

Family Violence and Cross-Examination of Parties Scheme

Guidelines

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Introduction

The Legislation

The *Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018* started on 10 March 2019. From 10 September 2019 parties will not be allowed to personally cross-examine another party where a ban applies.

Once a ban applies cross-examination of both parties must be conducted by a lawyer. If a party is unrepresented, they will be informed that they must have a lawyer or apply to the Scheme.

If a party does not have legal representation at trial, they will not be able to cross-examine the other party.

Application of Cross-Examination Ban

A Cross-Examination ban may apply in any family law proceeding where there is an allegation of family violence between the parties.

The Cross-Examination ban will apply automatically if:

- (a) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;
- (b) a family violence order (other than an interim order) applies to both parties;
- (c) an injunction for the personal protection of either party is directed against the other party under section 68B or 114 of the Family Law Act.

The Court can impose a ban even if the preconditions for an automatic cross-examination ban do not apply. The Court can do this on its' own motion or on application by a party or the Independent Children's Lawyer (ICL).

Bans may also be made in cases where an interim family violence order is in place.

Administration of the Scheme in Tasmania

The Commonwealth Government has asked the Legal Aid Commission of Tasmania to administer the Family Violence and Cross-Examination Scheme in Tasmania (the Scheme).

Definitions

Applicant: a person subject to a Cross-Examination Ban and who makes an Application for legal assistance under the Scheme

Application for Assistance: a formal request by an Applicant to the Commission for legal assistance under the Scheme

Assisted person: an Applicant who has been granted legal assistance under the Scheme

Commission: the Legal Aid Commission of Tasmania

Counsel: is a Barrister who has been added to the Register of Practitioners maintained by the Commission

Court: a court of law exercising jurisdiction under the Family Law Act 1975 and which makes an order pursuant to s102NA of that Act

Cross-Examination Scheme (the Scheme): the Family Violence and Cross-Examination of Parties Scheme 2019 funded by the Commonwealth Government and administered in Tasmania by the Legal Aid Commission of Tasmania

Cross-Examination Ban: an order made under s102NA Family Law Act 1975 preventing the personal cross-examination of one party by another party

e-Lodge: the Electronic Lodgement system used for lodgement of applications for assistance

Exceptional Circumstances: unforeseen and/or unusual circumstances outside the control of the Assisted person which would:

- cause unforeseen or unusual hardship to the Applicant and
- directly impact on the Applicant's ability to have representation for the cross-examination in their matter

Family Law Act: the *Family Law Act 1975* as amended

Fee Schedule: the Family Violence and Cross-Examination of Parties Stage of Matter Work Items and Fee Schedule

Guidelines for Grants: the Commission's published "[Guidelines for Grants](#)" created pursuant to s27 *Legal Aid Commission Act 1990*

Lawyer: a legal practitioner who has been added to the Register of Practitioners maintained by the Commission

Legal Aid Commission Act: the *Legal Aid Commission Act 1990*

Register of Practitioners: a list maintained by the Commission of legal practitioners willing to represent Assisted Persons under the Scheme

Guidelines

Guideline 1 Register of Practitioners (“the Register”)

- (1) The Commission has created and will maintain a Register of Practitioners.
- (2) Only lawyers on the Register will be appointed to provide assistance to an Assisted Person under the Scheme.

Guideline 2 Forum and Reciprocity

The test for forum and reciprocity set out in the “*Guidelines for Grants*” applies to the assessment of Applications to the Scheme:

