

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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Please also note that it is an offence under section 121 of the *Family Law Act 1975* (Cth) to disseminate to the public or to a section of the public by any means any account of any proceedings under the Act that identifies:

- 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 <i>(if you are providing a submission on behalf of an organisation, please provide the name of a contact person)</i>	cohealth Contact for information: Jane Stanley Manager: Policy
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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?

Litigation abuse – the use of the legal system by perpetrators of violence to continue to exert control and intimidation on their ex-partners - is one of the many forms of family violence. Custody disputes, property settlement disputes, and the like, are often reported by our family violence counselling clients as places where perpetrators of family violence find an avenue to continue abuse. Direct cross-examination has been used as a tactic in this broader context of litigation abuse.

In supporting victims of family violence in the Family Court a number of principles should apply:

- *The legal proceedings should not exacerbate the trauma already experienced by those experiencing family violence.*
- *All measures possible should be implemented to ensure that the victim is able to freely give open and honest responses to questioning. Real or perceived intimidation should not be allowed to influence this.*
- *Family violence involves the abuse of power and control. Directly cross examining an ex-partner is often used as a means to continue this abuse. The legislation should not enable this to occur.*

In light of these principles, cohealth cannot see any situation where direct cross-examination of a victim of family violence by the alleged perpetrator would be acceptable, and argue that it should be banned in all situations where family violence is present.

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

cohealth supports the banning of an unrepresented party from directly cross-examining a victim of family violence in the circumstances set out in the new proposed subsection 102NA(1), and argues that this should be extended to all circumstances where family violence is present.

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.

cohealth supports banning direct cross examination in all circumstances where family violence is present. To this end, we also argue that the ban should be extended to apply where an interim family violence order applies. Obtaining an interim order requires a victim to attend court, and attest before a magistrate that they are not safe, before such an order can be granted. We recommend the removal of the words "(other than an interim order)" from subsection 102NA (1)(c)(ii).

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?

Protecting a victim of family violence must be the key principle of this legislation, so preventing the alleged perpetrator from direct cross examination of the victim must be banned. Likewise, we are supportive of victims, if unrepresented, having the opportunity to regain a sense of control by having the potential to cross examine an alleged perpetrator.

However, we also recognise there may be circumstances where an alleged perpetrator will vexatiously claim they too have been a victim of family violence. To prevent this situation creating a loophole where an alleged perpetrator is able to cross examine a victim, cohealth supports the ban applying to both parties.

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?

Again, the key principle has to be the protection of victims of family violence from further trauma, abuse or intimidation. If the legislation is strengthened, in the ways we have suggested above, there would be less need for court discretion. Nonetheless, cohealth supports discretion for the court or victim to make an application to prevent cross examination, to enable the court to respond to unforeseen circumstances or situations.

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.

It is important that the person appointed to ask questions on behalf of a self-represented person have an understanding of family violence and court procedures and conventions, so it would not be appropriate for a lay person to be appointed to this role. We are unable to further comment on who the court should appoint.

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

cohealth is not in a position to propose specific qualifications for a court-appointed person. However, as it is essential that a court appointed person is not be able to be used by an alleged perpetrator to further the abuse of a victim, it is essential that this person has the following skills and knowledge:

- *Training and understanding of family violence, including the (mis)use of power and control; and best practice responses to victims and perpetrators. Minimum training should be equivalent to the four day accredited training run by Domestic Violence Resource Centre Victoria "Recognise and Respond Appropriately to Family Violence".*
- *Understanding of family law and court proceedings*
- *Ability to craft and pose questions so as not to exacerbate the experience of abuse and/or intimidate the witness.*

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

cohealth supports the inclusion in the Family Law Act of the skills and knowledge described at item 7 above. We are unable to comment further on this matter.

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.**

As mentioned above, direct cross examination of a victim of family violence can, and is, used as a means to further intimidate and re-traumatise a victim. The role of the court appointed person must ensure that this is not able to occur. To this end cohealth believes that the court appointed person should be able to exercise a degree of discretion in asking the questions they have been provided by a self represented party, to ensure they are not simply used as a mouthpiece for asking intimidating questions.

