



Women's Legal Services Australia

Submission to the  
Review of direct cross-examination ban-  
*Family Law Act 1975*

Prepared by  
Women's Legal Services Australia  
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Contact: Liz Snell  
Ph: 02 8745 6900

Women's Legal Services Australia

✉ PO Box 3496, Alice Springs NT 0871 ☎ (08) 8952 4055

🌐 [www.wlsa.org.au](http://www.wlsa.org.au)

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## About WLSA

Women’s Legal Services Australia (WLSA) is a national network of specialist, women-led accredited community legal centres, specifically developed to improve women’s lives through specialist legal representation, support, and advocacy.

WLSA’s members provide high quality free legal services, including representation and law reform activities, to support women’s safety, access to rights and entitlements, and gender equality.

WLSA members seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for almost 40 years.

WLSA members have specialist expertise in safety and risk management, maintaining a holistic and trauma-informed legal practice, providing women additional multidisciplinary supports, including social workers, financial counsellors, and trauma counsellors, for long-term safety outcomes.

WLSA members approach the legal issues facing women and their experience of the legal system within a broader analysis of systemic gender inequality. They are committed to providing individual services whilst also working towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.

## Introduction and summary of recommendations

1. We commend the Government on the introduction of a ban on direct cross-examination in family law proceedings in relation to family violence. The *Family Law Act 1975* was amended on 11 March 2019 to include s102NA – s102NC. The ban on cross examination in certain circumstances took effect from 10 September 2019. If the ban applies cross-examination can only be conducted by a legal representative. The Family Violence and Cross-Examination Scheme (**‘the Scheme’**) is funded by the Commonwealth Government. We recognise the vital importance of the Scheme and believe it is largely meeting its intended purpose. We also provide feedback below about how the scheme can be further strengthened to protect survivors of family violence.
2. While applauding this initiative, to effect significant change, substantive legislative reform to the *Family Law Act* which is centred around the safety of children and adult survivors is required.
3. The current *Family Law Act* incentivises violent men to litigate. It does this particularly through the presumption of equal shared parental responsibility and the requirement to consider equal time and significant and substantial time if the presumption applies.
4. The Australian Government has repeatedly expressed concern about the economic burden of the family law system and the impact of costs and delays in the family court system on families and particularly children. If this is to be addressed, the Government must remove mechanisms that incentivise violent men to litigate such as the presumption of equal shared parental responsibility.
5. In summary we recommend:
  - 5.1 Removal of the presumption of equal shared parental responsibility
  - 5.2 Continuation of the Family Violence and Cross-Examination Scheme, with adequate funding to ensure the discretionary protection is available when needed
  - 5.3 Expansion of “court-ordered protections in other cases” to apply to all matters involving allegations of family violence
  - 5.4 Extending the Scheme to witnesses who are not a party to proceedings
  - 5.5 Greater promotion of the Scheme, including through the Notice of child abuse, family violence or risk form, court websites and other means

## The operation of the legislative provisions

### The ban on direct cross-examination

6. We commend provisions for the banning of direct cross-examination in circumstances of family violence in family law proceedings.
7. Women’s Legal Services Australia, along with survivors and sexual, domestic and family violence and abuse services, advocated strongly for such protections, noting direct cross-examination *can result in retraumatisation, can compromise the quality of evidence given to the court, which can affect the court’s ability to make safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victim.*<sup>1</sup>
8. A mandatory ban occurs where one party (examining party) intends to directly cross-examine another party (the witness party) in any of the following circumstances as outlined in s102NA(1)(c)

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<sup>1</sup> Janet Loughman, “Protecting vulnerable witnesses in family law”, *Law Society of NSW Journal*, February 2016, p26-27 accessed at: <https://cld.bz/bookdata/Wo9CCxy/basic-html/page-26.html>

of the *Family Law Act*:

