ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Attorney-General's Department
Family Safety Branch
Robert Garran Offices
3–5 National Circuit
Barton ACT 2600
By email: cross-examination@ag.gov.au

Re: Review of the ban on direct cross-examination under the *Family Law Act 1975* (Cth)

Dear Mr Robert Cornall AO and Ms Kerrie-Anne Luscombe

ANROWS thanks the Attorney-General's Department for the opportunity to respond to the review of the ban on direct cross-examination under the *Family Law Act 1975* (Cth).

ANROWS is an independent, not-for-profit company established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan). Our primary function is to provide an accessible evidence base for developments in policy and practice design for prevention and response to violence against women, nationally. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Primary (core) funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

The information provided below is focused on the terms of reference. It draws on evidence from rigorous peer-reviewed research, including relevant ANROWS research. This submission is not confidential.

We would be very pleased to assist the Attorney-General's Department further, as required.

Yours sincerely

[redacted]

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Chief Executive Officer

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Response to terms of reference

1. Operation of legislative provisions

Support for the Family Violence and Cross Examination of Parties Scheme

ANROWS welcomes the Family Violence and Cross Examination of Parties Scheme (the Scheme), and this two-year review. It is ANROWS's view that the Scheme forms an important part of the wider system of improvements and adjustments in Family Court settings that are designed to improve the safety of women and children who are victims and survivors of domestic and family violence. Recent ANROWS research entitled "*No Straight Lines": Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence* confirms the importance of the Scheme, which commenced operation on 10 September 2019. While this research was not designed to evaluate this Scheme, the fieldwork was in progress while the Scheme was implemented, and thus it identified some issues with implementation outlined in the next section (Wangmann et al., 2020).

The research also reveals potential concerns for family violence cases that fall outside the current parameters of the Scheme, which will be addressed later in this submission (Wangmann et al., 2020). Despite these concerns, the research found that the recent legislative protections regarding personal cross-examination are much needed, with one research participant stating, "I can see that really making a massive difference" (quoted in Wangmann et al., 2020, p. 166). Another research participant said, "We're still in the very early stages but I think that's very exciting and the judges and litigants have taken that up with enthusiasm" (quoted in Wangmann et al., 2020, p. 116). While most research participants spoke in favour of the Scheme, one self-represented party reflected that it would be unlikely to change anything, because while being cross-examined by her ex-partner was horrendous, cross-examination remained a traumatic experience no matter who was conducting it (Wangmann et al., 2020).

Further evidence of the success of the Scheme can be found in its cross-application to protect other categories of victims and survivors (Booth et al., 2019). Most recently, the Australian Human Rights Commission (AHRC), in their seminal *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work) report, turned to safeguards like a ban on direct cross-examination by a self-represented party when considering how to best protect alleged victims of sexual harassment who are witnesses in civil proceedings (AHRC, 2020). Recommendation 39 of the *Respect@Work* report, which supports a range of safeguards including "being protected from direct cross-examination by a self-represented party" (AHRC, 2020, p. 573) was recently supported by the Australian Government in *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces.* This Government response states: "Where appropriate, the Government will support legislative reform to support victims, particularly in defamation proceedings (Recommendation 39)" (Attorney-General's Department, 2021, p. 22).

Effectiveness and adequacy of the legislative provisions

The measure of success of these legislative provisions should be creating a safe and supportive environment for the victim and survivor. The legislative provisions will only improve the safety of victims

and survivors of domestic and family violence if they are applied and utilised with a domestic and family violence-informed lens where safety of victims and survivors is kept at the forefront of judicial decision-making.

While we do not have specific evidence of the Scheme's effect on preventing re-traumatisation of victims and survivors of family violence in family law proceedings, ANROWS evidence continues to emphasise the impact on women experiencing domestic and family violence when courts, knowingly or unknowingly, permit abusive behaviours to take place. One self-represented litigant interviewed for the Wangmann et al (2020) study complained that while the judge did prevent the father from asking certain questions in his personal cross-examination of her, he did not "address … the fact that there was family violence being played out in the court … the impact on me and my family was almost irrelevant" (p. 145). Another research participant described the legal systems abuse she endured as worse than anything her former partner had done to her, which included rape, because it meant that she had "no faith in the law at all anymore" (Wangmann et al., 2020, p. 145).

