

# SafeNet Australia

## Submission to the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017 – Public Consultation on the Cross-Examination Amendment

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### About SafeNET Australia

SafeNet Australia is the national network of crisis services across Australia responding to domestic and family violence. Membership of SafeNet Australia includes crisis and support services in every State and Territory across Australia. These member agencies provide 24/7 responses to women and children who are at risk from domestic and family violence, with the aims of safety, validation and support.

The purpose of SafeNET is to be an informed and influential national voice regarding good practice in family violence responses. The network will share critical information, and identify emerging trends, concerns and opportunities. We will strengthen, through shared understanding and collective action and conversation, policy, practice and reform throughout the relevant sectors and across whole of community. We acknowledge that family violence is inherently gendered in nature, with the overwhelming majority of family violence perpetrated by men, against women. For this reason, throughout this submission we will refer to the victim-survivor as female and to the perpetrator as male.

The network intends for the safety and wellbeing of women and children, and the expertise of the practitioners who support them, to remain at the centre of service systems. The purpose is to ensure practice including any reform is designed to deliver a consistent and effective service system for women and children, victims and survivors by strengthening specialist responses.

### Member agencies:

- ACT - Domestic Violence Crisis Service
- NSW - NSW Domestic Violence Line
- Queensland - DV Connect
- South Australia – Women’s Safety Services
- Tasmania - DHHS Family Violence Counselling and Support Service
- Victoria - **safe steps** Family Violence Response Centre
- Western Australia – Women’s Domestic Violence Helpline
- National - 1800 RESPECT, operated by Rape & Domestic Violence Services Australia, DV Connect, **safe steps** Family Violence Response Centre and Women’s Safety Services South Australia

## For more information

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## Introduction

SafeNET strongly welcomes moves by the Commonwealth Parliament toward putting an end to the practice of parties cross-examining one another in Family Law hearings, where family violence exists. Specialists in family violence prevention, response and recovery have long advocated for this outcome, having observed first-hand the often traumatic outcomes self-representation in cross-examination has on our clients' confidence, well-being and legal outcomes. This has been a strong focus of submissions by family violence specialist organisations to a range of Parliamentary Inquiries in the past. Accordingly, a 2014 Productivity Commission report into *Access to Justice Arrangements* recommended that "The Australian Government, in consultation with the family law courts, should amend the Family Law Act 1975 (Cth) to include provisions restricting personal cross-examination by those alleged to have used violence along the lines of provisions that exist in State and Territory family violence legislation"<sup>i</sup>.

To a large extent, the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill* achieves this. However, this is only when the recommendation of the Productivity Commission is taken on its own, rather than as part of the greater whole. The recommendation by the Productivity Commission was made as part of a suite of recommended changes which acknowledge legitimate concerns that exist around self-representation in Federal Courts.

The recommendation itself forms part of a broader sub-chapter entitled *Lack of representation in family law matters can have particularly negative consequences where family violence is involved*<sup>ii</sup>. Quoting Richard Chisholm's *Family Courts Violence Review* conducted in 2010 for the Attorney General's Department, it notes that:

"The importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence. Where one or both parties are unrepresented, even with the benefits of increased judicial involvement arising from Division 12A [of the Family Law Act 1975 (Cth)], it can be almost impossible for the court to receive the sort of evidence and argument that can lead it to make an informed decision about the child's best interests. Settled cases, too, are a worry when parties are unrepresented, because they may reach agreements in ignorance of the legal situation, or because they know they cannot properly put their case before the court."<sup>iii</sup>

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The Productivity Commission report further acknowledges that “(a) range of responses is necessary to improve access to justice in matters involving family violence”<sup>iv</sup>. The report also notes that:

