Law Council
OF AUSTRALIA

Review of direct cross-examination ban

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4 June 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful to its Family Law Section for assisting in the development of this submission. It also acknowledges input received from the following Constituent Bodies:

- The Law Society of South Australia;
- The ACT Law Society; and
- The Victorian Bar.

Background

1. In December 2018, the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (**the Bill**) was passed, amending the *Family Law Act 1975* (Cth) (**Family Law Act**) to protect victims of family violence by banning direct cross-examination in certain circumstances in family law matters involving family violence. These include situations where there are convictions, charges or final family violence or personal protection orders in place between the parties.

2. Where the ban applies, parties involved cannot personally cross-examine each other, and cross-examination must be conducted by a legal representative. To meet the demand for legal representatives arising from this measure, the Government established the Family Violence and Cross-Examination of Parties Scheme (**the Scheme**).

3. In its 2018 submission on the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**), the Law Council acknowledged that, for survivors of family violence, the prospect of being cross-examined by a violent ex-partner can cause significant emotional distress and trauma and discourage them from continuing litigation. The Law Council therefore was supportive of consideration being given to alternatives to direct cross-examination wherever possible, however raised the following concerns with the proposals:

    - the lack of clarity regarding the circumstances under which a legally aided lawyer will be appointed to perform the cross-examination, including whether they will be appointed to act for the party for the entire hearing;
    - the adequacy of funding for legal aid commissions to enable them to administer this vital role;
    - a lack of clarity regarding the guidelines that will be applied by legal aid commissions to act for people who cannot afford a private lawyer and seek the appointment of a legally aided lawyer;
    - the adequacy of funding to the Family Court of Australia (**the Family Court**), the Federal Circuit Court of Australia and the Family Court of Western Australia to enable these courts to implement the reforms; and
    - the uncertainty about what is to occur if a party cannot afford a private lawyer and is not eligible for legal aid. The Law Council was particularly concerned that situations may arise where the perpetrator is legally represented, but the victim of family violence is unable to secure legal representation.

4. The Committee in its final report on the Bill cited the Law Council's position, noting that concerns regarding the funding of the Bill's proposed measures were a consistent theme throughout evidence provided. The report stated that:

    > *The committee believes there should be a commitment to additional funding for legal aid before the bill is put to a vote in the Senate, including the amount, timeline for distribution and method of distribution; and in any additional funding for legal aid that is announced, the government make clear the eligibility of litigants who do not meet regular eligibility requirements but could not otherwise afford a private lawyer.*[1]

5. On 10 March 2019, the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth) (**the Amendments**) came into effect. The

[1] Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 [Provisions]*, (August 2018), [2.56].

Amendments have applied to cross-examinations in hearings conducted in accordance with the Family Law Act since 10 September 2019, in proceedings instituted both before and after the commencement of the Amendments.

General comments on the operation of the Scheme

6. Cross-examination plays a critical role in the justice process by testing the credibility and the veracity of the witness. The Law Council acknowledges that, for survivors of family violence, the prospect of being cross-examined by (or having to cross-examine) a violent ex-partner can cause significant emotional distress and trauma and may discourage them from continuing litigation. This is clearly undesirable, and the Law Council has in the past supported alternatives to direct cross-examination wherever possible.

7. Self-representation in the family law system creates a number of procedural and practical challenges, many of which are magnified when there is the potential for direct cross-examination between parties in the context of family violence accusations.

8. Proceedings such as those in *Fennessy & Gregorian (Fmly* Sanchez) [2007] FamCA 1574 demonstrate the importance of the Scheme, as well as how processes may be subjected to abuse and delay should any one party seek to pursue such a course of action. This hearing, originally set for 10 days, ultimately ran for 52 days with multiple interlocutory appeals plus a final appeal. Commenting on the conduct of the applicant in this matter, who was self-represented, Collier J had regard to the emotional impact on the other party, stating:

> *His determination to conduct the proceedings in this manner caused it to become highly unpleasant and demeaning for those the father cross examined. The father was not prepared to be controlled or constrained by usually acceptable standards of courtesy and behaviour.*[2]

9. This is not an uncommon scenario, and the Law Council acknowledges the very real prospect of re-traumatisation for survivors of family violence when subjected to court proceedings and confronted directly by their former spouse. The Law Council therefore supports the continuation of the Scheme (as it did when first implemented) and continues to emphasise the need for it to be adequately funded.