- i. *either party has been convicted of, 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 s68B or 114 for the personal protection of either party directed against the other party;*
9. The court also has the power to exercise discretion to impose a ban on its own initiative or the application of the witness party, the examining party or an Independent Children’s Lawyer.
  10. It would be useful to understand how many times the ban has applied through mandatory grounds compared to the court’s discretion and in what circumstances the court exercises its discretion.
  11. Research funded by ANROWS, while not designed to evaluate the implementation of the ban on direct cross examination, was undertaken at the time the ban started to operate. The research included interviews with judges, legal practitioners, other professionals and parties. It also included an intensive review of some court files and court observations in three jurisdictions, including metropolitan and regional settings. The research highlights that availability of funding is one factor influencing the court’s discretion to exercise the ban, with at least 2 judges and one professional concerned at the time of interviews *“that the funding in their state had already run out”*.<sup>2</sup> This was a concern also shared by WLSA members.
  12. The research also highlights a need for consistency in application of the Scheme. In one interview with a Judge yet to have the opportunity to exercise their discretion in relation to the ban they thought they *“would err on the side of caution”* and make the order *“if there’s any suggestion that it would be appropriate”*.<sup>3</sup>
  13. In another case a Judge was observed to say the following to the unrepresented woman:

*There is no AVO. No criminal charge, it’s at the discretion of the court. You choose to be unrepresented even though you’ve been told endlessly to be represented. You will question each other.*<sup>4</sup>
  14. WLSA is strongly of the view that the safety of children and adult survivors is the lens through which any reform in family law should be considered.<sup>5</sup> Section 102NA should be amended to provide guidance on the court’s discretion to apply a ban on direct cross-examination. This guidance should require the safety of children and adult survivors to be considered. We support ANROWS recommendation that the National Risk Assessment Principles for Domestic and Family Violence<sup>6</sup> provides a good basis for evidence-based judicial decision making in this area.<sup>7</sup>
  15. We further recommend it be legislated that judicial officers be required to consider using their discretion to exercise the ban on direct cross-examination and provide reasons if they do not exercise the ban.
  16. It would also be useful to understand how often the protections have been applied in matters relating to children or children and property compared to property alone. The legislation provides the protection applies in both children and property matters. Given the same policy reasons for the

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<sup>2</sup> Jane Wangmann, Tracey Booth and Miranda Kaye, *“No straight lines”: Self-represented litigants in family law proceedings involving allegations about family violence* (Research Report 24,2020). Sydney: ANROWS, p121 (125) See also p119 (123) accessed at: <https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/MJ.18.01-Wangmann-RR-SelfRepresentation.pdf>

<sup>3</sup> Wangmann et al, Note 2, p119 (123)

<sup>4</sup> Ibid, p119 (123)

<sup>5</sup> Women’s Legal Services Australia, Five steps to creating a family law system that keeps women and children safe accessed at: [http://www.wlsa.org.au/uploads/campaign-resources/Safety\\_First\\_in\\_Family\\_Law\\_Plan.pdf](http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf)

<sup>6</sup> Toivonen, C., & Backhouse, C. (2018). National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018). Sydney, NSW: ANROWS

<sup>7</sup> ANROWS Submission to the Review of the ban on direct cross-examination under the Family Law Act, 28 May 2021, p3

protections in relation to children's matters also apply to property matters and increased awareness of the barriers to women accessing fair property settlements, particularly in the context of family violence,<sup>8</sup> and the importance of economic security in recovering from family violence and abuse it is important that the protection, including its discretionary application is being applied in practice, including in property only matters.

17. If the mandatory ban applies, the Court does not have discretion to waive the protection upon the request of the alleged victim-survivor of family violence.
18. WLSA has previously advocated the importance of agency for victim-survivors as part of a trauma informed response. If the mandatory ban on direct cross-examination was to be displaced with a discretion, it is important there be safeguards around the use of the discretion, including the mandatory ban could only be displaced at the request of the victim-survivor and that the request be based on a victim-survivor's informed consent.