- more than 70% of surveyed users of the QPILCH Self Representation Service indicated that they self-represented due to the costs of obtaining legal representation, and close to 40% because they were unable to obtain legal aid<sup>v</sup>
- in the Family Court, Hunter, Giddings and Chrzanowski (2003) “found a strong relationship between legal aid funding for family law and self-representation. Around half of self-represented litigants surveyed had applied for legal aid, with 50 to 67 per cent unsuccessful mainly due to means and merits tests and legal aid guidelines”<sup>vi</sup>
- some State and Territory Legal Aids may elect to put in place guidelines that restrict representation to one side of a dispute, or if one party elects to go unrepresented<sup>vii</sup>
- “a lack of knowledge about laws and procedures is common among self-represented litigants”, and in the United Kingdom a 2013 Judicial Working Group found that self-represented litigants frequently have difficulty understanding procedural requirements, identifying and focusing on the determinative issues in a case, working with opposing counsel and, critically, asking appropriate questions and self-examining<sup>viii</sup>
- a Canadian study found that self-represented litigants “experienced a range of negative consequences such as instability and loss of employment... and social isolation as the case became increasingly complex and overwhelming”<sup>ix</sup>
- self-represented litigants in Australian Federal Courts require more assistance to navigate the court system, use more Court resources than represented parties and their cases can take longer<sup>x</sup>.

In cases where family violence is present, these factors are exacerbated. Women and their children who have experienced family violence are already navigating trauma as well, often, as significant strain on finances, mental and physical health, employment, and family and other relationships. Being required to effectively skill themselves in the law to such an extent that they are able to self-represent in the Family Court is an additional and unnecessary pressure. The impact of this has been well canvassed in various submissions – including those submissions made by SafeNET members – to the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*, which is taking place concurrent to this Public Consultation. Indeed, the two processes would seem well placed to be informed by one another, rather than taking place separately.

Additional funding for Legal Aid and Women’s Legal Services is necessary in order to facilitate an overall reduction in self-representation in Family Law matters. We note that although the intention to introduce the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* was originally announced by the Attorney-General as part of the 2017-18 Federal Budget<sup>xi</sup>, no specific funding was allocated alongside this commitment. SafeNET hopes that, in addition to implementing the *Family Law Amendment (Family Violence and*

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*Cross-Examination of Parties) Bill* (with consideration of the suggestions made below), an outcome of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* will be additional funding to enable Legal Aid, Women's Legal Services and the Court system to ensure less women who have experienced family violence, go unrepresented in the Family Court.

In our own submission to the *Senate Standing Committee on Finance and Public Administration Inquiry into Domestic Violence in Australia (2014)* (made under SafeNET's previous name, Domestic & Family Violence Crisis Lines of Australia Network) we recommended "(a)dequate resources to be allocated to women's legal services to keep women and children safe and to prevent the cumulative disadvantages they face due to domestic violence" as well as that "(r)esources be invested to enhance the efficiencies of courts, while upskilling Magistrates and court staff to understand the dynamics of domestic violence"<sup>xii</sup>. This second point, around adequate training for professionals in and around the Court system in understanding the dynamics of family violence, has been echoed strongly throughout the hearings to the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*.

It is a strongly relevant point here also. As we discuss later in this submission, the idea of an examining party, who is a family violence perpetrator, appointing his own lay person to represent him in cross-examination of a victim-survivor is, in our opinion, deeply unsuitable. In any Court matter where family violence is present those involved should ideally have been trained in recognising and responding to the dynamics of family violence, or, in the non-ideal event of a victim-survivor being required to self-represent, would have a lived experience.

In connection to this point, we believe that the wording of the Amendment is currently such that areas are left open to interpretation. In particular, clarification is required around who the Court would appoint to ask questions in place of the examining party in 102NA section 2(b). Again, a lay person selected, and potentially coached, by the examining party would not be suitable.

Separate but relevant to this discussion is an issue we have identified around access to, and awareness of Notice of Child Abuse, Family Violence or Risk of Family Violence forms. Currently when commencing proceedings in the Family Law Court you begin by filing an Initiating Application (with supporting Affidavits). In the event that there is alleged abuse and the matter involves children, you are also required to file an additional Notice of Child Abuse, Family Violence or Risk of Family Violence form, accompanied by an Affidavit setting out the evidence on which the allegations are based<sup>xiii</sup>. Lawyers who regularly practice in family law are aware of this second form, but it has been our observation that lawyers who don't regularly practice or self-represented litigants frequently are not aware of it. It is not contained in the Do-It-Yourself kits available on the Family Court's website.

To enable greater ease of access, we would like this process to instead be incorporated as part of the Initiating Application, ideally as some kind of "tick box" alongside the section of

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the form in which applicants identify their gender and whether they identify as Aboriginal or Torres Strait Islander. We suggest that this might address the following questions:

Are there allegations of abuse, violence or controlling behaviours: Yes or No

If yes, please select:

Sexual abuse towards a child of the relationship

Domestic, family or intimate partner violence towards a child of the relationship

Sexual abuse towards the Applicant

Domestic, family or intimate partner violence towards the Applicant

Sexual abuse towards someone else

Domestic, family or intimate partner violence towards someone else.

