

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

(Consultation closes **COB 25 AUGUST 2017**). Please send electronic submissions to familylawunit@ag.gov.au)

Publication of submissions

Submissions will be published on the Attorney-General's Department website. Please advise if you wish all or part of your submission to remain confidential.

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The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.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

National Council of Single Mothers & their Children

Contact details

[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) (We have removed identifying information)

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?

It is our experience that family violence is under-reported. Therefore, in the event of an allegation of family violence between parties, and with the request of the victim of family violence, that cross-examination should be banned. The process of a ban should be easy, unilateral and made known to litigants before any court proceedings.

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

Yes, we support the cross examination be banned in the proposed subsection 102NA(1) unless the victim of family violence has requested that cross-examination be allowed. We further endorse that the court may suggest the ban to prevent direct cross-examination on the application of either the examining party or the witness party. We make this recommendation noting that domestic violence is not always fully recognized, by the victim until they have sought assistance or have had time to process. The extend of the family violence, and the subsequent impact of cross examination may be realised during the proceeding.

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.

Notice of risk should include child abuse, risk and threats to extended family members / friends and or pets. It should also be flexible to include the 'process of separating' as this in itself is an event that may trigger family violence.

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?

The ban should apply to the alleged perpetrator of the family violence asking questions of the alleged victim but we also endorse that the court may suggest an order to prevent direct cross-examination on its own initiative or on the application of either the examining party or the witness party.

5. Should the discretionary power only be exercised on application by the alleged victim, or by the courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?

We do not see any cause of the alleged perpetrator to be able to make an application to prevent direct cross-examination and have concerns that it could be a strategy for the alleged perpetrator.

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.

All of the stated options should be available and the final decision would be of the self-represented person.

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

The court employee not involved in the proceedings, other professionals, or the court-appointed person, at a minimum, have undertaken awareness training of domestic violence. Understand how an alleged perpetrator and the victim will experience and may react to the process of cross-examination and court proceedings. We also see merit in the person gaining an understating of the court process and the role of cross-examination.

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

If it is a court employee not involved in the proceedings, other professionals, or the court-appointed person, at a minimum, we anticipate that they have undertaken awareness training of domestic violence. Understand how an alleged perpetrator and the victim will experience and may react to the process of cross-examination. We also see merit in the person having some formal qualification but in the case of lay person they could have an online tutorial to provide them with the general knowledge of the court process and their role which should be free and available online.

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**
Yes, it is essential that the self-represented party be fully informed of the process and the court appointed person does not deviate from the known process. They should not be another layer of confusion or a process for the self-represented party to manage.
- **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions.**
At a minimum, they would need to meet with the self-represented party before all court proceedings in order to prepare for questions and the proceedings.
- **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination.**
The whole of the proceedings to be prepared for subsequent proceedings.
- **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**
None, all directions to be given by self-represented party. The court appointed person may consult / advise the self-represented party but not to initiate questions without the self-represented party endorsement.
- **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination.**
No, the court appointed person may consult / advise the self-represented party but not to initiate questions without the self-represented party`s endorsement.
- **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.**
The Children`s Lawyer and or the judicial officer could not direct the cross-examiner (court appointed or lay person) and that the self-represented party can give directions, liaise and seek advice from the cross-examiner.

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, a self-represented person should be given the choice to nominate or ask the court to appoint on their behalf.

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

Yes, the premise of the court appointed person model is to support and protect the alleged victim from direct cross examination, upon their request, from the alleged perpetrator. The model should not add another layer to manage and or contend with for the self-represented party. The court appointed person or lay person must follow the directions and liaise with the self-represented party.

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, only the consent of the alleged victim otherwise the court appointed person model would lose its capacity to protect the victim from the trauma of cross-examination and the power to control will again be that of the alleged perpetrator.

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, it should be at the request of the alleged victim and that the alleged victim should not need to reach a 'threshold of harm' for leave to be granted.

14. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?

No, the alleged victim / the self-represented party can make that decision

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

The court should inform the self-represented party of:

- The option of Teleconference.
- Be informed of other support such as the duty officer, safe rooms etc..