### **Other court ordered protections**

19. Section 102NB of the *Family Law Act* outlines protections the court must consider if there is an allegation of family violence, a party intends to directly cross-examine another and the ban on direct cross-examination does not apply. Specific examples are included, such as the cross-examination being conducted by video link or audio link and reference to s101 of the *Family Law Act 1975* requiring the court to forbid the asking of offensive questions and s41 of the *Evidence Act 1995* requiring the court to disallow certain questions, such as misleading questions.
20. This section, along with s102NA, has an important educative function across the family law system. The provisions draw attention to the challenges for family violence victim-survivors, particularly self-represented litigants, in participating in proceedings, the need for protections and provides the protections in a centralised Division. But in order for these provisions to be most effective it is also important that self-represented litigants are made aware of these protections. WLSA believes further work is required to raise awareness particularly amongst self-represented litigants about the existence of these protections. This is discussed further below in the section on the design and operation of the Scheme.
21. Further, section 102NB protections should not be limited to circumstances where there are allegations of family violence but no ban on direct cross-examination applies. Section 102NB needs to be amended to make clear that it applies in all circumstances where there are allegations of family violence, including if the ban on direct cross-examination applies.
22. The court should inquire if the victim-survivor would like to give evidence in a space separate to the alleged perpetrator. This may mean the victim-survivor attends the court and the alleged perpetrator gives evidence remotely. Further, if a victim-survivor is directly cross-examining their alleged abuser, consideration should be given to the victim-survivor being present in the court room with the alleged perpetrator appearing remotely.
23. These protections are also relevant for circumstances other than family violence.

### **Extending protections to witnesses who are not a party to proceedings**

24. It is possible that witnesses who are not a party to proceedings are called to give evidence in family law proceedings. These witnesses may also be subjected to family violence by the party seeking to cross-examine them. They may be a family member or a former partner of one of the parties. WLSA members have described occasions where former partners not a party to proceedings have disclosed also experiencing violence perpetrated by the male ex-partner but have been reluctant to

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<sup>8</sup> Women's Legal Service Victoria, *Small Claims Large Battles: Achieving economic equality in the family law system*, 2018 accessed at:

<https://womenslegal.org.au/files/file/WLSV%20Small%20Claims,%20Large%20Battles%20Research%20Report%202018.pdf>

provide evidence as they have been very fearful of direct cross-examination by their abuser.

25. The protections in s102NA and s102NB should extend to such other witnesses for the same policy reasons as they extend to parties who have been subjected to family violence. Such protections would provide confidence to witnesses that they will be able to safely participate in proceedings and thus encourage their participation. Such protections also help to ensure that witnesses can give their best possible evidence which is in the best interests of the child.
26. The case study below highlights the protective power of these provisions in state legislation, the ability to ensure the best possible evidence is before the courts and the importance of an early determination of a ban on direct cross-examination in minimising victim-survivor's trauma, including impacts on their mental health. We recommend the protections in s102NA and s102NB extend to other witnesses in family law proceedings.

### **Case study**

Mary\* was a victim of physical and emotional family violence perpetrated by a male family member, Jack\*. Mary's children had witnessed years of violence and were exhibiting the effects of trauma. Mary was seeking a protection order for the safety of her children and herself in a state court against this male relative.

A family member, June\* had witnessed the violence perpetrated against Mary and had also been subjected to violence by this same perpetrator.

Jack was self-represented in these proceedings.

Mary asked June if she would provide evidence of the violence she saw and also experienced. This would include evidence through an affidavit and appearing in court.

June was terrified of Jack. She wanted Mary and her children to get the protection they needed but she was also very fearful. She was willing to provide written evidence but the fear and trauma of the possibility of having to testify in court and be directly cross-examined by Jack was impacting upon June's mental health. June's treating psychiatrist advised against her appearing at the hearing.