In relation to this Public Consultation, it seems pertinent that this form demonstrates an example of the Court taking into consideration an allegation of family violence (as opposed to an existing finding), as a matter of relevance in whether the Court should grant or refuse an application in relation to a child<sup>xiv</sup>. Based on this it seems possible that the current wording of the Draft Amendment, which extends access to exemption from self-represented cross-examination only where an existing conviction, charges or injunction have been made, is unnecessarily limited:

(1) If, in proceedings under this Act:

(a) a party (the examining party) intends to cross-examine another party (the witness party); and

(b) there is an allegation of family violence between the examining party and the witness party; and

(c) one or more of the following is satisfied:

(i) either party has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party;

(ii) a family violence order (other than an interim order) applies to both parties;

(iii) an injunction under section 68B or 114 applies to both parties;

then this section applies to the cross-examination.

We would suggest extending the Amendment to also grant access to exemption from self-represented cross-examination to anybody who has completed the *Notice of Child Abuse, Family Violence or Risk of Family Violence* form with accompanying Affidavit.

SafeNET's position, in summary, is that whilst we are strongly supportive of ending the practice of parties cross-examining one another in Family Law hearings where family violence exists, we believe that the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* may not go far enough. We would welcome the opportunity to discuss this submission further and invite you to contact us at the details provided.

## Response to Questions Raised by the Attorney General's Office

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.

In response to Questions 1, 2 and 3:

As outlined in our introductory comments, it is clear from the original Productivity Commission report that self-representation is not instituted by choice in the majority of examples, but instead comes about as a result of parties being unable to afford independent legal representation and/or unable to obtain Legal Aid. Ideally, self-represented direct cross-examination would be unnecessary as both parties would have support from qualified legal representatives with a knowledge of the dynamics of family violence.

However where self-representation occurs, ideally the Court should be able to facilitate and empower the choice of the individual victim-survivor as to whether they have are required to participate in direct cross-examination. Victim-survivors have indicated throughout the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* that they have found their experiences of the Family Court to be disempowering and unsupportive; this must be recognised and addressed.

In the Public Consultation Paper supplied alongside this Amendment Draft, it is indicated that stakeholders to the consultation have expressed concern around the true "scope of the problem" and the potential that the framework may "encourage false allegations of family violence". SafeNET strongly repudiates the suggestion that the problem of self-represented cross-examination and the trauma that it causes to women and their children who have experienced family violence, is in any way exaggerated – and we believe that the independent findings of the Productivity Commission which we have outlined in detail above, attest to this.

Whilst we understand that in practice, the Courts are unable to respond to unsubstantiated allegations, we do feel that the eligibility criterion which have been set out at Division 4, 102NA, section 1 of the Draft Amendment are somewhat restrictive and could be expanded. In our introductory comments, we provided the example of the Notice of Child Abuse, Family Violence or Risk of Family Violence form, which currently allows those appearing in Family Court in a matter involving children to allege family violence or abuse through completion of

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this form and an accompanying Affidavit setting out the evidence on which the allegations are based. It is our opinion that:

- this form should be better promoted and form part of the Initiating Application;
- it should be able to be used in any Family Court matter (including those where children are not involved); and,
- in addition to the specific circumstances set out in the new proposed subsection 102NA(1), a person who has completed this form and supplied an accompanying Affidavit should be eligible to elect not to participate in direct cross-examination.

**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?**

In response to Questions 4 and 5:

SafeNET would be supportive of the Court generally requiring that direct cross-examination restrictions apply to both parties. This is in light of our recommendation that parties be able to seek a waiver of direct cross-examination where family violence is alleged through use of a Notice form and Affidavit, and also noting that the existing suggested provisions will apply where "either party has been convicted, *or is charged with*, an offence involving violence, or a threat of violence, to the other party".

