Any automatic ban is inimical to the method by which courts are to determine issues in proceedings, including particularly those involving the interests of children in parenting proceedings, and would give rise to a significant risk that the evidence upon which such determinations depend is unable to be properly explored and tested in proceedings, thereby compromising the ability of courts to determine issues and to act in the interests of the children the subject of proceedings.

Any automatic ban would be as likely to prejudice the interests of 'victims' as those of 'perpetrators', as it would necessarily constrain the ability of a court to properly determine necessary issues, including the whether family violence has occurred and the consequences of that violence for parenting and financial determinations.

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

No, the courts have sufficient powers presently to appropriately control and manage the oral evidence of parties in proceedings, including when and what cross-examination will be permitted. Such powers are to be found in the *Evidence Act 2006* (Cth), the *Family Law Act 1975* [FLA] and associated *Rules*, including particularly Division 12A of Part VII in parenting proceedings.

The NSW Bar Association is of the opinion that the section may well, in many proceedings, result in both parties being banned from cross-examination of the other. The section presupposes that there will be only one party who falls to be characterised as the 'victim' and one as the 'perpetrator' but this does not accord with the experience of members of the NSW Bar appearing in such proceedings. The result is that a court may be put in a position where the section operates to prevent the cross-examination of each party by the other.

Further, we are of the opinion that the section, as drafted, is too broad in its operation and goes well beyond that which could be considered as reasonably proportionate and necessary to address that which is intended. By way of limited example:

- (a) sub-section (1)(b) operates in respect of 'allegations of family violence' which in turn engages the definition of family violence in section 4AB FLA. Section 4AB incorporates within that definition many issues, including those involving the financial support of spouses, which is otherwise to be addressed pursuant to Part VIII of the FLA and is unlikely to give rise to issues to which the proposed amendments are directed; and,
- (b) sub-section (1)(d) operates in respect of a range of orders, including injunctions entered pursuant to section 114 of the Act, which injunctions are not limited to those entered for personal protection and related reasons, but also to injunctions entered for any purpose in proceedings under the Act entirely unrelated to such issues – by way of example, in relation to jurisdiction and for the protection of assets.

The result is that the section as drafted could give rise to an automatic ban in entirely inappropriate circumstances.

Further, section 102NA(1)(c)(i) operates in respect of either a 'conviction' or 'charge' and it is suggested that the section could not, without more, operate in respect of a person charged but acquitted.

Finally, sub-section (1)(c) operates to confine the ban to circumstances where there are pending or have been certain criminal proceedings and, thereby, does not operate in relation to the many persons who will have experienced family violence without resulting criminal proceedings.

There are a significant numbers of proceedings in which the nature of the allegations arising, and the evidence in support of those allegations, gives rise to serious concerns of 'family violence' but which evidence is (or have been found to be) insufficient to support a criminal conviction on the different (and higher) standard of proof required. In many instances there will not have been any involvement with the criminal law nor applications for protection / restraining orders. The courts administering the FLA deal on a daily basis with persons in such circumstances but for whom allegations and experience of significant family violence is a reality.

In this respect, the draft gives no evident or appropriate recognition to the 'family violence', and the consequences of the same, which it is presumed to seek to address in the context of proceedings pursuant to the FLA.

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.

Whilst the NSW Bar Association is not clear about that which is intended by reference to the 'Notice of Risk', it ought be noted that rules of the Federal Circuit Court of Australia require that such a Notice be filed in all proceedings, whether or not there is any allegation of risk. Thus reliance upon the filing of such a Notice as a 'trigger' for the operation of section 102NA(1), if this be intended or being considered, would have unintended and inappropriate consequences.

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.

This has been largely addressed above and our concern stems from recognising:

- (a) that there will not always be only one 'victim' and one 'perpetrator'; and,
- (b) that adoption of such a course would deprive a court of the ability to determine the necessary issues in the proceedings with consequent constraints on the ability of the court to determine necessary issues and, in parenting proceedings, to protect and advance the interests of children.