10. As a general observation, the Law Council is of the view that the Scheme is functioning well, however as set out below, there are several procedural and practical challenges that have been identified within the legal profession. Attention to these areas will assist the Scheme to achieve the desired policy results and promote the long-term viability of the cross-examination ban.

11. To assist the review of the Scheme, several de-identified case studies illustrating the perspectives of the legal profession when interacting with the Scheme are included at Appendix A.

Practical difficulties within the Scheme

Confusion amongst parties

12. Some practical difficulties with the Scheme have been identified by the Law Council's Constituent Bodies, including confusion at times from parties about the need for representation. It has been suggested that self-represented litigants may fail to read

[2] At [51].

the *Notations and Family Violence Information Sheet* annexed to orders in relation to section 102NA and accordingly present at final hearings without representation and seeking an adjournment.

13. This has the potential to cause prejudice to the represented party, who is often the victim of the family violence. It also causes delay to the allocation and hearing of matters generally. As such, the Law Council suggests there may be scope to introduce a mention no later than 12 weeks prior to the final hearing to operate as a 'check-in' to ensure there is clarity on matters such as representation and process.

14. If implemented, these mentions should operate as cost-effectively as possible, potentially be run by telephone or Microsoft Teams and be limited to the issue of legal representation at the final hearing (i.e., not offer the opportunity for other substantive issues in the matter to be raised).

15. Ideally the mentions would be run by Registrars, although it is noted they currently are only delegated power to make section 102NA orders under the mandatory provisions and do not have the power to make section 102NA orders on a discretionary basis. However, the mentions still could be run by Registrars at first instance and only referred to a judge where representation is in issue and a discretionary decision is required.

16. This process would avoid the current issue of final hearings being adjourned when litigants attend at the trial without representation in matters involving the perpetration of family violence which in and of itself could be seen as yet another means of perpetrating family violence. This process would hopefully assist in the current delay of cases awaiting a final hearing by reducing the number of adjournments.

Timing of orders

17. The Law Council notes that problems may arise when section 102NA orders are made close to the trial date. Once an unrepresented party attracts the provisions of section 102NA, the court must make an order preventing that person from cross-examining the other party. To afford procedural fairness to that unrepresented party, the trial may need to be adjourned to allow that party to receive the benefit of the Scheme.

18. It is undesirable for a situation to occur where an alleged perpetrating party terminates their instructions and proceeds to represent themselves at trial and is subsequently prevented from cross examining a victim. However, this situation illustrates how the Scheme may be used to cause delay and strain on proceedings should a party intend to frustrate the process.

19. Further and more specific challenges identified by practitioners engaging with the Scheme are set out in case studies provided at Appendix A.

Funding and application of the Scheme

20. The Law Council is aware that on occasions there have not been funds available under the Scheme to enable a party to receive representation, notwithstanding a section 102NA order having been made. An example is found in the decision of *Fraser v Lafayette* [2020] FCWA 43 in which O'Brien J stated:

> *In short, I conclude that a trial in this matter cannot proceed in a manner fair to the wife if she is precluded from cross-examining the husband because the operation of s 102NA prevents her from doing so personally, and she is unable (as distinct from unwilling) to secure representation,*

> *whether through the Scheme or otherwise. That conclusion is readily reached.*
>
> *Indeed, there is even potential for unfairness to the husband if he is, in those circumstances, not cross examined on his evidence in chief. That is so, as the weight to be given to admissible evidence upon which the witness cannot be cross examined, through no fault of the party who would wish to cross examine, can itself potentially be diminished.* [3]

21. It is critical that the Scheme is properly funded, and allocations are a result of close discussions with bodies tasked with administering the Scheme. Insufficient funding for the Scheme will mean that the courts will be unable to implement the initiative without adding to the backlog and delay of their existing caseload. It is untenable for there to be delays to trials because of a lack of funding for an unrepresented party who attracts the Scheme.

