



Submission

Family Law Cross Examination Arrangements

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Submitted by

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<https://wwwa.org.au/>

Acknowledgement of Country

The Working with Women Alliance (WwwA) acknowledge the Traditional Owners of the land on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and future. We value Aboriginal and Torres Strait Islander histories, cultures, and knowledge. We extend our respect to Aboriginal and Torres Strait Islander women who for thousands of years have preserved the culture and practices of their communities on country. This land was never surrendered, and we acknowledge that it always was and always will be Aboriginal land. We acknowledge the strength of Aboriginal and Torres Strait Islander people and communities. We acknowledge that Australian governments have been complicit in the entrenched disadvantage, intergenerational trauma and ongoing institutional racism faced by Aboriginal and Torres Strait Islander people. We recognise that Aboriginal and Torres Strait Islander people must lead the design and delivery of services that affect them for better life outcomes to be achieved.

About Us

The Working with Women Alliance (WwwA) represents two key portfolios: National Women's Safety (NWS) and National Women's Equality (NWE). The WwwA connects the critical areas of gender-based violence prevention and the advancement of women's economic equality and leadership, bridging these important policy fields for greater impact. We work with members and stakeholders, including the Australian Government, to provide expertise and advice on gender equality and women's safety.

Introduction

WwWA is grateful for the opportunity to consult on the review of cross-examination arrangements under the Family Law Act 1975 (the Act). This submission draws on insights provided by our membership, including legal practitioners and representatives from both Women's Legal Services Australia and Legal Aid. It considers both the ban on self-represented cross-examination under Section 102NA and 102NB of the Act (the Ban) and the Cross Examination of Parties Scheme (the Scheme) administered through state Legal Aid. WwWA emphasises the necessity of the program, recommending that the Attorney General's Department (the Department) address funding challenges through reconfiguration of the program, without repealing the mandatory ban.

Overarching Considerations

Protecting Victim-Survivors from Cross-Examination by Perpetrators

The Scheme's intention to protect victim-survivors from cross examination by perpetrators has been successful. Throughout consideration of amending the Scheme, protecting victim-survivors must remain the foremost priority for the Department.

Victims of family violence experience high rates of systems abuse through litigation strategies perpetrated by their former partner. These include excessive correspondence, unmeritorious applications, and failure to attend court and follow court orders.¹ These strategies are intended to manipulate systems, intimidate the other party, and drain the funds of victim-survivors, leading them to become self-represented.²

Accounts of self-represented cross-examinations that took place prior to the ban recall the impossible decision victim-survivors were forced to make: To subject themselves to the unsafe and traumatising cross-examination, or to settle outside to court and forgo the opportunity for justice.³ Cross examination by perpetrators has been found to be procedurally unfair, affecting the ability of victims to present clear and accurate evidence, or even attend the proceedings at all.⁴ The rationale for banning direct cross-examination and providing state-funded legal support is thus both trauma-informed and grounded in best practice for violence prevention.⁵

Increased demand on the Scheme is driven by two factors: The prevalence of family violence in the community and the number of bans applied under Section 102NA of the Act. Between November 2020 and April 2021, the majority of notices filed in both the

Family Court and the Circuit Court allege that the applicant has experienced family violence.⁶ The Australian Bureau of Statistics reports climbing rates of FDV order breaches, accounting for 52% of all FDV offences in 2023-24.⁷

The Family Law Amendment 2025 has also increased demand on the Scheme by broadening the scope of matters it covers. This includes the adoption of financial abuse under the definition of family violence, the requirement to assess family violence in property matters, and the increased power of the court to impose the Ban outside of the automatic criteria.⁸

Sustainability of Funding

The initial cost model under-estimated that 192.6 applications would be made to the Scheme in 2019-20.⁹ Legal Aid accepted 686 – almost a four-fold increase on the initial projection. Shortly after the Scheme commenced, Legal Aid Queensland exhausted all its funding.

Initial funding for the Scheme in 2021-22 was set at \$2.012 million, but was increased to \$8.244 million according to the cost of the scheme the previous two years.¹⁰

As advised by National Legal Aid, the ‘true’ annual cost of the Scheme is approximately \$26 million, reflecting caseload growth, rising case complexity, and expanded eligibility¹¹

National legal Aid are absorbing unsustainable deficits, with multiple jurisdictions.¹²

National Legal Aid have also indicated that there are significant administrative costs of hosting the Scheme that have not been factored into the funding sum. Furthermore, lawyers face disincentives to take up Section 102NA/B work for several reasons. The reduced supply of legal professionals means that Legal Aid is spending more on reimbursement for interstate lawyers to encourage participation in the Scheme.¹³

This chronic underfunding strains resources, generates significant workforce challenges (including retention and recruitment difficulties for legal aid lawyers), and may risk compromising the quality of representation provided to victim-survivors.¹⁴

