

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

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- a party to the proceedings;
- a person who is related to or associated with a party to the proceedings or is otherwise concerned in the matter to which the proceedings relate; or
- a witness in the proceedings.

Your details

Name/organisation

National Legal Aid

Representing the directors of the eight State and Territory legal aid commissions, and through them the legal aid commissions.

[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?

NLA is concerned that any new measures to be introduced provide the best protection for victims of family violence and also ensure that the current capacity of the family law courts to determine the evidence and make appropriate decisions is not adversely impacted.

Division 12A

Division 12A of the *Family Law Act 1975* enables the family law courts to actively direct, control and manage the conduct of child related proceedings including for the purposes of safeguarding the parties against family violence. As indicated in the Consultation Paper, the capacity of the courts to address issues which could potentially arise from direct cross-examination of a victim by an alleged perpetrator therefore already exists.

To the extent that there is concern that the powers in Division 12A are not being appropriately exercised, the legislation could be amended to ensure:

- the family law courts expressly determine in each case whether family violence is an issue and which family violence safe-guards will be exercised at the hearing of the particular case;
- the provision of reasons for the determinations; and
- the making of relevant procedural directions.

Division 12A safeguards against family violence should also be extended to property proceedings to support the safety of victims in those proceedings.

In the event that automatic bans are implemented, then this should only occur in specific circumstances and the family law courts will still need to determine whether the matter before it is a matter in which the automatic ban would apply, how the case is to be managed, and to make the relevant procedural directions.

Role of cross-examination

As indicated in the Consultation Paper, the role of cross-examination is to test the evidence presented to the court to enable the judicial officer to make the appropriate decision in the circumstances of the particular proceedings before the court. Cross-examination also puts the cross-examiner's case to the examined party.

In a family law context, the decisions to be made by the court relate to the safety and well-being of the children and the parties, the right of the child/ren to have a relationship with both parents, and the division of property and associated financial arrangements which may affect the party's livelihood. It is likely that the questions in cross-examination, and their answers, will affect the outcome/s in the range of matters for determination.

In this context it is necessary that where direct cross-examination is to be banned that effective alternative arrangements are available and will be put in place. In addition, any decision about the best way forward must address the potential risk of any new process being used to perpetrate further abuse, and ensure that risk of further abuse is minimised as far as possible.

AIFS research

The Consultation Paper notes “the lack of data about the extent to which cross-examination is occurring in family law proceedings where there are allegations of family violence, and the courts’ use of existing protections”. In determining the best way forward, and with any alternate arrangements needing to be resourced, it would be helpful to have a better understanding of the extent to which direct cross-examination of victims by alleged/perpetrators is taking place in family law proceedings, and the circumstances in which that has occurred. The research commissioned from the Australian Institute of Family Studies (AIFS)¹ about direct cross-examination in family law matters will be helpful in this regard.

NLA would appreciate any opportunity to give further consideration to the issues raised following the outcomes of the AIFS research.

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

The only circumstances set out in the proposed subsection which necessarily involve a finding of fact about whether violence has in fact occurred, are those where a party has been convicted of an offence involving violence (including threat of violence) against the other party. Clarification might be required in relation to the applicability of the ban where local courts have the power to record “no conviction recorded” following finding of guilt.

In circumstances where a party has been charged with an offence involving violence (including threat of violence) against the other party there will not have been a finding of fact about whether violence has occurred. In relation to family violence orders and injunctions, there may or may not have been a finding of fact made about whether violence occurred, as the parties may have consented to interim or final orders without admissions.

There are also circumstances where the victim of family violence is the respondent to the interim/family violence order, and/or the subject of a criminal charge and there is a factual dispute as to who is the primary/aggressor.

Where a finding of family violence has been made, it could be said that there is a logical basis for a mandatory ban as the victim/perpetrator roles are not in issue. However, it is difficult to see reasons not to impose a ban to also protect those people who may well be at risk of trauma from direct cross-examination because they have suffered the same (or worse) violence, but where a finding about the violence is yet to be made, provided that in both circumstances, but perhaps more importantly the latter, effective alternative arrangements to the direct cross-examination are available and

¹ [AIFS Direct cross-examination in family law matters](#)

appropriately resourced. If this approach is taken then logically the ban should also extend to include circumstances where an interim family violence order has been made.