22. It has been suggested by one of the Law Council's Constituent Bodies that the Scheme would be assisted by additional funding for both solicitors in the preparation of matters and barristers in their preparation and appearance. By their very nature, matters that attract section 102NA funding are often complex, involving mental health issues, family violence and associated issues. In many cases the parties have had multiple previous lawyers which necessitates obtaining previous files, the digestion of voluminous material and assessing the further action required in preparation for the final hearing.

23. However, the Law Council is conscious of the current costs of the Scheme, and as set out below, several factors that may lead to an increased reliance on it into the future.

Possible drivers for increased reliance on the Scheme

24. Family law proceedings around Australia are regularly subject to extensive delay. The COVID-19 crisis and the associated rise in unemployment will no doubt see more people unable to afford legal representation and therefore attract the Scheme (where they fulfil the other criterion). This will likely result in more trials being vacated and increased delays in the system. There will also be greater pressure to find monies to fund those who require assistance.

25. There have been increased rates of family violence during the COVID-19 pandemic. National research by the Australian Institute of Criminology found one in ten women in a relationship said they had experienced intimate partner violence during the pandemic – half of those women said the abuse had increased in severity since the outbreak of the pandemic in Australia.[4]

26. Further, the increased public discourse regarding family violence in recent times may result in a greater recognition of coercive behaviours that may not previously have been recognised as family violence. This, together with an increased willingness by many to speak about their exposure to family violence, may create an increased reliance on the Scheme into the future.

27. It is also relevant to note that in Western Australia, the cross-examination ban is not yet relevant to proceedings between non-married couples, as the *Family Court Act 1997* (WA) does not yet have a similar provision to section 102NA of the Family Law Act. The Family Court Amendment Bill 2019 (WA) aims to include de facto partners in the ban

[3] At [31]–[32].
[4] Boxall H, Morgan A & Brown R 2020. *The prevalence of domestic violence among women during the COVID-19 pandemic*. Statistical Bulletin no. 28. Canberra: Australian Institute of Criminology.

and was passed by the Western Australia Legislative Assembly on 12 March 2020 but has not proceeded beyond its second reading in the Legislative Council. Once passed, it is likely these amendments will create additional demand on the Scheme.

28. If the Federal Government decides to implement a 'codification' of the case of *Kennon and Kennon* [1997] FamCA 27 into the Family Law Act (a move flagged in the recent consultation paper by the Attorney-General's Department titled '*A New Decision-Making Framework for Property Matters in Family Law*')[5] this would likely see a large number of cases in the property and spouse maintenance realm of the married and de facto provisions of the Family Law Act attract the provisions of section 102NA if consideration of family violence becomes a statutory factor, whether when weighing the contributions of a party or assessing other factors such as future needs.

29. Each of these factors may place more pressure on the Scheme into the future. It is important that the Scheme is resourced appropriately to address this forecast growth in demand, and the Law Council continues to advocate for adequate funding to be made available.

Means testing

30. Noting the possibility of an increasing reliance on the Scheme and the financial commitment required from Government, it has been suggested by several of the Law Council's Constituent Bodies that that the Scheme could benefit from the introduction of some form of means testing, whereby the litigant is required to complete a statement of financial circumstances as part of their application under section 102NA.

31. Subject to an applicant's financial position, the litigant would then be required to make a contribution commensurate with their financial circumstances towards their representation. Such an approach would be similar to the requirement for parties to complete a statement of financial circumstances when an Independent Children's Lawyer is appointed and make the requisite contribution to the costs of the Independent Children's Lawyer referable to their financial circumstances.

32. Those Constituent Bodies that have proposed a means testing regime have done so with the hope that the introduction of a financial assessment would ensure the ongoing funding of those who are impecunious and in genuine need of government-funded legal assistance pursuant to section 102NA. In this regard, the Law Council is aware that some members of the profession have experienced matters where formerly private paying clients have left their private lawyers and subsequently obtained assistance under the Scheme in circumstances where they could have continued to afford a private lawyer. There is some concern that such incidents are placing an unnecessary burden on the Scheme.

33. However, it is appreciated that while the Scheme is, for the most part, administered by legal aid commissions, grants made under the Scheme serve a very different objective to grants of legal aid. The Law Council acknowledges that the policy objectives of the Scheme may not be best served by the introduction of a financial assessment and is conscious that the administration of such a process will have its own significant costs which will ultimately fall on the bodies administering the Scheme.

