

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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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.

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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/organization (if you are providing a submission on behalf of an organisation, please provide the name of a contact person)

Victims of Crime Assistance League Inc NSW (VOCAL)

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?

[Response here]

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

VOCAL agrees that direct cross-examination should be banned in each of the specific circumstances, namely, if there is a criminal conviction under State laws for acts of, or threats of, violence to the other party.

VOCAL wishes it noted that the accepted legal definition of family and domestic violence does not capture the majority of instances of actual family and domestic violence. Outside of proven physical and sexual violence, family and domestic violence involves a range of other components, including emotional, psychological and financial abuse and a fundamental, gendered imbalance of power. As such, VOCAL believes that direct cross-examination should be banned in a much broader set of circumstances than currently takes place.

Family Violence Orders:

VOCAL appreciates the subsection makes reference to a family violence order, however strongly recommends that interim orders be considered in the mandatory requirements of 102NA. It is our view that direct cross-examination should be banned in instances of family violence where interim orders are in place.

The adversarial criminal legal system's demand for proof 'beyond reasonable doubt' along with its limited resources to manage family & domestic violence matters results in few convictions relative to the high number of reported matters. Anecdotal evidence further confirms this.

In order to apply a family violence order, police require an unnecessarily high level of proof of harm or fear to the victim. Not only this, in cases where criminal charges could legally be laid, the preferred strategy is instead a protection order, and there are many competing interests within this complex dynamic.

Little respect is given to the ongoing legal battles and the foreseeable challenges created by insufficient and inadequate attention paid to the victims' circumstances, or imbalances in resources and a multitude of other relevant, but often overlooked issues that make the victim's plight more burdened and less 'credible' than the perpetrator who decides to litigate. This is especially the case where perpetrators are motivated to litigate to exact revenge and punish.

It is appalling that where children are involved and the matter may be listed in the Family Court, there is police reluctance to charge or to proceed with issuing interim State family violence protection orders, which effectively 'flick-passes' the matter on from their overloaded workload. Similarly, when protection orders are listed in Local Court, it is our experience that magistrates in the Hunter Region often make basic interim orders with a view to "let the Family Court sort it out". These attitudes reveal systemic ignorance and do very little to protect the victim(s) of family violence.

Research indicates that the most dangerous time for a victim of family violence is immediately after leaving the abusive relationship. Violent perpetrators demonstrably escalate their behaviours due to loss of control over the victim. It is at this time that the victim needs the most protection from State agencies, and therefore if an interim order is granted in the Local Court, it is imperative that the Family Court take this into consideration as well. The Family Court must offer a decision and directions as early as possible on the subject of family and domestic violence. Where this does not take place or is left until the trial stage, an uninformed and often unrepresented victim may have little chance to understand the complex dichotomy between state and federal systems.

In our daily practice, we repeatedly see the police system failing to investigate reasonable cases, failing to validate evidence of recent abuse/threats (stalking, intimidation, harassment, assault, property damage) and trivialising high-risk behaviours like strangulation. During ongoing liaisons with local police, they feed back that they are reluctant to get involved as it is "a Family Court matter". So the seriousness of a state interim family violence order needs to be validated by the Family Court, not dismissed or trivialized in Family Court. They are often hard to get, not because they are not genuine, but because of poor state practices.

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.

VOCAL firmly believes that direct cross-examination should be banned in the additional circumstances of courts' Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence.

We regretfully note that only a proportion of actual cases fulfil the Family Courts' criteria labelled 'at risk' and the definition generally excludes paternal incest. Additionally, investigations at the state level are generally inadequate and fail to integrate domestic abuse and child protection – especially when the child is under age 10 and makes disclosures. Many young children remain at risk of harm as State and Federal Courts fail to take their disclosers seriously. Many report writers, solicitor and barristers prefer to use the phrase "Parental Alienation" as the reason a child does not want to see the abusive parent.

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 only to the alleged perpetrator asking questions of the alleged victim. This is because of the power imbalance that drives family violence, characterized by tactics of coercive control and intimidation.

It must be noted that strategies of guilt transference and victim blaming are widely applied by perpetrators of family violence. Guilt transference arises where the abuser deflects allegations and instead accuses the victim of the abuser's own behaviour.' Given the challenges arising from bearing the burden of proof, the perpetrator – given the power imbalance – has the stronger voice.

There are serious systemic issues that will arise in relation to the implantation of both of the above circumstances, especially if the Family Court relies on evidence that it already knows is most difficult to get. If the ban of direct cross-examination is limited to the alleged perpetrator, this may result in an increase in false allegations and false denials.

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?

VOCAL strongly recommends that discretionary power only be exercised on application by the alleged victim. Given the personal nature of family violence, and the coercive control that the impact of an imbalance of power demonstrates, the level of personal trauma experienced by victims of domestic violence can vary, is dependent on many different factors and is extremely personal.

VOCAL strongly believes that no court appointed employee should have the right to determine whether an alleged perpetrator should cross-examine an alleged victim of family violence. We simply have no faith in their capacity to openly and honestly consider and balance the relative imbalances created by Domestic Violence and the systems in place.

Regular feedback from parties in proceedings encompasses the belief that many solicitors, family report writers and Judges place little weight on allegations of Family Violence (both substantiated and unsubstantiated evidence). They report a 'blame the victim' culture that often exacerbates the abuse.