If the proposed sub-section were to be implemented, respondents to applications for domestic violence orders and defendants charged with offences arising out of family violence incidents at local family violence courts, would need to be provided with additional legal advice about the potential consequences of any decision they might make in relation to defending such matters on their ability to directly cross-examine the other party in family law matters if they are not legally represented.

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.

Please refer to our response to questions 1 and 2.

NLA considers that there is no logical reason for not extending any ban on direct cross-examination to protect non-party witnesses consistently with the approach to be taken to protect party witnesses.

The banning of in-person direct cross-examination in all circumstances where family violence has been identified in the Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence in circumstances which fit within the definition of family violence in the *Family Law Act 1975* is likely to have significant resource implications, including the need for triage, in these circumstances.

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?

Any ban on direct cross-examination should apply to both parties asking questions of each other.

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?

NLA considers that the discretionary power should be exercised on the courts' own motion and that applications should be capable of being made by each of the alleged/victim and alleged/perpetrator and an Independent Children's Lawyer.

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.

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

Please refer to our response to question 1 above.

As indicated in our response to question 1, cross-examination has a distinct and important role in relation to the determination of family law disputes, with the questions asked in cross-examination and the answers given likely to affect the outcomes in each case.

Cross-examination requires an understanding of each party's case. The cross-examiner has the opportunity to read filed materials, to hear the evidence of the other party, and in the cross-examination to test the evidence by asking questions, including questions which flow from the responses received, with full knowledge of the circumstances the case. In this context, NLA is concerned that court appointees asking questions on behalf of a self-represented person are unlikely to be an effective alternative for cross-examination purposes.

Further concerns include:

- i) The need for timely triage for the purposes of identifying matters where a ban on cross-examination might apply and the making of appropriate procedural orders including so as to ensure that the "court appointed person" would be present at, and prepared for, the hearing, and
- ii) that any alternative arrangements, short of legal representation, will likely import new potential grounds for appeal and/or issues of professional/personal liability, which will need to be addressed.

NLA's view is therefore that the people most appropriate to be appointed by the court to ask questions of "self-represented people" are lawyers.

It would benefit victims, alleged/perpetrators and the efficiencies of the family law system if the recommendation of the Australian Government Productivity Commission's Inquiry into Access to Justice Arrangements about funding the relaxation of the legal aid commission means test was implemented. This recommendation was essentially directed at expanding the availability of aid for Commonwealth family law matters as it related to existing matter type guidelines. The vast majority of LAC Commonwealth family law matters involve family violence. If this recommendation was implemented, the inability of financially disadvantaged victims and perpetrators to engage legal representation and victims being exposed to direct cross-examination would be addressed to a significant degree. Representation on a grant of legal aid would be available not just for the purpose of cross-examination, but aimed at avoiding matters reaching the door of the court in the first place, utilising options such as legally assisted family dispute resolution including remote or shuttle conferencing where appropriate. Appendix H to the Productivity Commission report, Eligibility for legal aid and the cost of extending it, is attached to this submission.

It is acknowledged that reasons for self-representation can include choice, possibly for purposes of directly cross-examining a former partner, and/or including in circumstances where an application for aid which would have passed on means has been refused for lack of merit, but the party does not concede that his/her case does not have merit. The model to be implemented will need to manage the particular challenges presented by litigants in these circumstances.

NLA's strong view is that the people most appropriate to be appointed by the court to ask questions of "self-represented people" are lawyers. NLA acknowledges that the Consultation Paper anticipates that the court appointed person will not be a legal representative of the party.

The suggestions following below are made in this context and might be considered as possibilities for appropriately funded pilot/s.

It is also suggested that establishing a Commonwealth Family Violence Fund for the purposes of funding the pilot/s would ensure that the number, nature and costs of the matters involved would be readily identifiable. This would help provide data for, and facilitate, the comprehensive review envisaged by the consultation paper.

Lawyer models

1) Legal representation at hearing stage

The most appropriate response to matters which have reached hearing stage and where direct cross-examination is to be banned would be full legal representation for each party. This could include options of legally assisted family dispute resolution using shuttle or remote models of conferencing as appropriate.