[5] See <https://www.ag.gov.au/families-and-marriage/publications/consultation-paper-new-decision-making-framework-property-matters-family-law>.

34. It is submitted that any proposal to introduce a means test to the Scheme would require further consultation, particularly with legal aid commissions to ensure the costs do not outweigh the potential benefits.

Merit testing

35. There has been some concern raised by the Law Council's Constituent Bodies regarding the absence of any assessment of merit or complexity prior to a grant being made under the Scheme, and the Law Council is aware of the suggestion that costs of the Scheme would be dramatically reduced if grants were only given for cases with merit.

36. It is further suggested that without merit testing in place, the Scheme may be used as a strategic tool by parties for a purpose for which it was not intended. Specifically, there is a concern that parties might use the Scheme in order to receive free legal representation and seek orders that they might otherwise not be funded to pursue because their application would be deemed without merit, such as unrealistically applying for 'lives with' orders as opposed to 'spends time with' orders.

37. The absence of merit testing for Scheme access may also give rise to an inability for legal representatives to reality test. As a result, parties could potentially conduct three-day trials in order to argue over miniscule sums, as they are not incurring legal fees by doing so. In this context, views were expressed by members of the profession that the Scheme is generally susceptible to further abusing victims by keeping them in court longer. As a result, the matter can be delayed and prolonged because there is not a requirement to demonstrate merit.

38. The Law Council is advised that it is often the case that clients under the Scheme will not take advice, putting lawyers in a position where they cannot continue to act. Despite this, as there is no merit test, should one lawyer withdraw, the client will be appointed further representation under the Scheme, often resulting in multiple lawyers being engaged on a single matter.

Clarity on funding for lawyers engaging with the Scheme

39. The Law Council has received feedback highlighting that grants of funding under section 102NA are different to usual legal aid grants, and often result in more paperwork for practitioners and billing outside of the usual legal aid system. There have also been concerns of inconsistency with practitioners unable to work out what will be funded.

40. In response, it has been proposed that matters pertaining to section 102NA of the Family Law Act be added to the legal aid scale to make solicitors aware of what funding is available, and ensure that it is applied consistently. The Law Council is advised practitioners may be deterred from accepting grants where matters are not resolved at trial and the solicitor is required to continuously seek further extensions of funding.

Vacated matters

41. The Law Council is advised of the experience of a family law practitioner who provided insight into their experiences under the Scheme. Their client was provided funding to prepare a matter for trial. When the trial was vacated by consent and interim orders were made, the practitioner was left in a precarious position as funding could only then be provided in small increments.

42. The practitioner queried what rights the client had to continued funding in the event the trial is subsequently vacated, where the intent behind the Scheme was to avoid clients from being cross examined by a perpetrator of family violence at trial.

Scope of the Scheme

Civil proceedings for damages

43. In *Monaco and Daniels & Anor* [2020] FCWA 35, O'Brien J found that the ban did not apply to civil proceedings for damages for injuries allegedly inflicted on the wife by the husband, which had been transferred from the Supreme Court of Western Australia pursuant to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) to the Family Court of Western Australia:

> *I conclude that the transferred proceedings are not proceedings under the Act. The provisions of s 102NA accordingly do not apply to those proceedings. The oral application of Ms Daniels for a declaration to the contrary will be dismissed.*
>
> *I would not wish those findings to be misunderstood by any of the parties. The anomaly referred to in my earlier judgment whereby the component of the proceedings most centrally directed to issues of family violence and its effect on Ms Daniels was the only component not subject to legislative provisions designed to protect victims of family violence from personal cross-examination.*[6]

44. Paragraphs 102NA(1)(b) and 102NB(1)(b) of the Family Law Act provide for the following prerequisite for the cross-examination ban to apply:

> *… [T]here is an allegation of family violence between the examining party and the witness party…*

45. The phrase 'there is an allegation of family violence …' is not clear and can be interpreted differently. If a court interprets this provision to be a current, live allegation of family violence, it is not likely to ever use this provision, which is only enlivened where the parties are in proceedings and are therefore not likely to be living together anymore. It is reasonable to assume that in most cases, any family violence occurred in the past and allegations of live family violence (such as coercive control and intimidation) are difficult to prove.

