



Australian Government
Attorney-General's Department

**Proposed amendments to the *Family Law Act*
1975 (Cth) to address direct
cross-examination of parties in family law
proceedings involving family violence**

Public Consultation Paper

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Introduction

The Australian Government has released an exposure draft of the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* ('the exposure draft') to provide an opportunity to comment on proposed amendments to the *Family Law Act 1975 (Cth)* (Family Law Act). The proposed amendments would amend the Family Law Act to provide that a legislative ban on direct cross-examination apply in specific circumstances and that the court would have a discretion to apply the legislative ban in other cases where allegations of family violence are made.

This issue has been the subject of consultation with stakeholders, who have expressed contrasting views on matter such as the scope of the problem and when direct cross-examination should be restricted. Concerns have been expressed that the framework around any proposed changes should appropriately balance the following issues:

- ensuring that victims of family violence are not re-traumatised and appropriately supported in putting evidence before the court.
- ensuring that the framework does not encourage false allegations of family violence.
- ensuring that the framework does not encourage people to be self-represented.
- addressing the difficulties lawyers may experience if they are appointed to assist only in the discrete element of a hearing that involves cross-examination of a party.

The exposure draft is available at <https://www.ag.gov.au/Consultations/Pages/Family-Law-Cross-Examination.aspx>. Submissions in response to the proposed amendments are due by **25 August 2017** and should be provided using the submission template available on our website. Submissions should be emailed to familylawunit@ag.gov.au and will be made publically available on our website unless you indicate otherwise in your submission.

To assist you in preparing a submission, this consultation paper sets out the context in which the amendments are proposed, explains the Government's proposed approach to amending the law, and seeks stakeholder and community views on that approach.

Direct cross-examination

Direct cross-examination is where a party to proceedings asks questions of another party in the proceedings personally, rather than having questions asked by a legal representative.

Existing protections for vulnerable witnesses in family law proceedings

Courts exercising jurisdiction under the Family Law Act have a range of powers to protect vulnerable witnesses during hearings, including alleged victims of family violence.

The courts have general powers to control proceedings and they have specific powers under the Family Law Act to protect vulnerable witnesses—for example, ordering that witnesses can give evidence via video-link and disallowing cross-examination of witnesses in child-related proceedings. These powers are described in

the *Family Violence Best Practice Principles* (December 2016) published by the Family Court of Australia and the Federal Circuit Court of Australia (extracted at Appendix 1).

Concerns about the current legal approach

There is a lack of data about the extent to which direct cross-examination is occurring in family law proceedings where there are allegations of family violence, and the courts' use of the existing protections. Some community members suggest that direct cross-examination occurs only in a very small minority of cases, and that the issue is appropriately managed by judicial officers. Other community members suggest that, while the protections that the family law courts can give to vulnerable witnesses are extensive, they do not outright prevent direct cross-examination, are subject to judicial discretion, and are therefore insufficient to prevent trauma to a victim of family violence in all circumstances.

The Australian Government acknowledges that direct cross-examination potentially exposes victims to re-traumatisation and can affect their ability to give clear evidence. It can also be problematic for victims to directly cross-examine their alleged perpetrator if they (the victim) have no legal representation. In many cases there may be cross-allegations of family violence, meaning that in those cases both parties are an alleged victim and an alleged perpetrator.

In October 2016, the Council of Australian Governments (COAG) hosted a National Summit on reducing violence against women and their children. The Summit included a roundtable on family violence and the court system, where participants agreed that perpetrators of family violence should not be able to directly cross-examine their victims in any family law or family violence proceedings.

Proposed amendments to the *Family Law Act 1975*

The amendments proposed in the exposure draft would amend the Family Law Act to prevent parties from directly cross-examining each other in specific circumstances and would allow the court to have discretion to apply the legislative ban in other cases where allegations of family violence are made. The Government is interested in stakeholder views about each element of the proposed amendments, as set out below.

Ban on direct cross-examination in specific circumstances

The proposed amendments in the proposed new subsection 102NA(1) in the exposure draft would enact a legislative ban to prevent an unrepresented party from directly cross-examining, or being cross-examined by, another party if there is an allegation of family violence between them, and one or more of the following are satisfied:

- (a) either party has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party;
- (b) a family violence order (other than an interim order) applies to both parties;
- (c) an injunction under section 68B or 114 of the Family Law Act applies to both parties.

The only exception to this new proposed subsection would be where the court grants leave (see below for when the court can allow direct cross-examination to occur).

The proposed new subsection 102NA(1) captures all parties to proceedings where there is an allegation of family violence between them and one or more of the circumstances in (a), (b) or (c) above are satisfied. This includes intervening parties.

The proposed amendments would apply both in the case where the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim, and in the case where the examining party is the alleged victim and the witness party is the alleged perpetrator.

We are interested in obtaining stakeholder views about whether the ban on direct cross-examination should apply to all of the specific circumstances set out in the new proposed subsection 102NA(1), or whether any additional special circumstances should be covered by the legislative ban.

