

# 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](mailto: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)

Mr Philipp Bachmann

**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](mailto:familylawunit@ag.gov.au).

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

I find this question too vague and speculative for me to answer usefully.

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

PMI

PLUS

- For the many parents who don't have the skill to cross-examine, this will reduce the likelihood of pointless questions being asked.
- Cross-examination may run more smoothly, reducing the need for judges to inhibit proceedings by barring aspects of the cross-examination (see s69ZX(2)(i) of the Family Law Act).
- Inevitably, the court-appointed person required to ask the questions will be able to assist the party formulating his questions.

MINUS

- More red tape – confusion, delay, frustration.
- The bar may apply in circumstances where the best way for the Court to be informed of the parents' relationship is to hear them exchange views in court.
- Men may perceive an anti-male sentiment and be dissuaded from applying to courts to protect the welfare of their children.
- Women may perceive a pro-female sentiment and be deluded into believing that the authorities will support her regardless of her conduct.

INTERESTING

- I have read over 100 judgements and never read of a judge talk about a witness being traumatised: Courts are places where parties are coerced into remaining calm and polite.
- Would a woman be more traumatised by being cross-examined by her emotional ex-partner or a skilled, ruthless barrister?
- Why, as the Consultation Paper suggests, is there "a lack of data about the extent to which direct cross-examination is occurring in family law"? Why didn't you get some data before proposing amendments?

Interesting to hear judges' perspectives on this: they are, after all, at the coal face.

### 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.

Essentially this question asks, "Should cross-examination be barred in all cases where one party merely alleges abuse?"

I think it is likely that this would simply encourage extra abuse allegations.

### 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?

Neither option seems compelling:

If you ban only one side from asking questions directly, it raises the obvious question of, "Why should a woman be allowed ask questions of her abuser when she says she's not capable of answering his questions?"

If you say the ban should be two-way, then you stop potentially effective cross-examination by an alleged victim who wants to run her own case.

Clearly, women can be effective in confronting their abusers, as suggested by the recent case of Kennett & Nickson & Ors [2017]. In this case, Judge Wilson found that the father had, on separate occasions, likely pushed the mother down a concrete step, thrown her across a room, and wrapped his arms around her throat (p 214). Nevertheless, the mother ran the case herself against the father's legal team and an adversarial ICL and was effective both in cross-examination (eg.p 79) and answering questions (eg. p206).

**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?**

Presumably, this question relates to 102NB of the proposed amendment?

I suppose, given that existing provisions of the act (s69ZX(2)) gives a judge discretionary power to bar cross-examination, that a judge should have similar power to insist that cross-examination be conducted through an intermediary irrespective of who, if anyone, suggests it.

**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.**

I'm sure you'll receive submissions insisting that only lawyers can ask the questions (because lawyers understand court rules and are, in theory, bound by them). However, as you see from my response to question 9, the role I see for the questioner does not require a law degree – one day's training of an average, literate person would suffice.

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

See my response to question 6.

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

No, I don't think judges need your help with this.

**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.

Let me assume the following:

The purpose of cross-examination is to determine the extent to which the parties' written evidence is accurate. It is not to introduce new evidence: it is to test whether someone has been telling fibs (or is deluded).

1. The court-appointed person could have a very useful role in preparing the self-represented person to cross-examine effectively. I suggest the court-appointed person should provide the self-represented party with a pro-forma document to fill in. This document would contain questions like:
  - What points does the other party make in her evidence that you claim are false?
  - For each point, what questions could you ask that might show that she is lying or mistaken?
  - What answers has she given in the past to such questions?
2. The document should have examples of effective questions.
3. The completed pro forma is sent via email to the court-appointed person may, in a cursory way, suggest improvements: eg. that there are not enough questions or that some questions are duplicates.
4. During cross-examination, the court-appointed person stands at the bar table and asks the questions from the document. The self-represented person should be permitted to sit on the other side of the bar table and communicate with the court-appointed person by showing one of two coloured cards:
  - A red card signaling that the party thinks the witness has said something that is not true.
  - A gold card signaling that the party thinks the witness has introduced some new important fact that they did not previously reveal in written evidence.
5. Upon seeing the red card, the court-appointed person must put to the witness that what they have said is not true.
6. Upon seeing the gold card, the court-appointed person must put to the witness that what they have said was not revealed in written evidence.
7. If required, the court-appointed person can briefly seek clarity from the self-represented party as to the specific facts alluded to in 4 & 5 before putting these points to the witness.