When Mary's lawyer became aware of June's fear in testifying they discussed possible protections to ensure June could safely participate in proceedings. June agreed to testify if the protections were in place. Mary's lawyer sought a declaration for June to be a protected witness.

Under s150 of the *Domestic and Family Violence Protection Act 2012 Qld* a range of orders can be made for the protection of a protected witness to ensure their safety while giving evidence. One such order is a ban on direct cross-examination.

The declaration was made and the order to ban direct cross-examination was granted.

As Mary's lawyer made this application at an early mention, June knew well before the hearing that she would not be directly cross-examined.

June was immensely relieved when she heard she would not be directly cross-examined. She said she could not have given evidence without this protection as she was so scared. She also reflected upon the improvement to her mental health once she knew she could not be directly cross-examined.

\*Not her real name

# The design and operation of the Scheme

## Importance of awareness of the Scheme

27. In order for the Scheme to be most effective all parties need to be informed of the existence of the protections at the earliest possible time.
28. Research by Wangmann et al highlights the power of awareness of information – with many self-represented litigants unaware of the Scheme and reliant on being informed by the Judge, Independent Children’s Lawyer or other services.<sup>9</sup>
29. In WLSA’s experience, several Judges have been proactive in advising self-represented litigants about the Scheme and referring self-represented litigants to the Family Advocacy Support Service where these exist for assistance in making the application and completing the paperwork.
30. Research undertaken by Wangmann et al highlights gaps in awareness. This can be for a variety of reasons, including a matter is missed as it started before the commencement of the Scheme or a party became self-represented close to the hearing.<sup>10</sup>
31. It is vital that the Scheme continues to be widely promoted so those entitled to access it are able to access it in a timely manner.
32. In addition to current promotion, the Scheme could be further promoted in a number of ways.
  - i. The Notice of child abuse, family violence or risk form which must be completed in all family law matters in the Family Court of Australia and the Federal Circuit Court of Australia should include reference to the Scheme and a link to further information about the process of applying for the Scheme.
  - ii. On the Family Court of Australia and Federal Circuit Court of Australia websites.
33. Further, guidelines could be useful to assist Judges in exercising their discretion to impose a ban on direct cross-examination. As outlined above, we recommend this guidance require the safety of children and adult survivors be considered. We support ANROWS recommendation that the National Risk Assessment Principles for Domestic and Family Violence<sup>11</sup> provides a good basis for evidence-based judicial decision making in this area.
34. We further recommend judicial officers be required to consider using their discretion to exercise the ban on direct cross-examination and provide reasons if they do not exercise the ban.
35. Such guidelines could also assist self-represented litigants making arguments in favour of the ban. We also note many parties may need support to make such arguments, for example, because they are so fearful that they struggle to find the words to express their need for protection in the form of the ban.

## Importance of an early decision to impose ban on direct cross examination

36. It is important that a determination about a ban on direct cross-examination occurs as early as possible in proceedings. This is important so survivors of family violence and abuse are confident in the knowledge that they will be supported at hearing or to negotiate a safe agreement for their children and themselves prior to final hearing, rather than feeling pressured to settle in circumstances that are neither safe nor in the best interests of the child.
37. The importance of an early determination to impose a ban on direct cross-examination is

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<sup>9</sup> Wangmann et al, Note 2, p122 (126)

<sup>10</sup> Wangmann et al, Note 2, p 120 (124)

<sup>11</sup> Toivonen, C., & Backhouse, C. (2018). National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018). Sydney, NSW: ANROWS



highlighted in the case study above. While the case study relates to a domestic violence matter in a state court, the policy reasons for an early determination about the application of the ban on direct cross examination equally apply in family law proceedings.