A mutual ban on cross-examination would deprive a court of the ability to determine whether family violence has, in fact, occurred, thereby depriving a victim the opportunity to obtain protective orders, appropriate parenting orders and have any relevant financial consequence addressed.

Further, and as addressed below, real issues emerge for consideration in relation to the source of funding where one or both party are to be so constrained.

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?

Any discretionary power of a court should be available to be exercised on the application of any party to the proceedings (including any Independent Children's Lawyer) and by the court of its own motion.

It would be inconsistent with fundamental notions of justice if a party to proceedings was to be prevented, without more, from bringing an application in the proceedings to the court or if a court was to be prevented from dealing with such applications.

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 most appropriate person to undertake the role is an appropriately qualified and experienced legal practitioner.

The NSW Bar Association notes that the proposed ban is to operate in relation to cross-examination and that any questions to be asked on behalf of a person are to be by way of cross-examination, as opposed to the simple 'asking of questions' as posed by that person.

For the purpose of addressing this question, and those that follow, it is important to recognise that 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 the case they are facing to them in order to obtain their response. The significant aspects of a party's case to a witness must be put to satisfy the rule in *Browne v Dunn*. 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] 1 NSWLR 1 at 16:

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 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 any 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 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 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 ARLC (in conjunction with the NSWLRC and the VRC) provides a valuable basis for further consideration of any proposals and, importantly, a benchmark from which the reforms thereafter implemented can be assessed.

More particularly in relation to this question, we are particularly concerned with the adoption of any proposal which would seek to impose an unqualified and/or uninstructed intermediary to undertake such role. An intermediary who is not retained and instructed by a party is unable to properly discharge their duty both to the court and to the party that are appearing on behalf of. 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 – that is, to undertake the cross-examination which the party is to be precluded from doing themselves.

We urge that further funding be made available to the Legal Aid Commissions of the various States and Territories to ensure that appropriately experienced and qualified legal representation is made available where required, including in proceedings where courts require assistance in dealing with allegations of family violence.

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

For the reasons outlined in response to question 6, any court-appointed person ought to be an appropriately qualified and experienced legal practitioner.

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

In the event that, notwithstanding these submissions, a person other than a legal practitioner is to be appointed to fulfil the foreshadowed role, the qualifications and experience to be required of such a person ought to be incorporated in the *Family Law Act* (or *Rules* or *Regulations*).

For the reasons outlined below, both the parties and the courts will necessarily depend upon that which is done (and not done) by any court-appointed person in the course of the proceedings and for that reason some delineation of the qualifications and experience to be required is necessary.

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.**

In the event that a legal practitioner is to be appointed to fulfil the foreshadowed role, all of the above matters and, more broadly their duties to the court and other parties, are ones well-established by both legislation and authority. Similarly there are well established procedures and structures by which the courts and other agencies regulate the conduct of legal practitioners.

If persons other than legal practitioners are to fulfil the role of the court-appointed person, it will be necessary to:

- (a) clearly provide for the duties and obligations of such person, not only in the proceedings generally, but to the court, the person on behalf of whom they are asking questions and the other parties to the proceedings;
- (b) clearly provide for the consequences of any failure to fulfil such duties or breach of such obligations; and,
- (c) establish and maintain a procedure by which such failures and breaches are to be dealt with and a structure for addressing such matters.

It is otherwise noted that the examples provided above illustrate a consideration of a role for the person appointed other than to undertake 'cross-examination'. That is, the examples posit a role which would not permit proper cross-examination on behalf of a person – for example, as the appointed person may not be present throughout the proceedings, may have limited or directed involvement with the person precluded from asking questions and/or may be prevented from asking 'their own' questions.

For the reasons outlined above, significant concerns arise for the proper administration of justice and the proper conduct of proceedings if a person is to be precluded from conducting a direct cross-examination and any court-appointed person is then unable to conduct such a process on that person's behalf. Most materially in the present context, such an approach would deny the court the ability to even determine whether family violence has occurred, let alone properly address the consequences of such violence for both parties and children.