The psychological impact of family violence on a protective parent and children who have been brave enough to 'tell' children is almost routinely minimised and disregarded by report writers. Despite criminal convictions and criminal charges have occurred, and been successful, AVOS are repeatedly referenced to "not matter in Family Court". Statements such as that "the violence wasn't that bad otherwise you would have left a long time ago". The information available to the Judge via reports are often biased against one party and when reported abuse is ignored by court staff they place children into a mind-set that no one cares. Children have no option but to be in the care of the stronger, abusive parent. Evidence from outside experts is often trivialised, dismissed, ignored and appeals are ridiculously difficult and go nowhere. Many protective parents and children are harmed even further because they left violence.

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 only people appropriate to ask questions on behalf of a self-represented person would be those bearing family and domestic violence qualifications as well as skills of advocacy.

Experience with the court system alone (such as a court employee) would not qualify a person to ask questions on another's behalf, nor would legal qualifications. Independent Children's Lawyers illustrate this well. While ICL's have both court experience and legal qualifications, they rarely represent children appropriately, meet with children infrequently, have limited knowledge of child development and frequently appear biased against victims.

VOCAL sees many victims making the choice to self-represent in order that they have more agency in deciding who supports them in court. Often this decision rests on questions of access and trust – their Mackenzie friend of choice is someone who has both the time and the empathy to listen to their story. Unfortunately, self-representation yields poor outcomes owing to the undeniable complexities of the legal system.

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

Expertise in trauma, Domestic violence, child abuse and sexual assault, and advocacy. The person probably should not simply be that of a lawyer or barrister, because it is clear their role is to take part in a legal process, not establish truth and best interests that include safety. Of course, that might impact legal 'bottom lines' so will be vigorously challenged.

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

In theory, requirements regarding who the court can appoint and their qualifications should be included in the Family Law Act. In practice however, the qualifications which confer 'expert' status within the legal system fail repeatedly to guarantee an appropriate level of service. Frequently, key players in the Family Court system have no understanding of trauma-informed practice and little understanding of victimisation. The following comment from a VOCAL stakeholder is illustrative: 'Victims suffer because of this well-defended ignorance. If it isn't ignorance, then it is systemic abuse.'

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.**

A duty to cooperate with ICL's is a recipe for more of the same - an extension of a strategy that has not worked for victims, protective parents or children.

They must be able to get instructions from the SRL at any time as to the questions to be asked, especially given the lack of perjury punishments in that court, so they might expect to hear very different responses than they expected.

The person advocating for the self-represented litigant should have the same restrictions placed on them that someone employing legal representatives has.

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

VOCAL feels that a self-represented person should be given the autonomy to choose who will ask questions on their behalf. It is essential that they approve of any court appointee and they must also retain the right to dismiss or change that person.

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

The SRL ought to have the right to choose who they think can do the job that needs to be done. If external people are permitted to carry out this role, the Court should arrange for comprehensive guidelines and preparation notes to ensure there is a quasi-legal structure to follow. Too many victims

have fallen foul of court appointed people. The lack of accountability in the Family Court system is failing many families.

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?

VOCAL agrees that both parties would need to be in agreement if direct-cross examination were to occur. In addition, it would be beneficial in instances of family and domestic violence that victims are directed to trauma-informed, legal support services in preparation for the court proceedings. It should also be taken into account that many victims do not label the source of their harm as 'domestic violence' until they are educated and empowered with appropriate information.

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?

If both parties agree to direct cross examination, and the court disagrees with the decision or believes that it may have a harmful impact on the alleged victim of family violence, VOCAL would encourage that the alleged victim be counselled and informed by court staff on their options and the possible ramifications of direct cross examination. Services on an independent, trauma informed support agency must be available for immediate referral and ongoing support, if it is required.

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?

The court cannot be relied upon to appropriately judge whether or not cross-examination will adversely affect the person questioned or the ability of the person asking questions. Historically, court staff and judges have not demonstrated meaningful comprehension of trauma and its causes and effects.

When the friendly parent provisions existed, the victim was frequently cross-examined by the opposing counsel, and yet, then, when *their* turn as a self-represented litigant, came to cross-examine their tormentor, the judge warned them "to be very careful lest he needed to invoke the friendly parent provisions against them". In other words, vigorous cross-examination proceeded by the barrister, but the (often female) victim was warned not to say anything that might count against her capacity to foster a relationship with her, (and the children's) abuser. This situation enforced silence and involved threats, perpetrating publically those instances of violence also taking place privately.

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 never grant leave for direct cross-examination until it is satisfied that the victim has been properly prepared by a properly trained and trauma informed expert in DV and child abuse.

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?

VOCAL believes that the amendments should apply to proceedings started before the law comes into effect.

Given the immense wait periods of the Family Court, the proposed bill has the potential to safeguard many traumatized, protective parents against cross-examination by an alleged domestic violence

offender. This right to personal safety should not be determined by the date of legislation passing, but should be granted to as many persons as possible.

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

Include interim family violence orders and not restrict it to Final family violence orders.

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?

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

More transparency and accountability in family report consultations is essential to ensure procedural fairness. Given the amount of weight that is placed on a family report, and the repeated complaints of inaccuracy, bias and unprofessional conduct of the writers, having the interviews electronically recorded (audio only) would provide transparency.

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?

21. Any general comments.