46. It is further noted that subparagraph 102NA(1)(c)(ii) requires that a current family violence order (**FVO**) applies to both parties. This subsection significantly limits the circumstances in which an alleged victim can be protected. In most cases, at the final hearing in the Family Court, it is very unlikely that FVOs are still in force due to the more immediate nature of these orders. For many parties, FVOs will be in place for 12 to 23 months after separation and the final hearing date may occur much further down the track.

47. In the absence of a current FVO or a conviction against the other party, the court would be required to make an order under subparagraph 102NA(1)(c)(iv). Research on case law for orders made under subparagraph 102NA(1)(c)(iv) shows that the courts are not making these orders.

[6] [25]-[26].

Family violence involving a child of the parties

48. In relation to violence that may involve a child of the parties, it is noted that section 102NA does not apply to family violence allegations against a person who is not a party to the proceeding. For example, in *Owen & Owen* [2020] FamCA 90, there were serious allegations of family violence involving the child of the parties, however the discretion to impose a ban on personal cross-examination was not exercised.

49. Children are often entangled in family violence matters. For this reason, the Law Council submits that there may be scope to view allegations of family violence against children of the parties as a consideration when applying these provisions.

Application of discretion

50. On occasion, the courts have found that despite a finding of family violence the ban did not apply, relying on the discretion provided for in subparagraph 102NA (1)(c)(iv). In the Federal Circuit Court of Australia, O'Shannessy J in *Middleton and Redmond* [2021] FCCA 316 ruled that the ban did not apply and that the circumstances enlivened the discretion within subparagraph 102NA (1)(c)(iv), stating:

> *Section 102NA(1) has three limbs, (a), (b) & (c) and the third limb, (c), has four branches. Each limb must be found to apply but any of the four branches of the third limb is sufficient for that limb to apply. The fourth branch of the third limb gives the court a discretion to order a ban on personal cross examination whether or not any of the other three (of the four branches) apply provided the first two limbs are satisfied. Section 102NB is a related back up provision. If sections 102NA(1) & (2) do not apply and a party intends to cross examine and there is an allegation of family violence then the court must ensure that during cross-examination there are appropriate protections for the party who is the alleged victim of family violence. Sections 102NA and 102NB provide a cascading scheme of provisions where there is an allegation of family violence and a party intends to cross examine another party personally. If the more stringent or serious conditions of 102NA(1) are met the ban on personal cross examination and the obligation for cross examination to be conducted by a legal practitioner is mandatory and at public expense. If the stringent conditions of section 102NA(1) are not met but there is an allegation of family violence and a party intends to cross examine another party then section 102NB provides that the court must still ensure there are appropriate protections for the party who is alleged to be the victim of family violence in every case.*[7]

51. The courts have also found that they have a discretion when it comes to applying the ban, if an adjournment to allow a party to apply under the Scheme would detrimentally effect the person the Amendments were designed to protect. In *Cavelli and Seldon* [2021] FCCA 605, Riethmuller J refused an adjournment application, stating:

> *Importantly, the Court has a discretion in cases where there is not a Final Family Violence Intervention Order, as to whether or not to impose the restrictions that the provisions contain. As discussed in the Explanatory Memorandum for this legislative amendment to the Act, that discretion is available in part, to ensure that litigants could not simply obtain an urgent temporary Family Violence Intervention Order close to trial, which would*

[7] At [30].

have the effect of stopping the trial proceeding because of an automatic ban on cross examination: see Explanatory Memorandum, Family Law Amendment(Family Violence and Cross-Examination of Parties) Bill 2018 (Cth), paragraph 23, page 10.

The purpose of the discretion is to ensure that one party cannot use the Court process to effect a form of systems abuse on the other. It must be accepted that misuse of Court processes can also amount to family violence: see Garrod v Davenort [2018] Fam CA 825.

