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Direct cross-examination in family law matters

Incidence and context of direct
cross-examination involving
self-represented litigants

REPORT 2018

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Executive summary

This report sets out findings from the Direct Cross-examination in Family Law Matters project, which was commissioned and funded by the Australian Government Attorney-General's Department. The project explores quantitative and qualitative data relevant to direct cross-examination involving self-represented litigants in family law matters, derived from court files and audio and transcripts of proceedings, collected from the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCCoA), together with an analysis of relevant unreported judgments of the Family Court of Western Australia (FCoWA).

The data analyses were undertaken to explore:

- the extent to which direct cross-examination was a feature of matters involving self-represented litigants in families characterised by alleged or substantiated family violence; and
- the factual and legal context characterising these family law matters as compared to those matters where direct cross-examination involving self-represented litigants did not take place.

The analyses highlight that the most common form of direct cross-examination was one where fathers directly cross-examined the mother only.¹ The data also show that there were higher rates of allegations of family violence against both parties in court files where direct cross-examination occurred. The data suggest that specific safeguards were typically not in place when direct cross-examination was permitted. If specific safeguards were in place, the most common forms involved judicial officers actively intervening to relay questions. A description of the sample characteristics and key findings from the quantitative analysis of the court files are summarised below.

Sample characteristics

The sampling strategy employed for the Direct Cross-examination in Family Law Matters project was to sample all Family Court of Australia (FCoA) and Federal Circuit Court of Australia (FCCoA) matters, in *all* case categories finalised in the 2015/16 financial year and the 2016/17 financial year that involved:

- one or more self-represented litigants;
- allegations of (or substantiated) family violence; and
- that had progressed through to a final hearing and the hearing had commenced, with the matter finalised either by consent during the proceedings or by judicial determination.

Court files meeting these criteria were deemed to be "*in-scope*" cases.

In total, 97 in-scope cases spanning the 2015/16 and 2016/17 financial years were sampled, and detailed data was collected from these files and (where applicable) from the audio of proceedings. Key characteristics included:

- The majority (76%) were heard in the FCCoA.
- FCoA cases were more likely to have an independent children's lawyer (ICL) appointed.
- Almost all (99%) involved a dispute about children/parenting matters. Around one-fifth of cases involved financial matters, with this being more likely in FCoA cases.
- Two-thirds of all cases proceeded to full judicial determination.

¹ The phrase "fathers cross-examined mothers only" means that fathers directly cross-examined the mothers but the mothers did not directly cross-examine the fathers in these cases and the phrase "mothers cross-examined fathers only" means that mothers directly cross-examined the fathers but the fathers did not directly cross-examine the mothers in these cases.

- Male parties (mostly fathers) were more likely than female parties (mostly mothers) to be self-represented and this pattern was consistent for applicants and respondents. Specifically, in just more than one-half of files (52%), fathers were self-represented and mothers were legally represented; compared to just over one-quarter of cases where the mother was self-represented and the father was legally represented (27%). In one-fifth of files (20%), both mothers and fathers were self-represented.
- Direct cross-examination took place in more than two-thirds of in-scope cases (72%; $n = 70$).
- Direct cross-examination was also more likely to occur when multiple matters were in dispute.

The process undertaken by the FCoA and FCCoA to identify all in-scope court files over the selected two financial year periods was a complex one that involved an assessment of a number of data fields in CaseTrack and, in some instances, the perusal of file notes. It was not possible within the project time frame to collect comprehensive data from all the court files identified as highly likely to be in-scope ($n = 138$), or to identify whether direct cross-examination took place in each of these cases. For these court files, which were not part of the detailed data collection for this project, small numbers of court files ($n = 30$) were randomly selected to assess the level of in-scope files and the occurrence of direct cross-examination. This assessment indicated that this supplementary sample mirrored the study sample in terms of the extent to which files were in-scope and involved direct cross-examination. These similarities mean that the findings made in relation to the study sample may be regarded as representative of overall in-scope cases.

If we assume the 30 randomly selected files were reflective of all the court files identified in the second round, this suggests that 90–130 cases would be in-scope and 52–103 cases may have involved direct cross-examination. Together with the cases from which detailed data were collected, approximately 187–227 would be in-scope and 122–173 cases across the two courts over two financial years may have involved direct cross-examination. Further details of the steps required to identify the relevant sample are provided in Chapter 1.