Losing faith in the protective power of the law can have serious consequences for women with experiences of domestic and family violence (Salter et al., 2020). In a research report entitled, *"A Deep Wound Under My Heart": Constructions of Complex Trauma and Implications for Women's Wellbeing and Safety From Violence*, participants "spoke extensively of their contact with the family court system and the ways in which their ex-partners manipulated court processes as part of campaigns of harassment and control" (Salter et al., 2020, p. 106). This evidence, which also examined the women's experiences with criminal justice processes, found similar themes emerging from the women's encounters with the Family Court. The themes were that the women were "frequently not believed or supported, disempowered and then left all the worse for the legal process, all of which is re-traumatising" (Salter et al., 2020, p. 107).

While we cannot provide evidence that the Scheme has encouraged victims and survivors of domestic and family violence to pursue consent orders in their best interests, or to pursue matters to trial without fear of direct confrontation with their perpetrator, Wangmann and colleagues (2020) did find some evidence of expeditious resolutions outside of settling early to avoid confrontation with a perpetrator. As one judge interviewed for their study explained, "All of these matters which have been quite difficult with issues of violence, everybody is now represented and, because they're represented, they have useful conversations outside the court" (quoted in Wangmann et al., p. 124). The research indicates that these conversations, conducted in the presence of skilled lawyers, have seen many parties reach settlements (Wangmann et al., 2020).

There is mixed evidence about procedural fairness and the quality of evidence adduced in final hearings as a result of these legislative provisions. For example, in one case examined by this research, while the judge had directed the lawyer acting as the independent children's lawyer (ICL) to conduct the cross-examination on behalf of the father, further use of alternative arrangements for giving testimony should have also occurred (Wangmann et al., 2020). As the legal representative interviewed for this study

explained, they retrospectively realised that the victim and survivor "was completely terrified" even though the perpetrator was not cross-examining them (Wangmann et al., 2020, p. 117). This fear no doubt impacted the quality of her evidence. Situations like this one point to the need for all legislative protections to be utilised with a domestic and family violence-informed lens that takes into account the safety needs of each individual victim and survivor. Keeping victim and survivor safety central to decision-making provides a firm basis to ensure procedural fairness in cases where domestic and family violence is involved.

Recommendation 1: Provide greater clarity and encouragement for judges to use the full suite of available judicial interventions and adjustments irrespective of whether litigants are eligible for the Scheme, including their use in conjunction with mandatory or discretionary application of the Scheme.

Examination of the discretionary application of the Scheme also highlighted that there could be a lack of consistency between judges about what particular factors are considered and weighed when decisions relating to prohibiting cross-examination are made (Wangmann et al., 2020). The research highlighted one case where a self-represented mother was told by a judge: "There is no AVO. No criminal charge, it's at the discretion of the court. You chose to be unrepresented even though you've been told endlessly to be represented. You will question each other" (quoted in Wangmann et al., 2020, p. 119). The *National Risk Assessment Principles for Domestic and Family Violence*, which stress the importance of keeping victim and survivor safety at the core of all risk assessment frameworks and tools, would provide a good basis for evidence-based judicial decision-making in this area (Toivonen & Backhouse, 2018).

Recommendation 2: Provide judges with domestic and family violence professional development and support to help ensure procedural fairness and evidence-based, safety-focused decision-making relating to the discretionary application of the Scheme and the use of interventions and adjustments.

Recommendation 3: Set out in section 102NA of the *Family Law Act 1975* (Cth) that safety of victims and survivors must be the guiding consideration in the exercise of judicial discretion. The *National Risk Assessment Principles for Domestic and Family Violence* (2018) provide a good basis for evidence-based judicial decision-making in this area.

Unintended consequences

Victims and survivors of domestic and family violence can be prevented by the Scheme from cross-examining even when they want to conduct a cross-examination. One judge interviewed for the research explained "an unusual matter where the alleged victim wanted to cross-examine her former partner and became angry when the judge informed her that this was not allowed" (Wangmann et al., 2020, p. 122). This sits in stark contrast to trauma-informed legal practice which seeks to restore agency and self-determination to victims and survivors (Salter et al., 2020). While it is necessary to balance procedural fairness and victim and survivor agency in this type of matter, having some judicial discretion within the Scheme might enable individual solutions that help victims and survivors heal from trauma.