<https://www.legalaid.tas.gov.au/resources-for-lawyers/guidelines/>

Guideline 3 Eligibility for Assistance

- (1) The Commission may grant assistance where:
 - (a) an Application for Assistance in the approved form has been made to the Commission (<https://www.legalaid.tas.gov.au/need-help/family-violence-cross-examination-scheme/>);
 - (b) a Cross-Examination Ban has been made;
 - (c) the Applicant is not represented by a legal practitioner at the time of making the Application for Assistance;
 - (d) the proceedings have been allocated a trial date no later than 12 weeks from the date of the Application for Assistance; and
 - (e) if requested by the Commission the Applicant has provided a copy of the Cross-Examination Ban and the Trial Directions.
- (2) Application forms are to be submitted via email to: grants.officer@legalaid.tas.gov.au or by post or delivery to the Legal Aid Commission.
- (3) An Applicant must satisfy all eligibility criteria set out above.
- (4) It is a condition that the Applicant continues to meet the eligibility criteria for the whole time that representation is provided under the Scheme.
- (5) The usual Means and Merits test set out in the “*Guidelines for Grants*” do not apply to applications under the Scheme.

Guideline 4 Appointment of a Lawyer

- (1) Once an Applicant is granted assistance under the Scheme the Commission will:
 - (a) refer the matter to a Lawyer on the Register nominated by the Applicant/Assisted person; or
 - (b) refer the matter to a Lawyer on the Register;
 - (c) notify the Applicant/Assisted person and the Lawyer of the decision.
- (2) Once the Lawyer has been notified they must make application to the Commission by e-Lodge for an allocation of funds for representation and take all reasonable steps to progress the Applicant's Cross-Examination Scheme matter.

Guideline 5 Conditions of Assistance

(1) Available Funds

- (a) Limited funding has been made available to the Commission for the administration of the Scheme. In determining whether to approve an Application for Assistance the Commission will assess whether there are sufficient funds remaining to meet the costs of the proceedings.
- (b) In assessing availability of funds, the Commission may have regard to both funds committed to other cases and funds expended by the Scheme at the time an application is received.
- (c) If the Commission determines there are insufficient funds the Commission may refuse an application or terminate assistance.

(2) Report to the Commission

A lawyer must immediately notify the Commission if:

- (a) Administrative reasons
 - (i) they become aware that any information provided in the Assisted person's application is incorrect or incomplete; or
 - (ii) there is any change in the Assisted person's means relevant to any contribution imposed; or
- (b) Conduct reasons
 - (i) an Assisted person refuses to accept or follow reasonable legal advice; or
 - (ii) the Assisted person has acted in such a manner as to cause the lawyer to fear for the safety or wellbeing of themselves or of their staff, colleagues or others in the proceedings.

(3) Examination of Lawyers Files

The Commission may examine a lawyer's file at any time during or after the conclusion of the proceedings.

(4) Assisted Person Must Follow Legal Advice

- (a) An Assisted person must accept or follow the reasonable advice of the Lawyer providing representation.
- (b) If an Assisted person fails to accept or follow their Lawyer's reasonable advice the Commission may withdraw the grant of assistance.

(5) The Applicant Must Not Behave in a Harmful Way

The Assisted person is expected to conduct themselves in a manner which does not cause the lawyer to fear for the safety or wellbeing of themselves or of their staff, colleagues or others in the proceedings.

(6) Transfer of Assistance To Another Lawyer

- (a) The Commission will only approve a request by an Assisted person to have another lawyer assist them in exceptional circumstances.
- (b) The Assisted person must:
 - (i) write to the Commission to request the change;
 - (ii) set out any exceptional circumstances to support that request, for example: long term illness or unavailability of the lawyer appointed.
- (c) In assessing the request to transfer, the Commission will consider:
 - (i) any information provided as to exceptional circumstances;
 - (ii) whether the Assisted person has breached any conditions in these guidelines and/or if there is any additional cost to the Scheme if the transfer were to be approved;
 - (iii) whether there is another lawyer who can assist the Assisted person;
 - (iv) any other information received by the Commission as to the conduct of the Assisted person.