…

To allow the father's application to adjourn the proceedings would allow him to use the very provisions that were enacted for the mother's protection in the processes of the Court to disadvantage the mother, in this case both financially and emotional, as the litigation will be delayed. It is not appropriate to allow the operation of s 102NA to result in such a disadvantage to the very person it is intended to protect.[8]

Non-denigration orders

52. It is understood that the current review is interested in the question of whether the making of a non-denigration order under the Family Law Act during interim proceedings (even if done on a mutual, non-admissions basis and assuming that paragraphs 102NA(1)(a) and (b) are met) falls within the provisions of subparagraph 102NA(1)(c)(iii) and thus triggers the mandatory protections under subsection 102NA(2).

53. Section 102NA of the Family Law Act provides as follows (emphasis added):

> *(1) If, in proceedings under this Act:*
> *(a) a party (the examining party) intends to cross-examine another party (the witness party); and*
> *(b) there is an allegation of family violence between the examining party and the witness party; and*
> *(c) any of the following are satisfied:*
> *(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 section 68B or 114 for the personal protection of either party is directed against the other party;*
> *(iv) the court makes an order that the requirements of subsection (2) are to apply to the cross-examination;*
>
> *then the requirements of subsection (2) apply to the cross-examination.*
>
> *(2) Both of the following requirements apply to the cross-examination:*
> *(a) the examining party must not cross-examine the witness party personally;*
> *(b) the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party.*

[8] At [11]-[23].

(3) The court may make an order under subparagraph (1)(c)(iv):
(a) on its own initiative; or
(b) on the application of:
(i) the witness party; or
(ii) the examining party; or
(iii) if an independent children's lawyer has been appointed for a child in relation to the proceedings-that lawyer.

54. Section 68B of the Family Law Act provides as follows (emphasis added):

(1) If proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including:
(a) an injunction for the personal protection of the child; or
(b) an injunction for the personal protection of:
(i) a parent of the child; or
(ii) a person with whom the child is to live under a parenting order; or
(iii) a person with whom the child is to spend time under a parenting order; or
(iv) a person with whom the child is to communicate under a parenting order; or
(v) a person who has parental responsibility for the child; or
(c) an injunction restraining a person from entering or remaining in:
(i) a place of residence, employment or education of the child; or
(ii) a specified area that contains a place of a kind referred to in subparagraph (i); or
(d) an injunction restraining a person from entering or remaining in:
(i) a place of residence, employment or education of a person referred to in paragraph (b); or
(ii) a specified area that contains a place of a kind referred to in subparagraph (i).
(2) A court exercising jurisdiction under this Act (other than in proceedings to which subsection (1) applies) may grant an injunction in relation to a child, by interlocutory order or otherwise, in any case in which it appears to the court to be just or convenient to do so.
(3) An injunction under this section may be granted unconditionally or on such terms and conditions as the court considers appropriate.

55. Further injunctive powers are found in subsections 114(1) and (3) of the Family Law Act which provide as follows (emphasis added):

(1) In proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:
(a) an injunction for the personal protection of a party to the marriage;
(b) an injunction 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;

(c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;

(d) an injunction for the protection of the marital relationship;

(e) an injunction in relation to the property of a party to the marriage; or

(f) an injunction relating to the use or occupancy of the matrimonial home.

(2A) In a de facto financial cause (other than proceedings referred to in, or relating to, paragraph (e) or (f) of the definition of de facto financial cause in subsection 4(1)) the court may:

(a) make such order or grant such injunction as it considers proper with respect to the use or occupancy of a specified residence of the parties to the de facto relationship or either of them; and

(b) if it makes an order or grants an injunction under paragraph (a)--make such order or grant such injunction as it considers proper with respect to restraining a party to the de facto relationship from entering or remaining in:

(i) that residence; or

(ii) a specified area in which that residence is situated; and

(c) make such order or grant such injunction as it considers proper with respect to the property of the parties to the de facto relationship or either of them.

Sections 90SB and 90SK apply in relation to an order or injunction under this subsection in a corresponding way to the way in which those sections apply in relation to an order under section 90SM.

(3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate.

(4) If a party to a marriage is a bankrupt, a court may, on the application of the other party to the marriage, by interlocutory order, grant an injunction under subsection (3) restraining the bankruptcy trustee from declaring and distributing dividends amongst the bankrupt's creditors.

(5) Subsection (4) does not limit subsection (3).