The Consultation Paper discusses the possibility of "false allegations of family violence". It has been our observation that incorrect identification of the predominant aggressor remains a significant concern in police handling of family violence matters. *The National Council's Plan for Australia to Reduce Violence Against Women and their Children*, the Australian Law Reform Commission and the Victorian Royal Commission have all identified the harm that can arise from "dual arrests" and/or incorrect identification of the primary or predominant aggressor in family violence law enforcement. Incorrect identification of the predominant aggressor often arises where the woman is still agitated or defensive in the time immediately following an attack, whilst the perpetrator may be skilled in manipulating and controlling his response to police enquiry. Dual and incorrect arrests frequently re-victimise women, prevent specialist services engaging with the true victim-survivor, and perpetrate a victim-blaming culture in a society which already conditions us to have unconscious bias against women showing aggression, even in self-defence. In this situation, they could also have the effect of women who have been incorrectly identified as the "perpetrator" losing their ability to determine their own participation in direct cross-examination.



Whilst it is true that some family violence survivors may elect to direct and reclaim their own narrative by conducting their own cross-examination, in practice and in the research, it would be very rare that a family violence survivor would request direct cross-examination but that this would be rejected by the perpetrator. Rather than the Family Court attempt to mediate and determine dual accusations of family violence prior to cross-examination taking place, it may be more appropriate that where one party requests that direct cross-examination be waived, that decision apply to both parties.

## 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.

SafeNET is strongly opposed to any suggestion that cross-examination should be undertaken by a lay person, especially where that lay person is an individual personally known to the perpetrator (a friend, family member or colleague). We are concerned that this does little to alleviate the distress of the victim-survivor and opens the door to the perpetrator manipulating his relationship with the cross-examining party to continue the power and control dynamic in the Court room. We also do not believe that the appointment of a lay person goes to the original intention of the Productivity Commission recommendation, which formed part of a chapter recognising the negative outcomes which frequently arise as a result of self-representation in the Family Court. Based on this it is our strong preference that where the Court appoints somebody to undertake cross-examination, it should be an individual who is independent of both parties, and ideally that person should also have legal knowledge/knowledge of the Court system (we understand from the Consultation Paper that appointing a lawyer will not be possible, however some knowledge or understanding of the Court and its processes is key) together with training in the dynamics of family violence.

SafeNET notes that there could be a potential role here for expansion of the new Family Advocacy and Support Services (FASS) program which has commenced in the Family Courts earlier this year. The purpose of the FASS program is to “provid(e) you with more than just legal help when you arrive at the Family Law Registry... If you have experienced, used or are alleged to have used family violence, a duty lawyer will help you with your legal problem and a social worker can help you work through other issues.”<sup>xv</sup> Examples of supports the duty lawyer might provide and the current program include:

- legal advice, information and referral in relation to family law, family violence protection orders and child protection matters
- applying for legal aid
- recovery orders
- some urgent proceedings.

The social worker can provide same-day counselling supports and connect clients with appropriate services, such as:



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- accommodation
- financial counselling
- drug and alcohol support services.

Launching the Family Advocacy and Support Services program in Parramatta in May this year, the Attorney General said:

“The Family Advocacy and Support Services are a path-breaking example of the different levels of government working together... The service will be funded by the Commonwealth Government, administered by state and territory governments, and delivered through Legal Aid Commissions... Both victims and perpetrators can require a multitude of different support services. They can be deterred from taking action by the difficulty of finding those services, or by the prospect of having to repeat their story to every new service provider. And that is why the increased duty lawyer capacity and integrated social support delivered through Family Advocacy and Support Services is such a vital element of the Government’s response to family violence in our family law system.”<sup>xvi</sup>

An arrangement which engaged the FASS program with the new cross-examination program would require additional training and resourcing, acknowledging that the Legal Aid duty lawyers and the social workers currently working in the FASS program are already experiencing significant demand for what is a vitally important role of providing legal, moral and counselling supports, and adding cross-examination support responsibilities to that existing workload would be inappropriate and unrealistic. However were the program expanded, specialist training could be provided to potentially enable an additional worker in each Court to act as a cross-examination support following the introduction of this Amendment. This is merely a suggestion, and would need to be explored further with the relevant parties.

In regard to the perpetrator, we acknowledge too the acute importance of ensuring that alternative representation is provided in order to ensure that cross-representation can still take place in the absence of self-representation. We observe this knowing that if the victim-survivor is not cross-examined in the course of giving evidence, that will amount to untested evidence, meaning that the Court is unable to give it as much weight as they would otherwise. Whether perpetrators are provided with one-off support from a duty lawyer or some other resource is employed, it is crucial that a system is in place to ensure they are otherwise represented in cross-examination where they are otherwise banned from self-representing.