Guideline 6 Termination of Assistance

(1) Grounds for Termination

The Commission may at any time terminate or suspend assistance under the Scheme on any of the following grounds:

- (a) if the Assisted person ceases to meet the eligibility criteria in Guideline 3;
- (b) if the Assisted person or their Lawyer has provided information to the Commission which is inaccurate and that information affects the Assisted person's eligibility under the Scheme;
- (c) the Assisted person has refused to accept or follow the reasonable advice of their Lawyer;
- (d) if an Assisted person acts in such a way to cause their Lawyer or any other Lawyer available to be appointed under the Scheme to fear for the safety or wellbeing of themselves or their staff, colleagues or others in the proceedings;
- (e) a failure by the Assisted person or their Lawyer to respond in a timely and complete manner to a request for information made by the Commission;
- (f) a failure by the Assisted person or their Lawyer to comply with any of the guidelines or any request or direction by the Commission;
- (g) there is no Lawyer available to represent the Assisted person under the Scheme;
- (h) there are insufficient funds remaining to meet the costs of the proceedings.

(2) Insufficient Funds in the Scheme

- (a) The Commission will terminate the grant of assistance if the Commission determines it has reached the limit of the funds allocated by the Commonwealth for the Scheme under the Grant Agreement.
- (b) Where assistance has been terminated because there are insufficient funds the Commission will advise the Lawyer and Assisted person and request the Lawyer file a Notice of Ceasing to Act.
- (c) If the Commission receives additional funding under the Scheme, it will invite the Assisted person to reapply to the Scheme.

Guideline 7 Assisted Person No Longer Wants Assistance

- (1) If an Assisted person notifies the Commission that they no longer want representation under the Scheme the Commission will terminate assistance, notify the Lawyer of this and request that the Lawyer file a Notice of Ceasing to Act.
- (2) If an Assisted person terminates representation under the Scheme, the Commission will not normally approve a subsequent application by the Assisted person in the same proceedings except in exceptional circumstances.

- (3) In assessing a subsequent application the Commission will have regard to:
- (a) any information provided as to exceptional circumstances;
 - (b) whether the Assisted person has breached any conditions in these guidelines;
 - (c) any additional cost required to re-instate representation for the Assisted person to the stage of proceedings reached at the time representation was terminated;
 - (d) whether another Lawyer on the Register is available to be appointed;
 - (e) any other information received by the Commission as to the conduct of the Assisted person.

Guideline 8 Fees, Work Types and Disbursements

(1) Stage of Matter Limits

- (a) The Commission will pay fees in accordance with the [Fee Schedule](#). Lawyers will be advised of the maximum payable for each Stage of Matter as set out in the [Fee Schedule](#).
- (b) The Commission will not pay any account which exceeds the maximum limit unless an extension of assistance was sought and approved prior to the work being performed or the cost incurred.
- (c) Where a work item is not normally covered by the Fee Schedule the Assisted person must provide evidence as to the exceptional circumstances and/or complexity of the matter that justifies the additional payment.
- (d) The Commonwealth funding cap as set out in the Commission's "[Guidelines for Grants](#)" does not apply to this scheme.

(2) Disbursements

- (a) The following expenses will ordinarily be approved:
 - subpoena expenses/conduct money
 - interpreter fees
 - reasonable photocopying
 - reasonable regional travel/accommodation for counsel
 - reasonable witness expenses
- (b) The following expenses will not normally be approved:
 - court filing/setting down fees
 - expert/valuation/medical reports

- sundry items including telephone, fax, postage and photocopying other than copying previously filed document/reports and subpoenaed documents.
- (c) Where a request is made for a disbursement not normally covered by the Schedule the Commission will require evidence as to the exceptional circumstances and/or complexity of the matter that justifies the additional payment.

Guideline 9 Cost Guidelines

(1) Lawyers Must Only Receive Payment Authorised By the Commission

A lawyer must not accept any payment from an Assisted person (or from any other person on their behalf) other than those payments which are authorised by the Commission.

Receiving unauthorised payments may amount to a breach of *Section 22(3)(b)* of the *Legal Aid Commission Act*.

