



Proposed Amendments to the *Family Law Act 1975* to Address Direct Cross-Examination of Parties in Family Law Proceedings Involving Family Violence

The *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* was released by the Attorney General on 9 May 2017 and is currently before the Senate.

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 for comment on proposed amendments to the *Family Law Act 1975* (Cth) (**Family Law Act**). The proposed amendments seek to apply a legislative ban on direct cross-examination in specific circumstances. It would also give the Court discretion to apply the legislative ban in other cases where allegations of family violence arise.

EXISTING PROTECTIONS

The Australian Government acknowledges that direct cross-examination potentially exposes victims to re-traumatisation and can impact 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 have been made. The Government is interested in stakeholder views about each element of the proposed amendments.



Ban on Direct Cross-Examination in Specific Circumstances

The proposed new subsection **102NA (1)**, would involve 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 the parties, and if one or more of the following are satisfied:

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

The 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) of the *Family Law Act*, for Courts 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) are satisfied.

The 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. One purpose behind the amendments is to encourage parties to proceedings to be represented by a court-appointed person. 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.



When the Court Can Allow Direct Cross-Examination to Occur

Under the proposed changes, family law courts can allow a self-represented party to conduct direct cross-examination (by granting leave), but only on certain grounds. Both parties (the alleged victim and the alleged perpetrator) would need to consent to direct cross-examination occurring. If both parties consent, the court would need to additionally 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 regarding when leave will be granted. These grounds provide important protections for parties as the court cannot grant leave unless both parties' consent.

Providing for the court to grant leave in certain circumstances is intended to strike a balance between procedural fairness and protecting victims of family violence.

Application of Amendments

The idea is that the proposed amendments would apply in proceedings instituted before or after they come into legislative effect, meaning that upon the amendments becoming law, they apply to all family law proceedings, even those commenced prior to the law being changed.