Court's discretion to prevent direct cross-examination in cases not covered by the legislative ban

The exposure draft also provides, in proposed new subsection 102NB(1), for the court to have discretion to prevent direct cross-examination in cases where there is an allegation of family violence between parties but none of the specific circumstances set out in the proposed subsection 102NA(1) (as set out above) are satisfied.

This proposed new subsection would also apply both in the case where the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim, and in the case where the examining party is the alleged victim and the witness party is the alleged perpetrator. It would also capture any intervening parties if the intervening party is involved in the allegation of family violence, whether as the alleged perpetrator or as the alleged victim.

The court may make an order to prevent direct cross-examination on its own initiative or on the application of either the examining party or the witness party.

Under this proposed amendment, the court could take into account any allegation of family violence, if it thinks appropriate to do so. Family violence is defined in section 4AB of the Family Law Act, which is extracted at Appendix 2. The definition in the Family Law Act is not exhaustive. The courts would be able to take into account other conduct that is not specifically mentioned in section 4AB.

Questions:

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

How questions are asked when cross-examination is banned

Legally-represented parties

For clarity, the proposed amendments in the exposure draft provide that if the ban on direct cross-examination applies, and a party is legally represented, then cross-examination must be conducted by the party's legal practitioner.

Self-represented parties

The proposed amendments in the exposure draft provide that if the ban on direct cross-examination applies, and a party is self-represented, any questions the self-represented party would like to ask the other party in cross-examination must instead be asked by a person appointed by the court.

The court-appointed person

The role of the court-appointed person would only be to ask questions on behalf of a party for the purposes of cross-examining the other party.

A court-appointed person will not be a legal representative for a party and they will not provide any legal advice to a party.

The appointment by the court of a person to act as an intermediary to ask questions in cross-examination is intended to prevent trauma to the alleged victim and safeguard against any abuse of court processes by the alleged perpetrator.

The model of having a person appointed by the court to ask questions in cases involving vulnerable witnesses already exists in other Commonwealth legislation (for example, in the *Crimes Act 1914*). There is also legislation in some states and territories to protect witnesses in domestic violence and sexual assault matters

by allowing for a court-appointed person to ask questions (for example, *Criminal Procedure Act 1986 (NSW)* and the *Domestic and Family Violence Act 2008 (NT)*).

Questions:

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?
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.
10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?
11. Do you have any concerns about the court-appointed person model?

When the court can allow direct cross-examination to occur

The proposed amendments in the exposure draft provide that where the ban on direct cross-examination applies under proposed section 102NA, the court can allow a self-represented party to conduct direct cross-examination (by granting leave), but only on certain grounds. Firstly, both parties (the alleged victim and the alleged perpetrator) must consent to direct cross-examination occurring. Secondly, where both of the parties consent, the court must also consider:

- whether it would have a negative impact on the ability of the party (whether the alleged victim or the alleged perpetrator) being cross-examined to give evidence
- whether it would have a negative impact on the ability of the party (whether the alleged victim or the alleged perpetrator) conducting the cross-examination to conduct that cross-examination, and
- whether allowing direct cross-examination would have any harmful impact on the alleged victim.

The grounds for granting leave are intended to limit judicial discretion and ensure a consistent approach to the courts granting leave. The grounds for granting leave provide important protections for parties, because the court cannot grant leave unless both parties consent. The requirement for the court to consider any potential harmful impact on the alleged victim, and any adverse effect on the evidence put before the court, provides additional safeguards for parties.

Providing for the court to be able to grant leave in circumstances where the ban on direct cross-examination applies under proposed section 102NA, with safeguards, is intended to strike an appropriate balance between procedural fairness and protecting victims of family violence.

The proposed amendments do not provide for the court to grant leave to allow a legally-represented party to conduct direct cross-examination. In all cases, cross-examination must be conducted by a legally-represented party's legal representative.

Questions:

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

Application of amendments

The proposed amendments in the exposure draft provide that the amendments would apply in proceedings instituted before or after commencement. This means that on the day that the amendments become law, they apply to all family law proceedings, even those that were started before the law was changed.

Questions:

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?

Evidence and procedural fairness

Any reforms to address the issue of direct cross-examination must be balanced against the need to ensure procedural fairness for all parties in family law proceedings. Procedural fairness is about ensuring that all parties 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.

The proposed amendments are intended to help protect victims of family violence from re-traumatisation from being directly cross-examined by, or directly cross-examining, the perpetrator of family violence.

Cross-examination allows the evidence of each party to be tested, and enables the court to make findings in relation to that evidence. It is therefore in each party's interest for their evidence to be tested by the other side, through cross-examination. If evidence is not appropriately tested, the court may be unable to accept the evidence of a party. It is intended that the ability to ask questions through a person appointed by the court will maintain the ability of a self-represented party to test the other party's evidence.