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

In keeping with previous submissions we have made on this matter, the submissions of our members and the submissions of many other family violence specialists (most particularly to

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the current *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*), SafeNET strongly supports training across professionals who work in and around the Courts to ensure that they are able to identify and respond to family violence in the course of their work, in a safe way.

In their submission to the *Parliamentary Inquiry into a better family law system...*, member organisation **safe steps** Family Violence Response Centre recommended “that all judicial, legal and non-legal professionals in the family law system undertake mandatory training in the complexities of family violence and how it can affect the people involved in family law proceedings. This training should address the gender-based nature of family violence and should specifically seek to promote a shared understanding of family violence across disciplines, Courts, and other professions who interact with the family law system”<sup>xvii</sup>. This is also in keeping with Women’s Legal Services Australia’s *Safety First – a Five Step Plan*<sup>xviii</sup>. Based on all of this, it is evident to us that where the Court appoints somebody to undertake cross-examination, it should be an individual who is independent of both parties, and ideally that person should also have legal knowledge/knowledge of the Court system together with training in the dynamics of family violence. The person appointed by the Court to undertake cross-examination should not be a lay person.

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

SafeNET believes that the Amendment should clearly state who the Court is able to appoint, that this should be limited to individuals who are independent of both parties, and that ideally that person should also have legal knowledge/knowledge of the Court system together with training in the dynamics of family violence.

## 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.

SafeNET believes that providing this additional level of detail around how the cross-examination process will function, is important. In particular:

- we would feel uncomfortable with the perpetrator still appearing in the Court room during the cross-examination, as their physical presence will still cause distress for the victim-survivor and will negate the ultimate aim of providing a safe space for the victim-survivor to speak openly about her experience
- as an extension of this, we would feel uncomfortable if the perpetrator, whilst in the Court room, used that opportunity to pass messages to the person conducting cross-examination as again, this will serve to undermine the independence of the process and will constantly reinforce the power and control dynamic
- based on this and in order to achieve procedural fairness for both parties, we believe it is important that an opportunity be provided for a prior briefing between the person conducting cross-examination and the party they are representing, in order that the party can instruct their representative on questions they wish asked, and receive any necessary advice from their representative in advance
- whilst the primary framework of questions should be agreed upon between the representative and the party in advance, it is reasonable that the representative be allowed some discretion in order to conduct follow-up questions which arise naturally in the course of cross-examination; but in general these should speak to the themes of what has been discussed between the representative and the party
- in order to ensure that the needs of the child are represented, we absolutely agree that the person undertaking cross-examination should be expected to cooperate with any Independent Children's Lawyer appointed.

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

We feel that there is too great a likelihood of the perpetrator using this provision to appoint a lay person who is a friend or family member and will continue the exertion of power and control in the Court room. On the balance of all probable outcomes and factors, SafeNET is opposed to the suggestion that a self-represented person should be allowed to nominate the person who is appointed by the court to ask questions on their behalf.

However, we do think it is important that in the victim-survivor's case, they are allowed to, for example, recommend the appointment of a willing family violence specialist from a recognised agency with whom they have an existing relationship of case management or other support. If there were a way that the amendment could be worded so that it supported the self-represented person nominating a recognised specialist agency to represent them, but would not allow them to nominate an individual lay-person, that would

be ideal.

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

SafeNET is concerned that there is not enough clarity in the current Draft around who would constitute a Court-appointed person. As already outlined above, we would strongly oppose any option where the Court was able to appoint a lay person who had been put forward on recommendation by the perpetrator. SafeNET believes that the Amendment should clearly state who the Court is able to appoint, that this should be limited to individuals who are independent of both parties, and that ideally that person should also have legal knowledge/knowledge of the Court system together with training in the dynamics of family violence.

## 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?

SafeNET has concerns that there would rarely be an occasion when it was safe or appropriate for the parties to be allowed to cross examine each other in a matter where family violence is present, especially the perpetrator cross examining the victim-survivor even if she has consented. We are particularly concerned that the parties may feel pressured into this outcome in order to progress matters if sufficient resourcing is not made available to ensure that suitable professionals are present at Court to conduct cross-examination on the parties' behalf. As already stated, there should be additional funding for services like Women's Legal Service or perhaps the FASS providers to supply this representation.