38. It has been WLSA's experience that prior to the implementation of the ban on cross examination scheme to avoid direct cross-examination many women reached agreements that were neither safe nor in the best interests of their children.<sup>12</sup>

### **Importance of early appointment of legal representative**

39. It is also important that a legal representative is appointed as early as possible once the court determines the ban on direct cross-examination applies.
40. While the ban is intended to primarily apply to final hearings the protection must extend to interim hearings if direct cross-examination is proposed at interim hearings.
41. We have heard anecdotally of instances where the ban did not apply in interim hearings and women were subjected to direct cross-examination.
42. An early determination that the ban applies and timely appointment of legal representation are important to prevent this from happening.
43. It is also important that the ban applies in contravention matters.
44. In a whole of system response to family violence it is also important there be adequate funding of the Scheme to be responsive to any new family law reforms. For example, based on the positive feedback to date on the Lighthouse Project and specialist high risk list called the Evatt List in pilot sites we are hopeful this will be rolled out nationally. Further, we note the introduction of the Family Law Amendment (Federal Family Violence Orders) Bill 2021 which has been referred to the Legal and Constitutional Affairs Legislation Committee for inquiry. Consideration must be given to ensuring the application of the Scheme to hearings related to Federal Family Violence Orders.
45. It can appear from the point of view of a represented litigant that an unrepresented litigant is treated more favourably by the Judge, for example, when the Judge might explain processes and procedures to the self-represented litigant. Such perceptions can contribute to family violence survivors experiences of family law proceedings as disempowering and some survivors lack of faith in the system. Not putting Judges in this position is an important benefit of the cross-examination scheme.
46. We note Judges acknowledge the importance and benefit of legal representation in family law proceedings, including efficiencies in time and in ensuring the best possible evidence is before the court.
47. The Australian Law Reform Commission found that parties who are most likely to proceed to final hearing are parties that are unrepresented.<sup>13</sup> It can be the case that self-represented litigants become more entrenched the longer proceedings are on foot if their expectations are not able to be reality tested through legal representation. Early appointment of legal representation can assist with reality testing proposals.
48. Research by Wangmann et al highlights confusion amongst parties about the steps required to obtain legal representation under the Scheme once a mandatory or discretionary ban applies.<sup>14</sup> This needs to be more clearly explained to self-represented litigants and self-represented litigants need to be supported in this process.

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<sup>12</sup> Women's Legal Service Australia, Submission to Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (29 October, 2015) p10 accessed at:

[http://www.wlsa.org.au/uploads/submission-resources/wlsa\\_flc\\_submission\\_151015\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/wlsa_flc_submission_151015_%28fa%29.pdf)

<sup>13</sup> Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019) p80 (86) accessed at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_135.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf)

<sup>14</sup> Wangmann et al, Note 2, p122 (126)



49. Wangmann et al also note following the appointment of a legal representative a matter may be more likely to settle.<sup>15</sup>

## A sustainable and efficient funding model for the Scheme

### Accurate modelling of need

50. While commending the introduction of this Scheme WLSA has always advocated the need for adequate funding for the Scheme to operate effectively.<sup>16</sup>

51. The AIFS study which highlighted the prevalence of direct cross examination in family law proceedings and the need to protect against direct cross-examination did not reflect the true extent of the issue. This is because the figures did not consider those women:

- i. who did not engage in the family courts due to fear of further harm from the perpetrator and from the system itself; or
- ii. who did engage but chose (or who were pressured) to settle their matter prior to trial. This includes women who felt the system would not result in a safe or fair outcome and those who felt the experience of proceeding to trial would cause them or their children further harm and/or trauma.<sup>17</sup>

52. The need for adequate funding for the Scheme to operate as intended is acknowledged in research.<sup>18</sup>

53. As outlined above it is also important in a whole of system response to family violence that there be adequate funding of the Scheme to be responsive to any new family law reforms.