Recommendation 4: While retaining the mandatory nature of the Scheme and balancing procedural fairness, consider whether limited judicial discretion could apply to enhance agency in situations where direct cross-examination of the perpetrator is requested by victims and survivors.

Wangmann and colleagues (2020) also pointed out that court delays resulting from self-represented litigants not knowing they would need representation, or not knowing they were the ones who had to lodge the form for representation under the Scheme, can impact victims and survivors. As one study participant explained:

> This created a number of delays in this matter including the adjournment of the final hearing because the SRL [self-represented litigant] was unaware that the prohibition on direct cross-examination … applied in his case due to the fact that he was a defendant in a current protection order. (Quoted in Wangmann et al., 2020, p. 68)

When mandatory triggering circumstances do not exist, this can also mean that neither self-represented party raises s 102NA of the *Family Law Act 1975 (Cth)* (Wangmann et al., 2020). In some cases this slack can be taken up by ICLs who, being privy to hostile communication between two self-represented litigants, might ask for discretionary application of the Scheme (Wangmann et al., 2020). As Wangmann and colleagues (2020, p. 122), who observed two matters where self-represented litigants lacked information about the Scheme point out, "this process relies on the SRL [self-represented litigant] being informed about the steps they need to take and being assisted to take them".

Recommendation 5: Remove the onus on the self-represented litigant to apply for representation under the Scheme when mandatory or discretionary orders are in place.

Clarity and consistency

While noting that this research took place early in the operation of the Scheme, it indicated a need for more clarity on what the funding under the Scheme is intended to cover (Wangmann et al., 2020). Several judges and lawyers interviewed noted confusion about "whether legal representation under the Scheme was for full representation or whether it was limited to cross-examination" (Wangmann et al., 2020, p. 120). While it would be advantageous to have a full-representation model, the research also noted that some self-represented litigants may find this problematic. The researchers "observed a case in which the SRL [self-represented litigant] respondent father only wanted the lawyer to conduct the cross-examination" (Wangmann et al., 2020, p. 123). This self-represented litigant refused the Scheme because he wanted to be able to direct proceedings, and eventually made a decision to forgo cross-examining his former partner (Wangmann et al., 2020, p. 123).

For those that sit outside of the Scheme's eligibility parameters, Wangmann and colleagues (2020) found marked variations in the use of allowable judicial adjustments and interventions to assist in personal cross-examination in the various courtrooms they visited. These adjustments include the ability for

judges to limit questions that are insulting, offensive, abusive or humiliating as provided under s 102 of the *Family Law Act 1975* (Cth); alternative methods of providing testimony as specified in s 102C; and changing the order of cross-examination. The most commonly used judicial strategy was changing the order of cross-examination, even if that meant that the respondent testified first (Wangmann et al., 2020). Changing the order is often done so the ICL asks questions first, both to model how questioning is done, and to ensure most questions are asked before self-represented parties take their turn. Some judges interviewed in this research pointed out they would only change the order if the ICL agrees (Wangmann et al., 2020).

This judicial request occurs within the context of a more burdensome workload for ICLs. As one ICL pointed out, when one or both parties are self-represented,

> I spend a lot of time with [self-represented litigants] actually at court events, going through things. So, it does … It can then take a lot of time. It makes longer court events … (Quoted in Kaye, 2019, p. 11)

Some ICLs interviewed in this research felt going first was part of their role, while others felt it would "compromise their role in some way" (Kaye, 2019, p. 20). As one ICL put it:

> You've got to be so careful about your ethical and professional position about what you can and can't put to somebody … And often I will refuse to go first in a family violence case for that very reason. (Quoted in Kaye, 2018, p. 20).

It was however noted by some judges in the research that changing the order of cross-examination may facilitate an earlier settlement (Wangmann et al., 2020).

While judges interviewed for the research by Wangmann and colleagues (2020, p. 116) "almost uniformly stated that they intervened in abusive cross-examination", several professionals interviewed for the study felt that "judges did not always intervene when they should". This is consistent with earlier research, which found a high level of judicial intervention in around a third of cases where an alleged or substantiated perpetrator undertook direct cross-examination, and low to moderate intervention in the remaining two thirds of cases (Carson et al., 2018). Wangmann and colleagues (2020, p. 115) also note that intervention, that is, a more active judicial role, challenges the "traditional passive role of a judge in adversarial legal proceedings". This tension may be a recurring reason for judges to avoid intervening wherever possible, and could perhaps be addressed with professional development and support.