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

A victim of family violence should be able to nominate a person to ask questions on their behalf, to rectify some of the power imbalances inherent in family violence. An alleged perpetrator, however, should not be able to nominate the person appointed to ask questions on their behalf, to minimise the chance of further intimidation or abuse of a victim.

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

In ideal circumstances neither party to family law proceedings would be self represented, so the proposed model of a court appointed person to ask questions on behalf of a self-represented person is a less preferred response.

We envisage that some practical considerations will need to be addressed, particularly reflecting the sensitive and difficult nature of family law proceedings for someone who has experienced family violence. If a victim of family violence requires a court appointed person to ask questions on their behalf, they should have choice in who this person is; have the opportunity to meet with them prior to the cross examination; be able to provide background information to assist in the asking of questions; and preparation time with the court appointed person.

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?

cohealth is unclear about the need or rationale for the provisions of section 102NA(3), which allows the court to grant leave (under certain circumstances) for a self represented party to directly cross examine the other party, if the consent of the other party has been obtained. It is not unusual for victims of family violence to acquiesce to the demands of the alleged perpetrator due to the history of fear and intimidation. In such circumstances it cannot be guaranteed that any consent is freely given, and given with an understanding of the potential impacts, particularly for further harm.

While safeguards aimed at preventing this occurring are proposed, we cannot be confident that the court will consistently protect the victim in this manner. As an example, despite the Family Law Courts' Family Violence Best Practice Principles providing direction to the court aimed at protecting victims of family violence, this does not always protect victims from being asked abusive or inappropriate questions.

cohealth argues that the legislation should not include provision for direct cross-examination by alleged perpetrators, to occur, even if both parties consent.

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?

As above

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?

As above.

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

As described above, cohealth does not support the granting of leave for direct cross-examination.

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?

The protection of victims of family violence needs to be the priority in all proceedings. Any provisions that strengthen these protections should be available as soon as possible. To this end cohealth supports these amendments applying to proceedings that commenced before the law comes into effect, in addition to those started after this time.

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

cohealth welcomes any changes and safeguards that ensure victims of family violence can feel safe to take proceedings to the Family Court and have their experiences heard. The post-separation period is one of the most dangerous times for victims of family violence, and all protections during this time are welcome. The proposed amendments should improve the willingness and ability of victims of family violence to take proceedings through the Family Court.

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?

A key to ensuring that procedural fairness and protection of victims occurs is that judicial officers have a thorough understanding of family violence and best practice responses. cohealth encourages the continuing training and education of judicial officers on matters relating to family violence.

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

No comment

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?

No comment

21. Any general comments.

cohealth is one of Australia's largest not-for-profit community health services, operating across 14 local government areas in Victoria. Our mission is to improve health and wellbeing for all, and to tackle inequality and inequity in partnership with people and their communities. cohealth provides integrated medical, dental, allied health, mental health and community support services, and delivers programs to promote community health and wellbeing. Our service delivery model prioritises people who experience social disadvantage and are consequently marginalised from many mainstream health and other services.

All experiences of family violence have detrimental impacts on health, and violence against women is well recognised as the biggest contributor to ill health and premature death in women aged 15–44¹. As such, family violence can be understood as one of the social determinants of health. cohealth service delivery, prevention work and advocacy are based on the social model of health, with family violence clearly seen as a health issue.

cohealth has both broad and deep experience in the field of family violence prevention and response. We provide specialist response programs such as family violence counselling, Victims Assistance Program and a legal service addressing elder abuse. We have also undertaken extensive family violence primary prevention activities with culturally and linguistically diverse communities and place based initiatives, with a particular focus on using peer facilitators. We are an active partner in a range of other primary prevention programs and strategies.

It is this experience, particularly that of supporting women who are going through family law proceedings, that has informed our responses to this consultation. We have seen the impact and trauma that being directly cross examined can have on a victim, and are well aware that this acts as a disincentive for women to either pursue family law action, or to be able to speak openly in court.

We reiterate that the safety of women and children who are victims of family violence must be the key priority in finalising these amendments. It is essential that any opportunities for victims to be further traumatised through family law proceedings must be removed, and we support the proposed amendments as an important development.

¹ VicHealth <https://www.vichealth.vic.gov.au/our-work/preventing-violence-against-women> accessed 21/8/17