(6) If a party to a marriage is a debtor subject to a personal insolvency agreement, a court may, on the application of the other party to the marriage, by interlocutory order, grant an injunction under subsection (3) restraining the trustee of the agreement from disposing of (whether by sale, gift or otherwise) property subject to the agreement.

(7) Subsection (6) does not limit subsection (3).

56. It is not uncommon, early in proceedings (whether in respect of parenting and or financial matters) for order/s to be made such as:

> *Pending further order, each party is restrained and an injunction granted restraining that party, from denigrating the other parent to, or in the presence of the child.*
>
> *Or*
>
> *Pending further order, each party is restrained and an injunction granted restraining that party from harassing, intimidating or abusing the other party.*

57. If that order in the context of a parenting case is to be interpreted as having been made not just for the personal protection of a child, but also for the personal protection of the parent (and that broader interpretation is probably more likely correct) then the source of power is most likely to be paragraph 68B(1)(b). That on the face of it would trigger the mandatory ban. The same would be the case in financial proceedings where the source of power is likely to be paragraph 114(1)(a) and the mandatory ban then arises.

Appendix A – Case studies

The following case studies have been obtained from legal practitioners sharing their experiences with the Scheme to date. It is noted that these case studies do not necessarily reflect the views of the Law Council, and accuracy has not been independently verified in the time available.

The following case example indicates the practical difficulties for a section 102NA lawyer when working out whether they go 'on the record', what access they are given to the electronic court portal and how they ensure a 'client' has given them all relevant material:

> *We have one for a matter currently being prepared for a final hearing. It's early days but … the scope and parameters of your role under s102NA is unclear and confusing.*
>
> *The client has some resources to fund private representation - but is SRL by choice. We can of course act on instructions but there is doubt as to how much effort should be applied in steering the client in terms of expectation setting and case strategy/theory.*
>
> *As a practical issue, accessing the Court file and other documents (s69ZW reports which are not released to parties only lawyers) is problematic when you may not want to formally go on the record when acting in solely a s102NA capacity. I am not sure what others do in relation to this. Our enquiries with the Court indicated the only way around this was for client to give us all the documents (unreliable) or we send in a written request to be permitted to access the court file that could take time to process. If this is a system that is going to continue perhaps some sort of limited access to Court portal for lawyers acting under a s102NA grant needs to be implemented to reduce the administrative work.*

The following disparate case examples came from a lawyer involved in matters for legally aided clients:

> *In one matter a party was eligible for the scheme but chose not to do so. The party then arranged for a solicitor to appear on the day to cross examine the other party. The solicitor had very limited knowledge of this complex parenting and property matter. The arrangement did not assist the party or the court.*
>
> *In one matter the case did not finish in allocated time and written submissions were requested. It is unclear if the scheme allows for payment for written submissions. This resulted in the possibility of the party having to prepare their own submissions. Ultimately it was organised for payment of the 102 NA counsel to provide written submissions."*
>
> *In one matter the s102NA solicitor advised the court at a CMC that they would not be preparing documents for the party as the payment from the scheme was inadequate. The party had no ability to prepare their own documents and would require significant assistance. The client also had no merit whatsoever for their proposal hence their ineligibility for Legal Aid.*
>
> *In one matter the party provided instructions that were incompatible with the legal representatives duty to the court. Certain questions were not put*

to the other party. The client ultimately complained to the Law Society about their representation.

The following case study is from a private practitioner :

Serious family violence was alleged in a case. The party alleged to have committed FV had a six-figure taxable income but chose to be self-represented, having sacked a couple of lawyers along the way. The s102NA scheme applied. The alleged perpetrator sought to engage using the scheme before the final hearing and then terminated the services of several lawyers under the scheme (in one instance because they told him they would direct/manage the process of affidavit preparation – which he did not want). He attended at the final hearing without a lawyer and made several applications during the hearing to try to persuade the Judge to allow a process for questions to be put to the alleged victim (and he was able to access the duty lawyer at court on a couple of occasions to take advice). He also sought orders that the ICL ask certain questions; that the duty lawyer come in and ask questions; that the Judge ask the questions etc. All of those applications were refused. The matter proceeded and final orders were made that the children not spend time with him.