54. Initially, ongoing funding of \$7 million over three years was allocated to Legal Aid Commissions to provide the Scheme.<sup>19</sup> A further \$2 million was committed to the Scheme for 2019-20. In February 2020 a further \$1.19 million was allocated following reports of a matter delayed in Queensland been delayed “*as funding had run out*”. It was reported “*35 trials in Brisbane had been directly impacted by the funding shortfall*”.<sup>20</sup>

### Clarity on what legal work is covered by the Scheme

55. The Legal Aid Commissions oversee the Scheme. The Legal Aid Commissions in each state/territory provide information about the Scheme. In NSW the following is covered by the Scheme:

- i. *reasonable hearing preparation*
- ii. *attendance at a case management hearing held just prior to the final hearing*
- iii. *hearing days*
- iv. *interim hearing preparation and attendance (in rare instances where personal cross examination may occur)*
- v. *contravention and enforcement proceedings (in instances where personal cross-examination may occur)*

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<sup>15</sup> Wangmann et al, Note 2, p 124 (128)

<sup>16</sup> Women’s Legal Services Australia, *Response to the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* p 4 accessed at: <https://www.aph.gov.au/DocumentStore.ashx?id=11b3591e-0323-40ab-b727-56ceee7d15ba&subId=613239>

<sup>17</sup> Ibid.

<sup>18</sup> Wangmann et al, Note 2, p 121 (125)

<sup>19</sup> Women’s Economic Security Package, 2018 accessed at <https://www.ag.gov.au/families-and-marriage/families/family-violence#womens-economic-security-package>

<sup>20</sup> Nicola Berkovic, “Extra legal funds to protect domestic violence victims being questioned in court by abusers”, *The Australian*, 27 February 2020

vi. *reasonable disbursements such as process server fees, travel fees.*<sup>21</sup>

56. Some WLSA members have expressed concern that there is insufficient funding for the issuing of subpoenas and settlement conferences.

### **Potential misuse of the Scheme – Is there a need for a means test?**

57. The Scheme is not means tested.
58. Women have raised with WLSA over the years the varying reasons why their former partner is not represented in family law proceedings. For some it may be the expense, for others it is part of a deliberate strategy of systems abuse - an ex-partner wanting to self-represent so they can directly cross-examine the woman, knowing the trauma this will cause. The latter must be prevented.
59. Since the introduction of the Scheme we have heard anecdotally of cases where both parties were initially legally represented and then following a determination that the ban on direct cross-examination applied, the wealthy male party sacks his legal representative so as to be eligible for legal representation funded by Legal Aid. This is also reflected in research.<sup>22</sup>
60. Further, women raised with WLSA prior to the introduction of the Scheme, the tactic of male ex-partners choosing to self-represent against their legally represented ex-partner and then bombarding the woman's legal representative with unnecessary and often irrelevant correspondence, driving up legal costs – another form of systems abuse. This is also reflected in the research.<sup>23</sup>
61. Wangmann et al highlight delays in requesting the ban and confusion about any paperwork required for the appointment of legal representative under the Scheme have led to further delays which can add to the legal costs of represented parties.<sup>24</sup> This can be mitigated if there is greater awareness about the Scheme and how to access the Scheme. As previously acknowledged the research shows that *“matters may be more likely to settle once lawyers are appointed.”*<sup>25</sup>
62. Wangmann et al note that while the Legal Aid information about the Scheme states contributions to legal aid funding may be required by the party that at the time of interviews for the research *“none of those interviewed had heard of a request for contribution to legal aid costs being made.”*<sup>26</sup>
63. A means test may prevent a woman who needs access to the Scheme being able to access the Scheme, noting that WLSA has previously raised the gap many women fall into between those who meet the legal aid means test and those able to afford legal representation.
64. We note ANROWS recommends a *“carefully designed means test for representation under the Scheme”, one that “does not also capture victims and survivors who may be occupying the family home with children but have no liquid assets”.*<sup>27</sup>
65. Consideration needs to be given to limiting opportunities for systems abuse in a manner that does not have unintended consequences for those who but for the Scheme would not have access to legal representation.