Limited data were also collected from 39 unreported judgments available via the PLEAS online service that were identified as in scope from the FCoWA over the 2015/16 and 2016/17 financial years. Parenting and children matters were in dispute in around three quarters of these judgments, with financial matters in dispute in 33% of judgments analysed. Matters heard in the Family Court were more likely to involve multiple issues compared to those heard in the Magistrates Court (22% compared to 10%). Direct cross-examination was a feature in around one half of the judgment sample (44%). However, as information was collected from judgments rather than directly from FCoWA court files, it is possible that direct cross-examination may have been undertaken but not mentioned in additional judgments in the Western Australian sample, however, data collectors had no way of identifying this as a feature in any such judgments.

Summary of key findings

Matters involving direct cross-examination

The majority of cases (72%) involved direct cross-examination. Most commonly, fathers cross-examined mothers only (33%). In a further 28% of cases, mothers cross-examined fathers only. In 11% of cases, both parents cross-examined each other and there was no cross-examination in the remaining 28% of files. Of the cases that did not involve cross-examination, some settled prior to cross-examination ($n = 10$) and in some instances the opposing party did not appear in court ($n = 5$), while in the remaining cases the reason that cross-examination did not take place was unclear.

The data can also help shed light on the characteristics of the cases where there is direct cross-examination.

- There were higher rates of allegations of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination.
- The rate of allegations of family violence against the father was higher than that against the mother (83% vs 39%). This pattern applied to cases involving direct cross-examination and those without direct cross-examination.

The majority of both self-represented fathers and mothers conducted direct cross-examination. While fathers were more likely than mothers to be self-represented, interestingly, self-represented mothers were more likely than self-represented fathers to conduct direct cross-examination in the in-scope sample (81% vs 62%).

The analysis also examined when a parent was self-represented and whether direct cross-examination was influenced by the other parent's legal representation and/or by the existence of allegations or substantiated family violence.

- When a father was self-represented, the likelihood that he would directly cross-examine the mother was associated with the mother having legal representation (being more likely to take place in these cases).

- Fathers were more likely to conduct direct cross-examination where the allegations of family violence involved children as victims.

The qualitative data provides insight into the experiences of both parties undertaking direct cross-examination and parties being directly cross-examined where these matters were characterised by alleged or substantiated family violence.

Risk assessment procedures and outcomes

Analysis of the data collected in the court files in-scope sample shows that the conduct of family violence/safety risk assessments by family consultants were more common than not. In almost 60% of files there was evidence that a risk assessment had been undertaken by a family consultant, with this being more likely in the FCoA (74%) compared with the FCCoA (54%).

The analysis also revealed that family violence or child safety risks were more likely to be substantiated and to consequently have the involvement of state child protection agencies in cases where the mother directly cross-examined the father (30%) than among other cases where the father directly cross-examined the mother (13%).

The analysis regarding judicial findings on allegations of family violence or abuse or risks to safety were similar for fathers and mothers; that is, the allegations against the cross-examiners (both fathers and mothers) were more likely to be upheld. For 45% of mothers who directly cross-examined the father, the allegation of family violence or abuse or child safety risk about her was upheld in part or in full; this applied to 31% of fathers who conducted direct cross-examination.

Evidentiary profiles

The court file data highlight that multiple forms of evidence were commonly used to support family violence or abuse allegations. In 63% of cases, at least two forms of evidence were identified on the given file. The most frequently submitted forms of evidence were family violence orders (57% of cases) and a family report or other evidence from a family consultant (42%).

A notable finding when this data was further analysed in relation to direct cross-examination was that for most of the evidence types for which information was collected, a higher proportion of cases where no direct cross-examination occurred had each form of evidence when compared to the corresponding proportion of files where direct cross-examination did take place.

Arrangements to accommodate cross-examination

The majority of cases (58%) involving direct cross-examination did not involve specific safeguards in place for either party (witness and cross-examiner). Specific safeguards could include remote witness facilities/screens, judicial intervention (including by relaying or rephrasing questions or reprimanding the parties) and monitoring of the direct cross-examination process or permitting assistance by a McKenzie friend. Where specific safeguards were in place, they were provided more commonly for the protection of mothers when cross-examining (42%) than for fathers when cross-examining (33%) or for either mothers (23%) or fathers (24%) as witnesses, and these safeguards were most likely to involve judicial intervention primarily to take an active role in formulation of and/or relaying of questions.

Final parenting and property orders

When looking at the relationship between direct cross-examination and children's final care-time arrangements ordered by consent or by judicial determination, an association was found between the parents' time with their children and the parent who undertook direct cross-examination. More specifically, it appears that fathers and mothers who conducted direct cross-examination had less overnight time when compared with their counterparts of the same gender who did not undertake direct cross-examination.