The administration of the appointment of lawyers could be managed by legal aid commissions (LACs) upon order and request from the family law courts similar to the way that appointments of Independent Children's Lawyers are administered. Orders/ contributions could be made for costs recovery from the parties where appropriate. If the assistance available from the LAC was refused by the party then the ban on direct cross-examination would remain with the judicial officers managing the process to ensure procedural fairness.

As well as being effective, this response might be less costly than other models because of existing efficiencies, infrastructure, skills and indemnities. However, as noted under question 7 above, this could not be accommodated under existing legal aid funding levels. This would therefore require both additional, targeted funding and clarification that legal aid representation in these circumstances was a priority use of that funding.

2) Limited or task legal representation by lawyers undertaking the cross-examination.

The limits of this role would need to be clearly identified and associated indemnities established, as the number of suitably qualified lawyers prepared to take on the work could be expected to be affected by such factors.

To the extent that there were lawyers prepared to undertake the work, LACs could establish panels and administer appointments upon order and request from the family law courts. Orders/contributions could be made for costs recovery from the parties where appropriate. If the assistance available from the LAC was refused by the party then the ban on direct cross-examination would remain with the judicial officers managing the process to ensure procedural fairness.

To minimise any potential for detriment to the individual's case by reason of the limited nature of the representation, and the associated professional liability risks, it would be best if the lawyer could be present throughout proceedings or have been provided with the transcript, however the increased time involved in court attendance/reading could be expected to increase the cost of the grant.

A limited or task legal representation model administered by LACs is considered preferable to non-lawyers asking questions as it would reduce the potential for inappropriate questions being put to witnesses, and/or for pertinent questions not to be put, than would be the case in scenarios involving the appointment of non-lawyers to ask questions. However, again, it is noted that due to various factors it may be difficult to ensure the availability of lawyers to undertake this work.

3) Counsel assisting model

Victoria Legal Aid (VLA) is supportive of trialling a “counsel assisting model”. VLA will provide a separate response to this consultation paper identifying how this proposed model could operate as a pilot.

Non-lawyer models

NLA is generally not supportive of non-lawyer models. If a non-lawyer model is to proceed, then NLA would strongly recommend that the person to be appointed by the court be independent, have appropriate family violence training and not be a lay person, particularly not a lay person associated with the parties as this imports the possibility of the issues arising that the proposed bans seek to avoid.

Non-lawyer models raise questions in relation to the purpose and scope of the questioner’s role, and may present new problems, e.g. by being unable to identify and/or eliminate abusive questions, in/advertently giving legal advice when not qualified to do so, and potentially creating issues with relation to the confidentiality of family law court proceedings (s.121 *Family Law Act 1975*).

4) Family Violence Intermediary drawn from pool of FDRPs

Family Dispute Resolution Practitioners (FDRPs) prepared to undertake a “family violence intermediary” (FVI) role could provide a ready and appropriately accredited national work force. Careful consideration would need to be given to the precise scope of the role of the FVI, as separate to and distinct from that of FDRP. In this regard, it is envisaged that one FVI would be appointed per party.

There are however concerns about the blurring of role responsibilities between the FVI and FDRP role and there are also likely to be issues for FDRPs who are also legal practitioners. Having identified the scope of the role potential issues would include whether there were sufficient numbers of FDRPs prepared to take up the role, the resourcing of the role, and ensuring that professional indemnity and appeal issues were addressed.

As with the preferred legal models identified above, LACs could administer appointments upon order and request from the courts and would seek to engage FDRPs willing to undertake the work including from other family relationship service providers where appropriate.

As indicated above, the family law courts already have the power to direct, control and manage the conduct of proceedings in a way that will safeguard parties to the proceedings against family violence in children’s matters (Division 12A *Family Law Act 1975*) and the potential to extend these powers should be considered.

8. Should any requirements regarding who the court can appoint and their qualifications 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.**

Please refer to our responses above, including in relation to the potential for extending the powers in Division 12A.