Alternative arrangements for giving testimony continue to be used rarely, with research by Wangmann and colleagues (2020) confirming earlier research findings (see for example Carson et al., 2018). In some cases judges noted that this may be due to an audio visual link (AVL) or separate room being unavailable, which is more likely to occur in regional and circuit courts (Wangmann et al., 2020). Pursuant to s 102NB of the *Family Law Act 1975* (Cth), which seeks to make courts take responsibility for protective measures being in place, safety in family court settings should not be dependent upon where a matter is heard.

Wangmann and colleagues (2020) also raised that judicial decisions about who is removed from the courtroom can be significant to victims and survivors of domestic and family violence. One lawyer interviewed for the study pointed out:

> A lot of family violence victims will be sent to another courtroom to appear by AVL … some of them would prefer to actually be in court and have the perpetrator excluded from the room so that they feel some ownership. (Quoted in Wangmann et al., 2020, p. 117)

Four judges interviewed for the study seemed cognisant of this, placing perpetrators in separate courtrooms and allowing victims and survivors to remain "in the main courtroom with all its supports and processes" (Wangmann et al., 2020, p. 117).

It is ANROWS's view that the safety of self-represented litigants experiencing domestic and family violence who fall outside of the Scheme could be aided by providing greater clarity and encouragement for judges to use the available suite of judicial interventions and adjustments. This would include judicial support and training to employ a domestic and family violence-informed lens where safety of victims and survivors is kept at the forefront when making decisions, including decisions about which party is excluded from the main court room. Keeping the emphasis on creating a safe and supportive environment for the victim and survivor would also include courts ensuring that all interventions are physically available.

Recommendation 6: Ensure that geographic location does not impact the availability of alternative means of giving testimony or other safety measures.

2. The design and operation of the Scheme

There were contrasting views about how hard it will be for litigants to meet the threshold that leads to the mandatory application of the Scheme (Wangmann et al., 2020). Some respondents argued that the bar for mandatory inclusion was quite high, while others argued the circumstances set out in s 102NA of the *Family Law Act 1975* (Cth) are so common in the legal matters they deal with that they would struggle to find circumstances where they did not apply (Wangmann et al., 2020). This probably contributes to the research finding that judges and legal professionals were concerned about the Scheme's "burgeoning costs and viability" with some state-based funding pools already empty at the time of interview (Wangmann et al., 2020, p. 121). The research found this has led to judges feeling they had to be "quite careful about not making too many orders" (Wangmann et al., 2020, p. 119). With adequate funding in doubt, and judges needing to prioritise the Scheme's viability by not referring too many cases to it, safety is not the primary motivation for making orders. More clarity and consistency could be achieved in this area by setting out in s 102NA that safety should be the guiding reason for the exercise of judicial discretion.

Recommendation 7: Provide certainty of funding so that judges are not influenced by numbers when making orders relating to the discretionary application of the Scheme.

3. Sustainable and efficient funding model

The research shows some evidence of self-represented litigants using the Scheme for free representation when they can afford their own, as it is not subject to the same means testing as other forms of legal aid. As one lawyer interviewed for the study explained:

> We had a matter which was part heard, and the father … he was the alleged perpetrator, he had privately funded counsel and solicitor, and as soon as he found out he could get a free gig through legal aid, he sacked them. (Quoted in Wangmann et al., 2020, p. 123)

Perpetrators of domestic and family violence are particularly good at using systems to their own advantage, as evidenced by one self-represented litigant interviewed for the study who said, "I would tell my friends … just accuse them of domestic violence and you'll get free legal representation" (quoted in Wangmann et al., 2020, p. 123). In another case reported by a judge interviewed for this study, "the SRL [self-represented litigant] appeared to use the Scheme to seek further delays at the hearing while also obtaining free representation" (quoted in Wangmann et al., 2020, p. 123).

At the time of this research, "none of those interviewed had heard of a request for contributions to legal aid cost being made" despite financial contributions being able to be requested under the Scheme (Wangmann et al., 2020, p. 123). One self-represented litigant interviewed for the study explained:

> And, unlike normal legal aid it is not needs-tested and even though the application form said that they might ask for something back, for a percentage, they never asked for any financial statement so how would they know who they can ask back money from and who not? In the case of my ex, he's earning over $130,000 a year so I honestly hope the government was to recover some funds, but I don't see how they would do it … it's not well thought through. (Quoted in Wangmann et al., 2020, p. 123)

Closing this exploitable financial loophole would have a twofold effect, assisting in reducing the cost of the Scheme, and addressing systems abuse that can impact victim and survivor wellbeing. Careful consideration should be given to how this is done, for instance with a means test that does not also capture victims and survivors who may be occupying the family home with children but have no liquid assets.

