

# Family Violence Cross-Examination Scheme

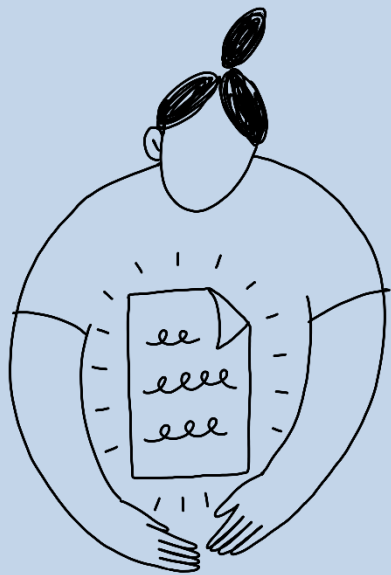


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**Julie Jackson**  
Director Family Division  
Legal Aid WA

# Second Reading Speech

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- Fear of being cross examined by a perpetrator is often a significant factor in deciding to settle a matter or agreeing to orders that place children and victims at risk of harm
- Applies to both Family Law Act 1975 parenting and property proceedings
- It is hoped that the Bill will assist with the provision of more reliable evidence in Court proceedings
- It is also hoped that it will strengthen the Court's ability to protect victims of family violence
- It is further hoped that the bill will assist with reducing the trauma to victims of family violence in family law proceedings.

# Section 4AB Family Law Act 1975

- Section 4AB (1) **Family Violence means violent, threatening or other behaviour that coerces or controls a family member or causes the family member to be fearful.**
- Section 4AB (2) Examples of behaviour include:
  - 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

# Section 4AB Family Law Act 1975

- Section 4AB (2) Examples (cont'd)
  - 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;
  - 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

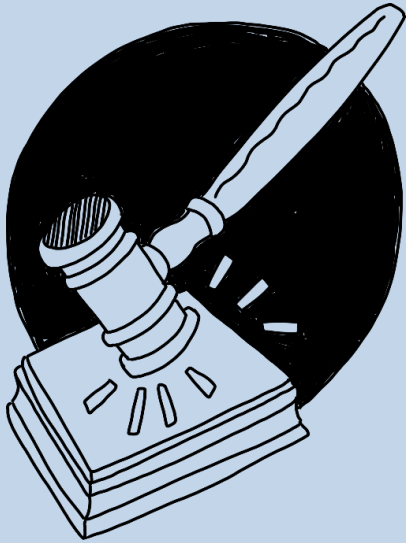
# The Amendments



- If one of criteria under 102NA(1) applies then 102NA(2) mandates:
  1. The examining party must not cross examine the witness party personally;
  2. The cross examination must be conducted by a legal practitioner acting on behalf of the examining party
- **This section applies where the examining party is the alleged perpetrator and the witness is the victim and vice versa.**

# The Amendments

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Applies to cross examination that occurs after **11 September 2019** currently in **Family Law Act 1975** proceedings only

Section **102NA** prohibits personal cross examination (where a party intends to cross examine another party) in family law proceedings

**WHERE:**

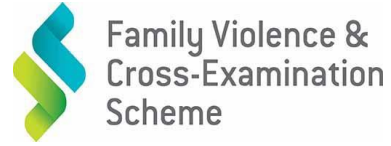
1. There is an allegation of family violence between the examining party and the witness; **AND**
2. **ANY** of the following apply:
  - (a) Either party has been **convicted** or is charged with an offence involving **violence**, or a threat of violence, to the other party;
  - (b) A **family violence order** (other than an interim order) applies to both parties; **OR**
  - (c) An **injunction** under Section 68B or 114 for the personal protection of either party is directed against the other party; **OR**
  - (d) **The Court makes an Order** that the mandatory ban is to apply to the cross examination. **Section 102NA(3)**

# Section 68B Orders

Section 68B of the Act allows the Court to make an injunction (if it considers appropriate for the welfare of the child):

1. For the personal protection of the child;
2. For the personal protection of a parent of the child, or a person who has parental responsibility for a child, a person who a child lives with, spends time with or communicates with pursuant to a parenting order;
3. An injunction restraining a person from entering a place of residence, education or employment of the above persons and child.

# Section 114(1) Family Law Act 1975



- a) Section 114(1) of the Act allows the Court to make an injunction, if it considers appropriate for the welfare of:
  - b) the personal protection of a party to the marriage;
  - c) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;
  - d) restraining a party to the marriage from entering the place of work of the other party to the marriage;
  - e) the protection of the marital relationship;
  - f) in relation to the property of a party to the marriage; or
  - g) the use or occupancy of the matrimonial home.