(2) No Payment for Work Done Before Assistance Approved

The Commission will not pay a lawyer for any work done prior to the Lawyer making an initial application for an allocation of funds under the Scheme.

(3) No Payment for Correspondence with the Commission

The Commission will not pay any fee charged by a Lawyer for:

- (a) assisting an Applicant to complete an Application Form;
- (b) interviews, letter and communications with the Applicant/Assisted person and/or the Commission for the purpose of an application or allocation and concerning the allocation or refusal of an Application for assistance;
- (c) preparation of and work done in connection with any itemised bill which it may require;
- (d) a report to the Commission regarding matters relevant to the Applicant/Assisted person's continuing eligibility or any assistance sought under the Scheme.

(4) Appointment of Counsel

- (a) Counsel may only be briefed where:
 - (i) Counsel is on the Register of Practitioners;
 - (ii) the payment to Counsel will not exceed the amount contained in the [Work Item and Fee Schedule](#) and will not involve additional cost to the Commission.

- (b) Counsel will be paid by the Commission upon presentation of Counsel's account.

(5) Finalisation of Matter

Within 14 days of the completion of a matter the Lawyer will provide a report to the Commission which must include:

- (a) the result of the matter, including details of orders made and particulars of any orders for costs;
- (b) full details of all monies recovered or to be recovered;
- (c) a certified pro forma invoice.

(6) Assisted Persons Contribution to Legal Costs

- (a) The Commission may at any stage request that the Assisted person make a contribution towards the costs of representation under the Scheme. The contribution may be up to the total estimated or actual cost of the representation. Any contribution to be imposed by the Commission will be assessed in accordance with [Guideline 7](#) of Commission's "[Guidelines for Grants](#)" then in force.

<https://www.legalaid.tas.gov.au/resources-for-lawyers/guidelines/>

- (b) The Commission may require the Applicant/Assisted person to provide information about their or any other financially related person's income, asset holdings in bank accounts, investments, real estate, business interests, all other assets other than household furnishings or any other information as required under the Commission's "[Guidelines for Grants](#)".
- (c) Any contribution to be imposed by the Commission will be assessed in accordance with [Guideline 7](#) of Commission's current "[Guidelines for Grants](#)" then in force.

<https://www.legalaid.tas.gov.au/resources-for-lawyers/guidelines/>

- (d) Any failure of an Applicant/Assisted person to provide the financial information as requested may lead to a refusal or termination of representation under the scheme.

(7) Applicant/Assisted Person Contribution – Lawyers Obligations

- (a) If the Commission levies a contribution on the Applicant/Assisted person the Lawyer will retain control of any money or property that comes into the Lawyer's possession or control, to cover the full amount levied by the Commission.
- (b) The Lawyer will continue to retain those funds until the Commission gives notice of the assessed amount payable by the Applicant/Assisted person.

- (c) When notified of the assessed amount the Lawyer will make payment to the Commission in the full amount assessed or, if the sum held by the Lawyer is less than the amount assessed, the whole of the amount held by the Lawyer.

(8) Lawyers Responsibilities for Costs

- (a) The Commission will not pay, and the Assisted person will not be liable for, costs arising from any application to correct faults of a procedural nature due to a mistake by the lawyer or counsel.
- (b) The Commission will not be liable for any personal order for costs made against a Lawyer or Counsel.

(9) Costs Order Against Assisted Person

- (a) The Commission will not pay any order for costs on behalf of an Assisted person unless a determination has been made under [Guideline 8](#) of the Commission's "[Guidelines for Grants](#)" pursuant to s26(2)(a) of the Legal Aid Commission Act.

<https://www.legalaid.tas.gov.au/resources-for-lawyers/guidelines/>

- (b) The Commission will not be responsible for any order for costs made against an Assisted person if assistance has been terminated due to the failure of the Assisted person to comply with any obligations under these Guidelines.