Whilst it is true that there may very well be occasions where a victim feels they may want to conduct the cross-examination in order to regain power and control or as an empowerment exercise, it remains true that self-representation rarely results in preferred outcomes in the Courts.

## 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?

One of the concerns echoed within various submissions to the *Parliamentary Inquiry into a better family law system...* has been that family violence victim-survivors do not feel heard or respected by the Courts. Many have indicated that they have found the Court experience retraumatising, with Court reporters questioning their experience of family violence or legal professionals coaching them to behave in a way which belittles their experience of family violence so as to appear non-adversarial. One survivor who contributed to the submission made by **safe steps** Family Violence Response Centre provided the following testimonial:

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“We went through the whole process of child psychologists, etc. ... who not only seemed to be one sided towards the abuser but had a way of making the victim feel inadequate and tried to make out that I had made it all up. It was degrading and uncomfortable.”<sup>xix</sup>

Another survivor stated that reports back to Court which concerned the perpetrator’s violence always included the statement “if the Court believes this to be true”, even though a family violence intervention order had been awarded and there had been a criminal conviction made against the perpetrator. She felt that the Family Court was constantly re-interrogating her family violence experience, even though it had been previously proven.

In light of this, we question how appropriate it is for the Court to attempt to provide a determination as to whether direct cross-examination will have a harmful impact on a party who has experienced family violence. In addition, it is likely that attempting to measure in any black and white sense whether the cross-examination will have a harmful impact on the party that is the alleged victim of family violence will be a difficult and ultimately, subjective process for the Court. Where the victim-survivor indicates that they will experience harm as a result of direct cross-examination, this should be believed and respected.

## **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 per our response to Question 13, our preference is for a more concrete set of directions regarding criteria for waiving direct cross-examination, rather than an evaluation of the level of adverse effect it will have on the party.

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

We believe that if the party does not wish to participate in direct self-represented cross-examination and satisfies any one of the criteria under 102NA(1), with the addition of our previously suggested criteria that a person who has completed an expanded version of the Notice of Child Abuse, Family Violence or Risk of Family Violence form and supplied an accompanying Affidavit, they should automatically be eligible to self-elect not to participate in direct cross-examination. We would be opposed to the Court ruling otherwise where the victim-survivor has indicated a clear desire not to be cross-examined by, or to themselves cross-examine, the alleged perpetrator.

## **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?**

We would be supportive of the amendments applying to proceedings started before the law

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comes into effect where possible, to enable greater access to this system by more victim-survivors of family violence.

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.

In response to Questions 17 to 21: please refer to our Introductory Statement.

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<sup>i</sup> Productivity Commission (2014) *Access to Justice Arrangements: Overview*, Inquiry Report No. 72, Canberra p69

<sup>ii</sup> Productivity Commission (2014) *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, p862

<sup>iii</sup> *ibid*, p863 citing Chisholm, Richard (2010) 'Family Courts violence review'.

<sup>iv</sup> *Ibid*, p864

<sup>v</sup> Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, p491; referencing QPILCH, submission 58 pp21-22.

<sup>vi</sup> *Ibid*; referencing Hunter, R, Giddings, J and Chrzanowski, A, 2003, 'Legal Aid and Self-Representation in the Family Court of Australia', Socio-Legal Research Centre, Griffith University (for National Legal Aid)

<sup>vii</sup> *Ibid*.

<sup>viii</sup> *Ibid.*, referencing Judiciary of England and Wales (2013) 'The Judicial Working Group on Litigants in Person: Report'.

<sup>ix</sup> *Ibid* p496, referencing Dr Julie Macfarlane (2013) 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report'

<sup>x</sup> *Ibid* p499.

<sup>xi</sup> Attorney-General for Australia, Senator the Hon George Brandis (9 May 2017) 'Transforming the family law system', <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/SecondQuarter/Transforming-the-Family-Law-System.aspx>

- <sup>xii</sup> Senate Standing Committee on Finance and Public Administration (2014) 'Domestic Violence in Australia' [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Domestic\\_Violence](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence) submission 103
- <sup>xiii</sup> Family Court of Australia (9 March 2016) 'Notice of Child Abuse, Family Violence or Risk of Family Violence', <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/family+violence/form-nchild-abuse>
- <sup>xiv</sup> *Ibid.*
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