The estimated cost per grant (\$10,000) has so far been adequate, making the projected cost of the Scheme easy to calculate based on recent demand.¹⁵

System Misuse and Disincentivisation

Misuse of the Scheme is likely contributing to increased demand and scarcity of lawyers: Because the Scheme is not means-tested and currently does not enforce contributions, users of the Scheme – both perpetrators and victim-survivors can repeatedly dismiss their appointed lawyer and apply for new counsel. This occurs for two main reasons:

Perpetrators exploit the system by proceeding with unmeritorious applications and/or firing their lawyers to delay proceedings. It is also common for perpetrators to apply to self-represent where they could otherwise afford a legal representative.¹⁶ These strategies are used to further abuse victim-survivors and/or to coerce and intimidate them, with the intention of influencing the final outcome and costing the victim substantial legal fees, emotional distress and ongoing engagement with court.

Additionally, litigants may fire their lawyers due to genuine disagreement at the stage of cross-examinations. Disagreement at this late stage is not unlikely – by the time lawyers are appointed, litigants have been self-representing for many months in previous hearings with no or little legal advice. Legal professionals from our membership have cited difficulty negotiating with clients because they have little understanding of the legal system and are unaccustomed to receiving legal advice. One lawyer explained that Section 102NA/B work is “not lucrative (for the fee paid) because it is so hard to advise someone at such a late stage in their case” and that “lawyers don’t want to be just a mouthpiece for individuals without any input in the case.”

Inconsistent Application of the Scheme

Disincentives for lawyers to engage with 102NA/B work are exacerbated due to inconsistent application of the Scheme across jurisdictions.¹⁷ The Statutory Review found that the array of services provided under the Scheme has expanded beyond what was originally intended. Lawyers feel compelled to provide additional services because cases assigned to them may not be prepared for cross-examination and they face threats of reputational damage.¹⁸

The scope of the Scheme should be reconfigured and standardised across states and territories. This requires balancing incentives and disincentives for legal practitioners:

- Representatives require flexibility in how they manage and prepare cases for cross examinations, noting the ‘mouthpiece’ effect and the integrity of their reputation.
- Unclear scope of the Scheme and late-stage legal counsel results in arduous workloads that are more substantial than the Legal Aid compensation paid.

Complexities and Considerations

Options to reconfigure the Legislative Ban and the Scheme involve intricate considerations around the incentives and disincentives for both lawyers and users of the Scheme, all whilst maintaining protection of victim-survivors. This will require further, in-depth consultations to ensure functionality and best practice. The below are areas for

consideration that require further consultation with peak legal bodies, specialist support providers and victim-survivor advocates:

Impact of Means Testing and Co-Payments

The potential introduction of means testing or financial contributions raises complex questions:

- **Theoretical Benefits:** Asset or liquid means tests could filter out clients with the capacity to pay, preserving finite resources for those in need and discouraging tactical abuse.¹⁹
- **Practical Limitations:** Evidence demonstrates that most scheme participants are on low or precarious incomes, so aggregate savings would be limited; administrative costs of assessment and enforcement may outweigh gains.²⁰
- **Risk of Exclusion:** Without robust hardship exemptions, means testing can inadvertently exclude vulnerable women and children—particularly survivors who are “asset rich, cash poor,” or already subject to economic abuse.²¹
- **Co-Payment Efficacy:** Reviews of co-payment models in legal aid schemes reveal they yield marginal revenue, can delay proceedings, and may further burden victim-survivors, decreasing overall fairness and accessibility.²²

Possible Administrative Reforms

Beyond means testing, administrative adjustments are being debated:

- **Limit on Representative Changes:** Capping changes of legal representative (e.g., maximum of two changes per case) could reduce costs stemming from duplication and extended litigation. Reports indicate such measures would limit abuse without harming genuine users—but require data collection and monitoring to avoid perverse outcomes.²³
- **Court-Appointed vs. Traditional Representation:** Moving toward a UK-style, court-appointed representative (QLR) model might further curtail system manipulation and reduce the adversarial dynamic—but may also dilute survivor agency if not carefully implemented.²⁴
- **Scope Clarification:** Clearly defining the services covered by the scheme and establishing transparent guidance for when legal representation is triggered, would help ensure consistency and reduce confusion across jurisdictions.²⁵

Gendered and Survivor-Focused Solutions

Any reform proposals must centre the lived experiences of those most affected:

- Deepened Vulnerability: Means-based barriers risk compounding the complexity of gendered economic abuse hidden debts, asset inaccessibility, and economic control mechanisms are often invisible to standard means testing.
- Best Practice: International and Australian guidance now emphasises tailored, intersectional policy, means tests should include blanket exemptions for victims of abuse, and any client contribution scheme must be non-punitive, accessible, and administratively light-touch.²⁶
- Workforce and Training: Implementation of reforms must be paired with increased, dedicated funding and trauma-informed, gender-sensitive training for judicial staff and legal representatives.²⁷

Agency and Choice for Survivors

Survivor empowerment requires that legal arrangements, representation models, and financial obligations be flexible and informed by trauma-aware practice.