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

In circumstances where a court precludes a person from direct cross-examination, and that person otherwise refuses to retain or accept the appointment of a legal practitioner to act on their behalf, that person should be entitled to nominate an alternate person, provided that any person so nominated is not such as to perpetuate any concerns as to the impact of family violence. The court ought retain the discretion to refuse to permit any such nominated person from being involved in the proceedings.

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

Yes, for the reasons set out above.

As addressed, the questions posed above and the 'model' confuse and insufficiently delineate between the concepts of 'asking questions' on behalf of a person and cross-examination. The former involves a person as a mere 'mouthpiece' for a party, the latter involves the exploration and testing of evidence relevant to the determination of issues in the proceedings.

Further, there is no evident consideration given to the manner in which such persons will be identified and funded in practice.

An analogous circumstance has been experienced in proceedings pursuant to the *Family Law Act* where a Case Guardian is sought to be appointed for a party. Recurring requests of courts and parties to the Attorney-General's Department have failed to identify any persons who can be identified to take on such roles and failed to elicit any proposal for the appropriate funding of such roles. There is no reason to suspect the position will be any different here.

An absence of identifiable persons and/or appropriate funding will only exacerbate the difficulties already experienced by those experiencing family violence in such proceedings, which difficulties will include the further delay of already prolonged proceedings and the inability of courts to properly consider and address family violence.

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. As outlined, there ought be no automatic ban on cross-examination. Further, the availability of cross-examination is not a matter that ought be put in the hands of the parties to proceedings.

There may be good reasons why a victim may not oppose direct cross-examination, including because he or she seeks to put a court in a position to determine issues on a timely basis.

There may be circumstances in which it is to the advantage of a perpetrator to prevent cross-examination occurring by withholding consent, including denying a court the ability to make findings adverse to them.

The mode by which cross-examination is to occur in circumstances involving family violence ought remain, ultimately, in the discretion of the court seized with the particular proceedings.

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. As outlined above, the mode by which cross-examination is to occur in circumstances involving family violence ought remain, ultimately, in the discretion of the court seized with the particular proceedings.

As part of any such determination, the impact of cross-examination on the alleged victim is and would inevitably and ought be one of the primary matters to be taken into account.

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 above, to the extent that this question is predicated upon there otherwise being a ban on cross-examination, the answer is 'no'.

We agree, however, that in determining the course of oral evidence in proceedings, a court ought consider both the impact upon the 'victim' and the manner in which the 'perpetrator' might intend or be reasonable apprehended to intend to undertake any cross-examination.

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

The matters addressed above are repeated here.

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?

Any amendments ought only apply prospectively.

Any pending proceedings have been prepared and conducted to date without reference to any amendments which may come into effect. The recasting or reformulation of proceedings to take into account any amendments can only result in further delay and expense to parties who will already have inevitably experienced significant cost and delay in awaiting determinations.

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

For the reasons outlined above, it is our view that the amendments are both flawed and unnecessary.

If any version of the amendments are to be pursued, including any proposal to give content and direction to any 'court-appointed model' of representation, we would appreciate the opportunity to comment further.

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 the responses above.

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

See the responses above.

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?

See the responses above.

21. Any general comments.

It is our view that the amendments represent an unnecessary and ill-considered approach to the issue of the impact of proceedings on victims of family violence.

The courts already have a variety of power available to regulate the manner in which proceedings are conducted and to protect victims of family violence from the impact of oral evidence in those proceedings. These include the powers under the *Evidence Act 2006* (Cth), the *Family Law Act 1975* (including Division 12A of Part VII) and as part of the courts power to regulate proceedings more generally.

The real issue for victims of family violence is that the courts administering the *Family Law Act* are in a state of disarray, including as a result of sustained under-funding and slow and poor judicial appointments.

All litigants in New South Wales, including victims of family violence, face appalling delays of more than 3 years in having their proceedings determined. No amendment to the legislation will address this issue, which is the primary cause of harm to the welfare of victims, including children. This amendment is only likely to add to the expense and delay experienced in proceedings.

The most appropriate, efficient and cost-effective means of protecting the victims of family violence, including children, is to ensure that a properly funded legal system is available to determine proceedings in which they are involved on a timely basis.