All services to support victims of violence should be joined irrespective of when or how the courts are informed of the violence.

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?

Both, as some proceedings can span years and several proceedings.

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

We understand that all parties should have a fair hearing, have sufficient opportunity to make their case and have the opportunity to test any adverse evidence presented by the other party. We don't believe that a 'selected court appointed model' (as it must be the choice of the victim of domestic violence) will disrupt a fair hearing but rather protect the victims of family violence from re-traumatisation from being directly cross examined by the perpetrator of family violence. However, all changes should have an evaluation process which enables the voices of the self-presenting party who is the victim of domestic violence. We suspect that an evaluation would validate this legislation but there may be some enhancements.

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?

We note that you have started to discard the 'lay person' as an option and believe that this is still an

option.

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

The courts have made determinations even when victims of family violence were re-traumatized from being directly cross-examined by, or directly cross-examining, the perpetrator of family violence. In the event that the victim of domestic violence has chosen to be part of the court-appointed model we believe this should enhance the current decision-making. The process of removing high-level trauma from the cross-examination by a preparator thus taking the trauma out of the cross-examination provides an opportunity for questions to be more considered on their merit rather than imbedded in fear. It may also have the outcome of reducing litigation abuse as the alleged perpetrator's lever to continue his control and fear maybe reduced.

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?

Again, we suggest an evaluation that seeks to include the voice of victims of family violence and have included two experiences to highlight the different needs of self-represented parties. We suggest that experience (1) would be more common but we should not remove or discount the experience of (2) and seek that the court-appointed model can accommodate both elements.

There he was looking sharp, clean cut, a man with a new wife and baby. This upstanding citizen, who coaches cricket and is gainfully employed. My tormentor, my abuser, my rapist. He was beside me in his 'good man costume'. Did this man threaten my life? You bet. Could this man have harmed his first born? You bet. Did he just love the court? You bet. It continued his ability control and to harm. Would I agree to what he wanted? Yep, get me out of here. Would I argue my point? NO get me out of here. Do I get sick just at the thought of been in the same room? Get me out of here. How the hell do you think the court case went. I just wanted to stop him talking to me, demanding that I answer his questions. Where else are perpetrators allowed to continue their abuse and control?. In the family court. If he could not force me to answer questions the whole process would have been more manageable. I think I would have asked my sister to the cross-examiner. She knows everything, she is on my side and she is not afraid of him. The power in the room would become more even. I would have stood a chance.

I have been involved in a DV relationship for nearly 20 yrs! In & out of court for last 5 yrs - magistrates and family court - he initiated to continue ridiculous abuse & control of me as his ex and mother of our 3 young boys! The ONLY time I had ANY control or power in any court case and the ONLY time the truth was able to be established in our matter was when I cross examined my ex!! And I would do it a 1000 times over to ensure he can't worm out of his lies!! As he and I are the only two people on earth who really know 'the truth' bw us and no solicitor, no ICL, no barrister and no Judge can get to that same place of truth without my cross examination bc I am THE ONLY PERSON who knows WHEN IF AND HOW is is LYING and in cross examining him I get to grind the truth out. Disgustingly I have also been challenged by the ICL as to why and how I could or would put myself in such a position 'IF I had been abused by him as I claimed' with the absolutely implied accusation that the abuse wasn't real or bad enough! In NOT being able to cross examine my ex in our 'trial' justice and truth were foiled!! And I sm still angry that I did not get the opportunity to expose his abusive, derranged, gas lighting, narcicisstic lies!!

21. Any general comments.

Our voice is for women affected by domestic violence and in particular women who self-represent because they do not qualify for legal assistance, and or they can't afford legal representation, and or the proceedings have continued to the point that their funds are expunged. It is these women who enter and leave proceedings isolated and without the buffers of legal support. We seek that the evaluation of newly implemented legislation that bans, upon request from victims of domestic violence, direct cross-examination to victims of domestic violence.

The evaluation should also quantify the amount of self-represented parties affected by domestic violence who don't have legal representation and why this the case. Increasing the option for women affected by domestic violence to access legal support would be a progressive next step to compliment the implementation of this legislation.