- Judicial Discretion: The ban on cross-examinations for Domestic Violence cases risks impeding on victim-survivor's autonomy. Equally, making the ban entirely discretionary risks shifting the onus to victim-survivors to advocate for themselves and relying on court judgement.
- False Allegations: It has been observed that some perpetrators make false allegations of family violence to invoke the ban, forcing the other party into an unfavourable position where the case is likely to be prolonged.²⁸

International Models

A comparative perspective further contextualizes Australia's approach:

- United Kingdom: The Domestic Abuse Act 2021 brought the QLR scheme, banning both mandatory and discretionary direct cross-examination and providing for state-funded legal representation in relevant cases. The UK faces similar problems with system abuse, limited cost recovery, and a focus on survivor safety through court-appointed representatives.²⁹
- New Zealand: Family courts may exclude direct cross-examination and appoint counsel to operate on behalf of vulnerable witnesses. However, coverage and enforcement vary, with less systematic funding for universal representation.³⁰
- Europe and Beyond: Approaches are more fragmented: some use intermediaries, remote testimony, or have inquisitorial judicial questioning without adversarial cross-examination.³¹ Funding, survivor agency, and rights to accessible representation are less consistent than in Australia or the UK.

Guiding Recommendations

Policy Balance

- Cost-control measures (limited means testing, targeted contributions, administrative caps) should be pursued only where they will not undermine access, survivor agency, or trauma-informed care.

Eligibility Exemptions

- Any means or merit test must include robust hardship provisions, automatic exemptions for domestic violence victim-survivors, and detailed guidance on hidden financial harm.

Administrative Monitoring

- Administrative Monitoring: Changes such as limiting representative switches or clarifying scheme scope should be implemented with publicly reported monitoring and regular review to track unintended impacts.

Trauma-Informed Reform

- Survivor safety, participation, and empowerment must remain central. Legal aid and judicial training should be expanded and specialized.

Resourcing

- Increased base funding for legal aid is essential for equity and sustainability.
- Implement a nationally consistent cap on the number of approved 102NA applications for litigants.

Continuous Evaluation

- Policymakers should establish ongoing evaluation of the program once establish with new guardrails. This includes ongoing dialogue with survivor advocacy groups, legal aid providers, and specialist services to ensure the living experience remains at the heart of reforms.

¹ Cornall, R., & Luscombe, K. (2021). Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General.

² Reeves, E., (2023). Journal of Violence Against Women, *Incredible Women: Legal Systems Abuse, Coercive Control, and the Credibility of Victim-Survivors*.
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⁴ Kaye, M., et al. (2017). Australian Journal of Family Law, *Preventing personal cross-examination of parties in Family Law proceedings involving family violence*. <https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2019/09/Issue-423-Booth-Kaye-and-Wangmann-14.pdf>

⁵ Family Law Act 1975 (Cth).

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⁶ Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*. (Pg. 84).

⁷ Australian Bureau of Statistics. (2024). *Recorded Crime – Offenders*,
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⁸ Attorney General's Department. (2025). *Family Law Changes from June 2025*,
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¹⁰ Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*. https://www.ag.gov.au/sites/default/files/2023-02/cross-examination-review_final-report.pdf (Page 83).

¹¹ National Legal Aid. (2025). Funding and Caseload Data for Cross-Examination of Parties Scheme.

¹² Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*.
https://www.ag.gov.au/sites/default/files/2023-02/cross-examination-review_final-report.pdf

¹³ Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*. https://www.ag.gov.au/sites/default/files/2023-02/cross-examination-review_final-report.pdf

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¹⁵ Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*. https://www.ag.gov.au/sites/default/files/2023-02/cross-examination-review_final-report.pdf

¹⁶ Australia's National Research Organisation for Women's Safety. (2021). *Re: Review of the ban on cross-examination under the Family Law Act 1975 (Cth)* [Submission no. 5], <https://www.anrows.org.au/resources/attorney-generals-department-review-of-the-ban-on-direct-cross-examination-under-the-family-law-act-1975-cth/>

¹⁷ Cornall, R., & Luscombe, K. (2021). *Review of the Family Violence and Cross-Examination of Parties Scheme: Final Report to the Attorney-General*. https://www.ag.gov.au/sites/default/files/2023-02/cross-examination-review_final-report.pdf

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²⁰ Legal Aid NSW. (2020). Legal Aid for Family Law Cross-Examination Program: Submission to Statutory Review.

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²⁴ Home Office. (2022). Domestic Abuse Act 2021: Implementation Guidance.

²⁵ Attorney-General's Department. (2025). Options Paper: Family Law Cross-Examination Arrangements.

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