### **Legislative and policy reform centred on safety of children and adult survivors**

66. Any discussion about a sustainable and efficient funding model for the Scheme must look beyond

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<sup>21</sup> Legal Aid NSW, Family Violence and Cross-examination of Parties Scheme Information for Family Law Courts and Legal Aid NSW, accessed at: [https://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0015/32343/Cross-examination-information-sheet-for-court.pdf](https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0015/32343/Cross-examination-information-sheet-for-court.pdf)

<sup>22</sup> Wangmann et al, Note 2, p123 (127)

<sup>23</sup> Ibid, p 52 (56)

<sup>24</sup> Ibid, p 122 (126)

<sup>25</sup> Ibid, p124 (128)

<sup>26</sup> Ibid 123 (127)

<sup>27</sup> ANROWS Submission to the Review of the ban on direct cross-examination under the Family Law Act, 28 May 2021, p6.

the Scheme to the family law system. The *Family Law Act* currently incentivises violent men to litigate. It does this through the presumption of equal shared parental responsibility and its insidious links to equal time and substantial and significant time. Until the incentives for violent men to litigate are removed and the safety of children and adult survivors are at the centre of legislative and policy reform, children, adult survivors and society will be forced to carry unnecessary social and economic costs.

67. The presumption of equal shared parental responsibility is not meant to apply in cases of family violence and abuse because it is recognised that it would not be in the best interest of the children for an abuser to be involved in long-term decision-making about someone they have abused or exposed to family violence. However, the family law system has difficulty identifying and assessing the risk of family violence early.<sup>28</sup> Many victims-survivors can be unrepresented in court because of limited legal aid and many matters are settled in family dispute resolution, often without legal assistance. It is often difficult to prove violence/abuse to the satisfaction of the court because it occurs behind closed doors.
68. It is WLSA members' experience that women whose partners have exerted coercive controlling violence and abuse feel pressure to and do agree to consent orders for equal shared parental responsibility and then continue to have to manage a continuing relationship characterised by coercive controlling behaviour over shared decision making.
69. Even in litigated outcomes where coercive controlling violence and abuse is present in a case, a sole parental responsibility order can be difficult to obtain.
70. Women who consent to an order for equal shared parental responsibility in the context of family violence and abuse often present to WLSA members with continuing parenting issues. In some cases they are responding to contravention orders, in other cases they are responding to ongoing issues relating to the exercise of shared parental responsibility, such as decisions about school enrolment; or travel overseas for school or sporting excursions or for short family holidays. Children have also been prevented from accessing specialist counselling due to the presumption of equal shared parental responsibility and a violent father refusing to consent to the child receiving counselling. Children continue to be distressed by impasses in decision making such as about disagreement in enrolment in high school. Where such issues require further litigation to resolve, and the consequent stress caused by delay and uncertainty in school enrolment, the presumption of equal shared parental responsibility has operated to impede a proper focus on the best interests of the child.
71. The Australian Government laments the economic burden on the family law system and has repeatedly expressed concern about the impact of costs and delays in the family court system on families and particularly children.
72. It is within the Government's power to address this by removing mechanisms that incentivise violent men to litigate such as the presumption of equal shared parental responsibility. This has been recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry ('**SPLA Inquiry**')<sup>29</sup> and the Australian Law Reform Commission.<sup>30</sup>

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<sup>28</sup> For example, in 2015 the AIFS found that almost 3 in 10 separated parents interviewed said they had "never been asked" about family violence or safety concerns when using dispute resolution, lawyers and courts to resolve parenting matters. Only three in five parents said that the family legal service they engaged with asked them about their experiences of family violence: Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J. et al. (2015). *Evaluation of the 2012 family violence amendments: Synthesis report* (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies, p 33 (47) We acknowledge and welcome the recent development of the Lighthouse Project and specialist high risk list – the Evatt List, but note this is currently only being piloted in 3 locations: Parramatta, Brisbane and Adelaide.

<sup>29</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs *A better family law system to support and protect those affected by violence* (December 2017) Recommendation 19

<sup>30</sup> Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System*, 2019 Recommendation 8