The patterns of final judgment orders regarding general parenting and property-related matters were similar overall across the cases whether or not direct cross-examination occurred and whether it was the mother or father who conducted the direct cross-examination. Contravention orders were more common in cases where the mother cross-examined the father and supervised contact orders were more common in cases without direct cross-examination or where the father directly cross-examined the mother.

1 Introduction

This report sets out findings from the Direct Cross-examination in Family Law Matters project, which was commissioned and funded by the Australian Government Attorney-General's Department. The project explores quantitative and qualitative data relevant to direct cross-examination involving self-represented litigants in family law matters, derived from court files and audio and transcripts of proceedings, collected from the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCCoA), together with an analysis of relevant unreported judgments of the Family Court of Western Australia (FCoWA).

The aim of this project was to develop a robust, evidence-based understanding of:

- the extent of direct cross-examination involving self-represented litigants in family law matters that proceed to a final hearing and where family violence has been alleged or substantiated; and
- the factual and legal context characterising these family law matters (including the arrangements made by the courts to safeguard litigants where direct cross-examination took place) as compared to those matters where direct cross-examination involving self-represented litigants did not take place (including any alternative arrangements made where direct cross-examination was not permitted).

The focus of this research was on cases where:

- the self-represented party undertaking the direct cross-examination was the alleged or substantiated perpetrator of the family violence and the witness was the alleged or substantiated victim; and
- the self-represented party undertaking the direct cross-examination was the alleged or substantiated victim of the family violence and the witness was the alleged or substantiated perpetrator.

In this chapter, the research aims and research design of the Direct Cross-examination in Family Law Matters project will be outlined, together with relevant literature, legislative frameworks and case law, to provide context to the analyses in the substantive chapters of this report.

Chapter 2 will outline the demographic profile of parties and case characteristics from both the FCoA and FCCoA primary court file sample and from the FCoWA judgment sample. Chapter 3 will provide analyses relating to the extent to which the sampled cases involved direct cross-examination. It will also examine the relationship between direct cross-examination and claims made about each party (including claims made about family violence, family violence orders and criminal history). Chapter 4 will consider the extent to which risk assessments were conducted in the files included in the primary court file sample, together with the evidentiary profiles in these cases. Chapter 5 will explore the range of arrangements made to accommodate and manage direct cross-examination in the data samples, including the presence of any safeguards for either party. The discussion in Chapter 6 will provide an analysis of findings in relation to any association between the case outcomes for parenting, property or other cases and the extent of direct cross-examination. A summary of the key findings and a discussion of the conclusions arising from this research will be provided in Chapter 7.

1.1 Background

Our family law system is based on the adversarial approach to court proceedings, with cross-examination a key tenet of this approach and the means by which evidence that is relied upon by parties is tested in court (see e.g., discussion in *Martin v Martin* (2014) FCCA 2838 in the family law jurisdiction and more generally e.g., *Browne v Dunn* [1894] 6 R 67; *Lee v The Queen* (1998) 195 CLR 594 [32]. See also Murray, 2014; Wigmore as quoted in Bowden, Hanning, & Plater, 2014, p. 560 and Australian Law Reform Commission (ALRC), 2015, p. 237). Given that a substantial proportion of litigated family law matters proceeding to judicial determination are characterised

by allegations of family violence (see e.g., 65% of parenting and parenting/financial matters in the post-reform sample of Kaspiew et al., 2015, p. 45), it is important to note that at present, there are no specific provisions in the *Family Law Act 1975 (Cth)* (FLA) that:

- prohibit a self-represented, alleged perpetrator from directly cross-examining the alleged victim; or
- provide an alternative process for a self-represented alleged victim so that they are not required to directly cross-examine an alleged perpetrator.

In July 2017, the Australian Government, Attorney-General's Department released an Exposure Draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017, which seeks to ensure that victims of family violence are protected from being personally cross-examined by their alleged perpetrator. More specifically, the proposed sections 102NA(1) and 102NA(2) provide for the prevention of direct cross-examination involving self-represented parties where allegations of family violence have been made and:

- either party has been *convicted of or charged with* an offence involving violence or threat of violence to the other party; or
- a final family violence order applies in relation to both parties; or
- an injunction under sections 68B or 114 of the FLA applies to both parties.