Recommendation 8: Apply a carefully designed means test for representation under the Scheme, and include recoupment of costs for those with income over the usual threshold.

If sufficient funding for the Scheme is not able to be secured, alternative eligibility criteria based on risk assessment for the Scheme might be another option. Managing risk is already noted as a core principle by the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA) in *Joint Practice Direction 1 of 2020: Core Principles in the Case Management of Family Law Matters* (28 January 2020). A risk assessment model would also have the advantage of addressing the needs of self-represented litigants who might not meet the conditions for the mandatory application of the Scheme, or ask for its discretionary application, but are nevertheless at high risk of escalating violence. It might be worth

investigating whether the Lighthouse Project trial, currently targeted at parenting matters in three registries (Parramatta, Adelaide and Brisbane), could be expanded across the country and integrated into prioritising cases where victim and survivor safety is at high risk. One potential risk with this notion is that the Family DOORS Triage questionnaire is currently opt-in, so those who chose not to fill out the survey would not be assessed as to whether the Scheme should apply (Federal Circuit Court of Australia, 2020).

Recommendation 9: Consider alternative eligibility criteria for the Scheme if adequate funding cannot be obtained. For example, investigate whether initiatives like the Lighthouse Project could be rolled out across the country and integrated into prioritising cases for inclusion where victim and survivor safety is at high risk.

Earlier this month ANROWS convened a webinar, "Safety in the Family Court", where an esteemed panel of experts discussed the ban on direct cross-examination as just one of a raft of measures that could improve the safety of victims and survivors in Family Court settings. The panel discussion featured Dr Jane Wangmann (University of Technology Sydney), Dr Rae Kaspiew (Australian Institute of Family Studies), Janet Carmichael (Child Dispute Services, FCA and FCCA), Angela Lynch AM (Women's Legal Service Qld), Associate Professor Molly Dragiewicz (Griffith University) and Tracey Turner (Domestic and Family Violence Specialist Worker [Aboriginal Focus], Sydney Women's Domestic Violence Court Advocacy Service). ANROWS can provide either the webinar recording, or a transcript, upon request.

Recommendations

ANROWS recommends the following measures to improve the safety of victims and survivors experiencing domestic and family violence in Family Court settings.

Recommendation 1: Provide greater clarity and encouragement for judges to use the full suite of available judicial interventions and adjustments irrespective of whether litigants are eligible for the Scheme, including their use in conjunction with mandatory or discretionary application of the Scheme.

Recommendation 2: Provide judges with domestic and family violence professional development and support to help ensure procedural fairness and evidence-based, safety-focused decision-making relating to the discretionary application of the Scheme and the use of interventions and adjustments.

Recommendation 3: Set out in section 102NA of the *Family Law Act 1975* (Cth) that safety of victims and survivors must be the guiding consideration in the exercise of judicial discretion. The *National Risk Assessment Principles for Domestic and Family Violence* (2018) provide a good basis for evidence-based judicial decision-making in this area.

Recommendation 4: While retaining the mandatory nature of the Scheme and balancing procedural fairness, consider whether limited judicial discretion could apply to enhance agency in situations where direct cross-examination of the perpetrator is requested by victims and survivors.

Recommendation 5: Remove the onus on the self-represented litigant to apply for representation under the Scheme when mandatory or discretionary orders are in place.

Recommendation 6: Ensure that geographic location does not impact the availability of alternative means of giving testimony or other safety measures.

Recommendation 7: Provide certainty of funding so that judges are not influenced by numbers when making orders relating to the discretionary application of the Scheme.

Recommendation 8: Apply a carefully designed means test for representation under the Scheme, and include recoupment of costs for those with income over the usual threshold.

Recommendation 9: Consider alternative eligibility criteria for the Scheme if adequate funding cannot be obtained. For example, investigate whether initiatives like the Lighthouse Project could be rolled out across the country and integrated into prioritising cases for inclusion where victim and survivor safety is at high risk.

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