(10) Application for Costs

- (a) The Commission may require the Assisted person to make an application for costs.
- (b) In assessing if the Assisted person will be required to make a costs application the Commission may request a report setting out:
 - (i) a summary of the conduct of the Assisted person and other party/s to the proceedings;
 - (ii) an assessment of the financial capacity of the other party/s to meet a costs order;
 - (iii) the impact upon any child of the relationship or other family member if a costs order is made;
 - (iv) details of any financial or other hardship that may be incurred by the other party/s if a costs order is made;
 - (v) an assessment of the merits and likelihood of success of the costs application.

Guideline 10 Review and Complaints

(1) Review of Decisions

- (a) An Applicant/Assisted person may request a review of a decision of the Commission that:
 - (i) an Applicant is not eligible for assistance;
 - (ii) refuses a request for an allocation of funds or disbursement;
 - (iii) terminates assistance under these Guidelines.
- (b) A request for review must be made in writing within 14 days of being notified of the decision.
- (c) The review will be dealt with in accordance with Part 5 of the *Legal Aid Commission Act*.

(2) Complaints

Complaints about the administration of the Scheme or the representation provided can be made in writing to:

The Director
Legal Aid Commission of Tasmania
GPO Box 1422
HOBART TAS 7001

COMMONWEALTH FAMILY VIOLENCE AND CROSS- EXAMINATION OF PARTIES SCHEME

REGISTER OF LEGAL PRACTITIONERS

1. Background

The *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* was passed by in late 2018.

Under the Act, personal cross-examination is prohibited in family law proceedings where there is **an allegation of family violence** between two parties **and** one or more of the following applies:

- *either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party*
- *a family violence order (other than an interim order) applies to both parties*
- *an injunction under section 68B or 114 of the **Family Law Act 1975** for the personal protection of either party is directed against the other party, or*
- *the court makes an order that the mandatory requirements apply to the cross-examination.*

The provisions relating to cross-examinations apply from **10 September 2019**.

Where a ban is imposed cross-examination must be conducted by a **legal practitioner** acting on behalf of the examining party.

The Commonwealth is providing funding, to be administered by the Legal Aid Commission of Tasmania, to pay legal practitioners to represent parties where a personal cross-examination ban order is made.

2. The Register

2.1 The Family Violence and Cross-Examination of Parties Register (the Register) is established pursuant to section 22 of the *Legal Aid Commission Act 1990* (the Act).

2.2 The Register records the names of practitioners who are willing to represent parties eligible for assistance under section 102NA the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* and who have been accepted by the Legal Aid Commission of Tasmania for inclusion on the Register.

2.3 To be eligible for inclusion on the Register practitioners must have:

- a) Three years post admission experience, including demonstrated experience in the family law jurisdiction;
- b) Recent family law trial experience including having conducted cross-examination;

- c) the capacity to interact with persons affected by family violence and understand the issues impacting on these persons and their lives; and have undertaken CPD in relation to family violence within the last 2 years (or have registered to attend CPD prior to 10 September 2019);

2.4 Notwithstanding a person meeting the criteria in 2.3, a person may be refused inclusion on the Register if they:

- a) have been convicted of criminal offences or are subject to criminal proceedings including but not limited to family violence related offences, or
- b) are subject to a family violence order or a respondent to an application for a family violence order, or
- c) are subject to professional disciplinary proceedings or have been found to have breached their professional code of conduct or similar, and

such conduct, order or proceedings is considered to make it inappropriate to include them on the Register.

2.5 The maintenance of the Register, including the appointment, refusal to appoint or the removal of a practitioner from the register will be conducted in accordance with the requirements of section 22 of the Act.

2.6 To be considered for inclusion on the Register practitioners must send to the Director an expression of interest that addresses the criteria in clause 2.3.

2.7 Practitioners will be advised of the outcome of their expression of interest for inclusion on the Register within 28 days.