# Nuts & Bolts of the Family Violence Cross-Examination Scheme



# Who can apply?

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**Section 102NA(3)** provides that :

The Court may make an Order to ban cross examination:

1. On it's own initiative;
2. The application of the:
  - (i) witness party;
  - (ii) examining party; **OR**
  - (iii) Independent Children's Lawyer

# Other protections

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## Section 102NB

1. If Section 102NA doesn't apply; and
2. A party intends to cross examine another party personally; and
3. There is an allegation of family violence between the examining party and the witness party

Then the Court must ensure that during the cross examination there are appropriate protections for the party who is the alleged victim of the family violence.

*For example – that the cross examination be conducted by video or audio link*

# What happens in Court?

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When the Court is making directions for trial it will identify whether the mandatory ban applies or may consider whether a ban on cross examination should be imposed.

If the ban applies then the Court Orders made at the hearing will identify :

1. That the ban applies
2. The implications of the ban;
3. The steps that the parties can take in light of the ban.
4. That a copy of the Orders will be provided to Legal Aid WA

The notice will specify if for any reason a party becomes unrepresented prior to or during the trial the ban remains in place and cross examination will not occur.

**Parties can obtain their own private legal representation OR make an application to the family violence and cross examination scheme administered by Legal Aid WA.**

- Legal representation will be available for the hearing (generally the final hearing) where cross-examination occurs. It includes preparing for that hearing and, where appropriate, for late-stage legally assisted family dispute resolution.
- **Representation under the scheme is not a grant of legal aid**
- Legal Aid WA (and other LACs) administer the Scheme on behalf of the Commonwealth Government (Department of the Attorney General)
- **No means or merit test** but may be asked to contribute to the cost of the legal representation. This will depend on their ability to pay and their circumstances.
- **Conditions apply** to legal representation under the Scheme and ongoing representation is not automatic.

## The Conditions:

- follow their lawyer's advice ;
- tell the lawyer everything he or she needs to know about their case;
- provide any documents requested by Legal Aid WA or their lawyer as soon as possible, and
- let Legal Aid WA know if their address or phone number changes while they are receiving legal representation under the Scheme.

## Applications to the Family Violence Cross Examination Scheme

The application form for the scheme is available from Legal Aid WA and the duty lawyer service (Perth Registry) and Family Advocacy and Support Service (FASS) duty lawyers on regional FCWA Magistrates Circuits

The completed form is to be **emailed to [xemscheme@legalaid.wa.gov.au](mailto:xemscheme@legalaid.wa.gov.au) OR** hand delivered to **Legal Aid WA 32 St Georges Terrace Perth OR** posted to **Legal Aid WA GPO Box L916 PERTH WA 6842**

**The duty lawyer/FASS service can provide assistance with completion and submission of the application form. The Legal Aid Info Line (Client Services) can also be contacted for assistance on 1300 650 579.**

## COMMONWEALTH FAMILY VIOLENCE AND CROSS-EXAMINATION OF PARTIES SCHEME

If there is an allegation of family violence in a family law case the court may tell you that there is a ban on personal cross-examination. This means that cross-examination of the other party must be conducted by a lawyer who is representing you.

If you have been told that there is a ban on personal cross-examination you can—

- engage your own lawyer, or
- use this form to apply to the *Commonwealth Family Violence and Cross Examination of Parties Scheme* (the Scheme) for a lawyer.

If you do not have a lawyer, you cannot cross-examine the other party. You must consider getting a lawyer now.

Access to this Scheme is not limited by means and merits tests but you may be asked to contribute to the cost of the legal representation. This will depend on your ability to pay and your circumstances. Conditions apply to legal representation under the Scheme and ongoing representation is not automatic.

Legal representation under the Scheme will be available for the hearing (generally the final hearing) where cross-examination occurs. It includes preparing for that hearing and, where appropriate, for late-stage legally assisted family dispute resolution.

For you to receive legal representation under the Scheme you must agree to the following conditions—

- follow your lawyer's advice
- tell your lawyer everything he or she needs to know about your case
- provide any documents requested by us or your lawyer as soon as possible, and
- let us know if your address or phone number changes while you are receiving legal representation under the Scheme.