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

As long as the court can be relied on to provide people capable of performing the functions outlined in 9, then it is probably not necessary or desirable that parties find their own questioners (since it would bring in further complications).

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

Only to the extent that it impedes a judge's duty as described in my answer to question 13.

**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?**

Assuming this question relates to proposed sub-sections 102NA(2) & (3), – it seems that the only fair way to deal with this is to ensure both parties wishes are taken into account, or neither.

**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?**

The suggestion implied in this question, that judges do not already consider the harmful impact on witnesses, seems like a slur on judges.

Justice Young of the Supreme Court of New South Wales in *GPI Leisure* laid out 13 guidelines in relation to the cross-examination of witnesses:

- (1) The only actual "right" is the right to have a fair trial.
- (2) It is the duty of the trial judge to ensure that all parties have a fair trial.
- (3) In carrying out his duties the trial judge must so exercise his discretion in and about the examination and cross-examination of witnesses that a fair trial is assured.
- (4) Ordinarily, a judge in carrying out his duty will see that the trial is conducted in the manner that is commonly used throughout the State, namely that witnesses are examined, cross-examined and re-examined.
- (5) Where there is more than one counsel for the same party, then ordinarily the judge will not permit any more than one counsel to cross-examine the same witness.
- (6) Where there are parties in the same interest, the judge will apply the same rule as stated in (5).

(7) Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before

cross-examination begins, it may be proper for the judge to permit cross-examination of one or more witnesses by more than one counsel in the same interest notwithstanding prima facie rules (5) and (6).

(8) It may be that in the interests of time or to prevent "torture" of the witness or for other good reasons, a judge may in special circumstances limit cross-examination. Such a situation would occur where, for instance, there was only a fixed amount of time before an event occurred and a decision was essential before that event occurred.

(9) It is usually not proper to indicate at the commencement of the hearing that cross-examination will be limited to X minutes subject to the right to make an application for an extension, although such a ruling might be justified if time was limited. It would, however, appear to be proper for the judge to say, at any stage during the cross-examination, that he would, unless convinced that the cross-examiner was being of more assistance to the court, curtail cross-examination in Y minutes time. This power would of necessity be used sparingly.

(10) Group cross-examination either by all counsel cross-examining the witness at one time or a group of witnesses being cross-examined by one counsel at the same time is not a procedure that should be permitted.

(11) In all proceedings, the court has a duty to prevent cross-examination purely for a collateral purpose or to "torture" the witness.

(12) In interlocutory proceedings, especially proceedings for an interlocutory injunction, the collateral purpose rules must be looked at very closely because ordinarily it is not proper to permit counsel to go on a fishing expedition and all that the plaintiff need show is a prima facie or strongly arguable case on the merits. Cross-examination on laches, balance of convenience etc is, of course, in a different plight.

(13) Ordinarily a judge should permit cross-examination of all witnesses by all counsel unless one or more of the above rules apply.[77]

The role of a judge, in part, is to ensure that the trial is fair. It would be unreasonable to require a judge to tarnish his role by requiring.

I would ask officials collating these submissions to ponder the words of Justice Young and reflect on whether they might have something to learn about balancing justice and civil conduct from his Honour.

**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, refer to my answer to question 13.

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

The way the parties communicate with one another is likely to be highly relevant to considerations regarding children's future welfare. If you're going to force judges to focus on relevant issues, the judge should certainly consider whether it would be useful to hear how the parents talk to one another.

**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?**

If you follow my recommendations: sure, do it straight away.

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

Change proposed 102NA(3) by deleting (c) and replacing (a) as follows:

"the court has considered whether the cross-examination is likely to provide meaningful evidence as to the parties' ability to communicate and co-operate".

**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 my response to question 9.

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

See my response to question 9.

**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?**

I wonder what the intended consequences were?

My answer is: No.

**21. Any general comments.**

To the extent that the amendments introduce another tool into a judge's toolbox for aiding him to fulfil his role, it is to be applauded. However, it should not be done in a way that impinges upon a judge's ability to ensure procedural fairness.