2.8 If a practitioner seeks removal of their name from the Register an email requesting removal should be addressed to the Director, Legal Aid Commission of Tasmania and forwarded via email to grants.officer@legalaid.tas.gov.au

Commonwealth Family Violence & Cross-Examination of Parties Scheme

(Court Ordered under Section 102NA Family Law Act)

Stage of Matter Work Items & Fee Schedule

		Hours	Rate
Stage 1	Pre-trial File Notice of Address for Service, attend client, read material, attend mention	4	Sol
Stage 2	Trial		
(a)(i)	Children or Property Matters only Documents for Trial - Instructions, drawing, settling, swearing/affirming filing and serving all trial Affidavits, subpoenas, Notice to Admit Facts, Notices to Produce, forms seeking exemption from payment of fees.	6	Sol
(a)(ii)	Children and Property Matters Documents for Trial - Instructions, drawing, settling, swearing/affirming filing and serving all trial Affidavits, subpoenas, Notice to Admit Facts, Notices to Produce, forms seeking exemption from payment of fees.	9	Sol
(a)(iii)	Documents - Matters listed in excess of 3 hearing days Additional time to prepare documents for longer hearings.	4	Sol
(b)(i)	Children or Property Matters only Trial Preparation – Outline of Case/Case Summary document, settle Joint Case Summary, List of Authorities, Attend client, review all material, draw list of objections, prepare opening, submissions, examination in chief and cross-examination	10	Sol
(b)(ii)	Children and Property Matters Trial Preparation – Outline of Case/Case Summary document, settle Joint Case Summary, List of Authorities, Attend client, review all material, draw list of objections, prepare opening, submissions, examination in chief and cross-examination	13	Sol
(b)(iii)	Trial Preparation - Matters listed in excess of 3 hearing days – (per additional day)	2	Sol

(c)	Trial Costs as Solicitor or Counsel , attendance at each day of hearing, including negotiations over the course of the trial – per day.	7	Counsel
(d)	Preparation for Closing - Complex Matters Only payable where cases are closed and matter is adjourned to prepare closing submissions	1.5 for each day of trial to date	Counsel
XE	Additional File/Work items		
(a)	Negotiations - Any Stage Pre-Trial	Up to 2	Sol
(b)	Attendance at FDR, ICL or Court Ordered Mediation – Instructions, attendance at conference	4	Sol
(c)	Instructions on Report – reading and instructions on Expert or Family Report	2	Sol
(d)	FCA Bundle Book (Family Court only) - preparing, copying and distributing Bundle Book including index/list of documents, approving list with other parties, copying documents for the purpose of admitting or tendering by consent those documents	3	Sol
(e)	Extra mention or listing To be claimed where additional pre-trial mention listed by the Court	2	Sol
(f)	Contravention or Interim Proceedings with Cross-Examination Instructions, perusal of Order, preparation of Application, supporting Affidavit/s, arrange service including evidence in support, prepare cross-examination and submissions, all Court appearances including hearing.	7	Sol or Counsel
(g)	Other - Exceptional circumstances Exceptional circumstances must be directly related to the proper conduct of the cross- examination at trial and of a complex and/or novel nature.	Variable up to 4	Sol or Counsel

Other	Disbursements		
	Barrister – Trial Preparation Children or Property Barrister disbursement for trial preparation children and or property matters	As per 2(b)(i)	
	Barrister – Trial Preparation Children and Property Barrister disbursement for trial preparation children and or property matters	As per 2(b)(ii)	
	Barrister – Trial Costs Attendance at each day of hearing, including negotiations over the course of the trial – per day.	As per Item 2(c)	
	Mediation Chairperson fee	variable	
	Subpoena Expenses	Up to \$100	
	Interpreter	variable	
	Photocopying of filed documents/reports and subpoenaed documents	0.20 per page	
	Regional accommodation if approved per night of trial	Up to \$180	
	Regional travel if approved (solicitor's time in hours)	140	
	Travel Distance (kilometres)	0.40 per km	
	XE Other disbursements – Exceptional circumstances (must be directly related to the proper conduct of the cross-examination)	variable	