The Government is committed to ensuring that the proposed amendments do not have unintended consequences for parties to family law proceedings, especially victims of family violence. The Government is interested in views on whether the proposed amendments will allow all parties to have a fair hearing, whether the proposed amendments will affect the courts' ability to make informed decisions, and whether there is any potential for the proposed amendments to have unintended consequences for victims of family violence.

An opportunity to provide any general comments about issues raised in this paper is provided at question 21 in the submission template.

Questions:

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

Review and evaluation of proposed amendments

Given the important role that cross-examination plays in testing evidence, and the aim of the amendments to reduce potential trauma to victims of family violence in family law proceedings, the Government proposes to comprehensively review and evaluate the operation of the proposed amendments.

The draft proposals prescribe that a review must commence as soon as possible after the second anniversary of the legislation commencing. The review period may be altered by regulation, for example, if more time is required to meaningfully evaluate the changes.

Questions

Below is a list of the questions posed throughout the consultation paper:

1. Should direct cross-examination only be automatically banned in specific circumstances?
2. Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?
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.
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?
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?
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?
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.
10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?
11. Do you have any concerns about the court-appointed person model?
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?

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?
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?
15. Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?
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?
17. Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?
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?
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.

Appendix 1 – Family Law Courts’ Family Violence Best Practice Principles (December 2016)

(The text below is extracted from the section on ‘Vulnerable witnesses and managing the courtroom’) in the *Family Violence Best Practice Principles* published by the Family Court of Australia and the Federal Circuit Court of Australia).

Victims of family violence are often traumatised and vulnerable witnesses. To ensure parties are afforded fair and equal access to justice and those at risk of harm are not re-traumatised by the court process, it is essential that judicial officers and practitioners utilise the courts powers to achieve a fair hearing.¹

In addition to the courts general powers to regulate its own processes, courts exercising jurisdiction under the FLA:

1. May direct or allow a person to give testimony and/or appear by video or audio link (for example from another location or in the same court facility). *[Sections 102C–102D FLA]*
2. Must forbid the asking of offensive, abusive and hectoring questions unless it is essential to the interests of justice. *[Section 101(1) and (2) FLA]*
3. May disallow questions asked in a manner or tone that is inappropriate or based on stereotype. *[Section 41 Evidence Act 1995 (Cth)]*
4. Disallow misleading or confusing questions. *[Section 41 Evidence Act 1995 (Cth)]*
5. A child cannot be called as a witness or be present in court unless the Court makes an order to the contrary. *[Section 100B(2) FLA]*
6. May change the venue of a hearing to a safer location. *[Section 27A FLA, Section 52 FCCA, Rule 11.17 FLR, Rule 8.01 FCCR]*

In child related proceedings:

7. The Court is to actively direct, control and manage the conduct of proceedings and is to conduct proceedings in a way that will safeguard parties to proceedings against family violence. *[Section 69ZN FLA]*
8. The Court can give directions or make orders about how particular evidence is to be given. *[Section 69ZX(1)(c) FLA]*
9. Make orders limiting, or not allowing, cross-examination of a particular witness. *[Section 69ZX(2)(i) FLA]*
10. Receive into evidence the transcript of evidence in any other proceedings before the court or another court or tribunal, and draw from that transcript any conclusions of fact that it thinks proper, and adopt any of the recommendations, findings, decisions or judgment of those bodies. *[Section 69ZX(3) FLA]*

In the exercise of its general powers to control proceedings the Court may:

11. Require that an alleged perpetrator be shielded from view while the victim is giving evidence.
12. Allow the victim can have a support person near them while giving evidence.
13. Close the Court to the public or exclude specific persons from the courtroom.
14. With forewarning refuse permission to continue cross-examination.
15. With forewarning determine the proceedings be concluded without further input from a party.

¹ AIJA National Domestic and Family Violence Bench Book 2016.

Evidence of an admission is not admissible unless the court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct whether towards the person who made the admission or towards another person; or a threat of that kind. *[Section 84 Evidence Act 1995 (Cth)]*

Judicial officers should also consider the possible impact of family violence on the victim's ability to give evidence. For example, coping strategies to deal with the violence and memories may mean that a victim has:

- difficulty giving testimony about the violence in a linear, time-ordered sequence
- difficulty recalling collateral detail surrounding the violence
- emotional detachment such that testimony can be given in an unemotional, flat, detached manner
- inability or difficulty offering complete information about abuse and violence (by virtue of the tendency to minimise memories), and
- exaggerated startled and defence responses resembling anger, hostility and aggression.²

² Neilson, Dr L (2009) *Domestic Violence and the family law in Canada: A handbook for Judges*, Ottawa National Judicial Institute.

Appendix 2 – Definition of family violence in the *Family Law Act 1975*

Section 4AB - Definition of family violence etc.

- (1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or
 - (f) intentionally causing death or injury to an animal; or
 - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
 - (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.
- (3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
 - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.