Matters such as the qualifications of the “court appointed person”, the boundaries of the “court appointed person” role, timing of procedural orders and directions, including any order and request for the court appointed person to be in attendance at court, associated liabilities and indemnities, what should happen if any available assistance is declined, and provision for the recovery of costs will need to be clearly established.

It may be, however, that the detail of such arrangements would be best identified in family law court rules, e.g. Rule 15 Family Law Rules, in the implementation phase and that further legislative amendment might more appropriately follow after the review envisaged by the consultation paper.

The resources required to meet the court appointed role would, at a minimum, include a person assigned to each of the parties meeting the respective party, explaining respective roles, obtaining questions, putting questions, and potentially adjourning to obtain and then put further questions. Regardless of the model proposed, the court would ultimately have to retain control of the proceedings, and indemnities would need to be put in place. Issues such as whether the in-person litigant can be present in the court during the cross-examination asked will also need to be addressed as this will affect the nature and the extent of the resources required for the court appointed role.

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

Please refer to our response to questions 6 and 7, and in particular that if a non-lawyer model is to proceed, then NLA would strongly recommend that the person to be appointed by the court be independent, have appropriate family violence training and not be a lay person, particularly not a lay

person associated with the parties as this imports the possibility of the issues arising that the proposed bans seek to avoid.

If a self-represented person is to be able to nominate someone then the court will need the power to reject the nomination specifying the grounds for the rejection.

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

NLA has concerns about the court-appointed person model as set out in our response to the questions above.

Further specifically, any non-lawyer model needs to ensure that a party still has the opportunity to adequately test the evidence. Considerations arise such as:

- Formulation of the questions – how will this occur? Will there be a need to read all the trial material, prior conferencing with the alleged/victim/perpetrator, only asking the cross-examination questions being put by the alleged/victim/ perpetrator?
- Are questions on particular issues appropriate when there is evidence such as the transcript of proceedings from another court available?
- What happens when responses from the alleged victim warrant further clarification/questioning of which the court-appointed person has no knowledge but which the alleged perpetrator wishes to further explore or put a contrary proposition forward?
- Whether the process could slow down the trial resulting in matters becoming part-heard and adding to the trauma and stress of litigation.
- Discord between the alleged perpetrator/victim and the court-appointed person during the cross-examination hampering the cross-examination.

As indicated above, NLA is of the view that if Legal Aid was funded to appropriate levels, and judicial officers were expressly determining how proceedings would be controlled, that matters could be far better managed within the existing legislative and procedural frameworks, noting the potential for Division 12A powers in relation to family violence to be extended to property matters.

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?

The context in which consent was given by the alleged victim/perpetrator should be considered, e.g. whether the consent might have arisen out of a threat or coercion, fear of saying 'no' to a judicial officer, gratuitous concurrence etc.

The court will need to determine on the basis of available evidence whether direct cross-examination should occur including in circumstances where consent has been provided by both parties. For example, where a psychological or psychiatric report suggests that a person might not be well placed to consent.

12. 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?

Yes, on the basis of the available evidence. Consideration will need to be given to how that evidence is to be obtained in non-child related matters.

13. 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?

Yes.

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

Any other matter that in the interests of justice the court considers appropriate.

15. 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 should apply to proceedings started after the law comes into effect. This will ensure that a party knows that s/he will/may not be able to directly cross-examine at the time that proceedings are filed.

In relation to children's matters filed prior to any new law coming into effect, the ability of the court to make orders to direct, manage and control child related proceedings utilising Division 12A already exists and the implementation of the new provisions will encourage courts to exercise these powers in relevant circumstances.

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

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

Please refer to our response to the questions above.

Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?

Please refer to our response to the questions above.

19. In these circumstances, in particular in order to protect alleged victims and not disadvantage alleged perpetrators, it is necessary to ensure that truly effective alternatives to direct cross-examination by in person litigants are identified, put in place and appropriately resourced. Any general comments.

LAC experience suggests that victims of violence are also very concerned about delays in the court process and other related issues often arising out of a family violence dynamic, such as vexatious applications, contraventions and subpoenas etc. These are also matters which need to be addressed.

Conclusion

Please do not hesitate to contact us if you require any further information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Graham Hill', written in a cursive style.

Graham Hill
National Legal Aid
Chair
19 September 2017