If you wish to apply to the Scheme, please complete the attached application form and email it to—

[xemscheme@legalaids.wa.gov.au](mailto:xemscheme@legalaids.wa.gov.au)

Or deliver it to —

*Legal Aid WA*  
32 St Georges Terrace Perth

Or post it to —

*Legal Aid WA*  
GPO Box L916  
PERTH WA 6842

If you need assistance with this application please contact the FASS or duty lawyer service in the family law courts, or your local legal aid office on 1300 650 579.

## COMMONWEALTH FAMILY VIOLENCE AND CROSS-EXAMINATION OF PARTIES SCHEME

### APPLICANT DETAILS

1. Title Mr / Mrs / Ms / Miss Other \_\_\_\_\_
2. Family name \_\_\_\_\_  
Given names \_\_\_\_\_
3. Do you use, or have you used, other names? Yes / No  
If Yes, please give other names  
Family name \_\_\_\_\_  
Given names \_\_\_\_\_
4. Date of birth \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_
5. Gender Female / Male / Transgender / Intersex or indeterminate / other
6. Address \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_  
Email \_\_\_\_\_  
Postal Address (if different from above)  
\_\_\_\_\_  
\_\_\_\_\_  
Preferred contact method phone / email
7. Do you identify as an Aboriginal or Torres Strait Islander? Yes / No
8. What is the main language spoken at home?  
\_\_\_\_\_
9. Do you need an interpreter? Yes / No  
Language / dialect \_\_\_\_\_
10. Do you have a disability or mental illness? Yes / No  
Intellectual / physical / psychological / psychiatric / head injury, stroke / sensory – hearing, visual, speech
11. Who are you in dispute with?  
Full name/DOB \_\_\_\_\_

### FINANCIAL INFORMATION

12. Income  
Employment income \$ \_\_\_\_\_ per wk  
Centrelink income \$ \_\_\_\_\_ per wk  
What type of payment do you receive? \_\_\_\_\_  
Other income \_\_\_\_\_ \$ \_\_\_\_\_ per wk

### WHO DO YOU WANT YOUR LAWYER TO BE?

Name \_\_\_\_\_  
Firm name \_\_\_\_\_

In some cases you may not get the lawyer you name. If you do not name a lawyer, or the lawyer you name is not one who can be appointed under this Scheme, Legal Aid WA will appoint a lawyer for you.

### CONFIDENTIALITY

Under s64 of the *Legal Aid Commission Act 1976*, the information provided in your application form remains confidential in most cases. The information will be used—

- to assist with your legal representation
- for inclusion in our records
- to compile statistical information for use by us and our funders
- to communicate with the courts about the status of your application.

To evaluate our service your name and telephone number may be provided to an organisation to undertake a client survey. If you object, please tick

### DECLARATION

I agree to the conditions for legal representation under the Scheme, and I have read the confidentiality statement and consent to the use of my information for the stated purposes.

All the information I have given is true and correct.

Signature \_\_\_\_\_ Date \_\_\_\_\_



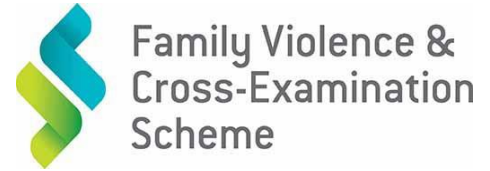
# What will Legal Aid WA do?

- LAWA sent out invitations to express an interest in taking on matters under this pilot Scheme.
- We have sought to engage experienced trial lawyers (both Solicitors and Counsel) who also have DR experience
- Once the Family Court of WA has made an Order/Notification, parties will be encouraged to obtain private representation or alternatively parties will apply under this Scheme.
- Successful applicants will receive assistance by way of advice, negotiation, drafting and representation at DR and trial if necessary.
- In certain complex cases, Solicitors will instruct Counsel.
- The Commonwealth plans to review this pilot Scheme after three years.

# Update on activity of Scheme

As at 25 October 2019, the Cross Examination Scheme has received and granted the following:

- Orders received: 95
- Applications received: 45
- Applications approved (both the Application and Order received): 41



The principal contact person at Legal Aid WA for enquiries from the legal profession and the Family Court of WA in relation to the Scheme is:

Colleen Brown

Director Client Services

**Email:** [colleen.brown@legalaid.wa.gov.au](mailto:colleen.brown@legalaid.wa.gov.au)

Telephone: (08) 9261 6429