Current protective measures relevant to direct cross-examination in the *Family Law Act 1975 (Cth)*

At present, Division 12A of the FLA requires child-related proceedings in the family law jurisdiction to be conducted following a less adversarial approach that reduces formality and accommodates greater judicial intervention in the conduct of proceedings. Following research in relation to the effect of escalating conflict in the context of the adversarial approach and its effect on children (McIntosh, 2006), Division 12A was introduced into Part VII (child-related proceedings) with a view to enshrining the Children's Cases Program pilot, placing "the control of the proceedings ... in the hands of the judge, rather than the parties or their legal representatives" and involving a child-centred focus that is "geared to the needs of the child" (Harrison, 2007, ix; Murray, 2014 and see e.g., *Martin v Martin* (2014) FCCA 2838 [32]; *Truman v Truman* (2008) FamLR 614 [7]).² Of particular relevance to this research project, Division 12A requires the court:

- to conduct proceedings in a manner that safeguards parties to proceedings against family violence (s 69ZN(5) FLA) and "with as little formality, and legal technicality and form, as possible" (s 69ZN(7) FLA; see also s 69ZT); and
- to "actively direct, control and manage the conduct of proceedings" (s 69ZN(4) FLA).

Division 12A also provides for the court to limit or preclude cross-examination of a witness and to admit and draw conclusions from transcripts of evidence from other proceedings (s 69ZX FLA).

Provision may also be made for proceedings to be facilitated via remote witness facilities to enable evidence to be provided from a location outside of the courtroom (s 69ZQ FLA; see also s 102C-102D FLA in relation to video link and s 27A for safe location hearings), and for findings in relation to family violence to be made "at an early stage" (s 69ZR FLA), thereby potentially avoiding the need to rely on evidence from the victim. Additional arrangements may include the ICL cross-examining the witness prior to the self-represented litigant, the placement of screens to separate the parties or case management measures including the judicial officer relaying the questions on behalf of the unrepresented litigant. The Family Law Courts *Family Violence Best Practice Principles* (2016) also reference these and other provisions and provides guidance in the exercise of judicial discretion in these circumstances.

Additional provisions in the FLA, and in both the common law and the uniform evidence legislation (see *Evidence Act 1995 (Cth)* s 41), also operate to inform the manner in which parties may undertake questioning in cross-examination. Section 101(1) FLA also requires the court to "forbid the asking of, or (to) excuse a witness from answering, a question that it regards as offensive, scandalous, insulting, abusive or humiliating" unless it is "essential in the interests of justice". Section 101(2) FLA similarly prohibits the examination of a witness that is regarded by the court to be "oppressive, repetitive or hectoring, or (to) excuse a witness from answering questions asked during such an examination". Section 41 of the *Evidence Act* also disallows "misleading", "confusing", "unduly annoying, harassing, offensive, oppressive, humiliating or repetitive" questions that are asked in "a manner or tone that is belittling, insulting or otherwise inappropriate" or has "no basis other than in stereotype".

² This Division was introduced into the FLA with the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* following the Children's Cases Program Pilot. See further Harrison, 2007; Hunter, 2006; McIntosh, 2006; McIntosh, Wells, Smyth, & Long, 2008.

As the discussion of literature below suggests, however, these particular provisions have been identified by some commentators as providing insufficient protection to witnesses in practice (see for e.g., Bowden et al., 2014; Cossins, 2009; Kaye, Wangmann, & Booth, 2017a; Kennedy, Eastal, & Bartels, 2012, p. 338; Women's Legal Services Australia [WLSA], 2015; Women's Legal Service Victoria [WLSV], 2015a).

This suite of current protective measures was considered by the Family Law Council in their final report on *Families With Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2016). Measures described as “court craft”, which involved the judicial officer relaying questions to witnesses or reprimanding self-represented litigants for aggressive questioning, and warning of the implications this questioning may have on findings of credit, were contrasted with the state and territory legislative provisions and, in this context, were identified as limited in their capacity to “balance the competing interests in these cases of ensuring therapeutic process, good quality evidence and procedural fairness” (p. 114). This issue of procedural fairness is considered in more detail later in this chapter.

While the measures introduced in the family law jurisdiction to address the needs of vulnerable witnesses (including these alternative arrangements for evidence to be given via remote witness facilities) have been identified as intending to address the trauma posed by direct cross-examination, calls have been made by some commentators for more fundamental changes to be made to address the underlying issues associated with allowing direct cross-examination in these circumstances (see for e.g., Bowden et al., 2014, p. 563; Kaye, Wangmann, & Booth, 2017a; WLSA, 2015).

In spite of the provisions included in Division 12A FLA, concerns have also been raised more generally about the opportunities within the family law system for “perpetrators of family violence to continue the abuse of their families ... (via) delaying tactics, repeated applications and the failure to comply with court orders in order to control ... and coerce them into unsafe consent agreements” (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, p. x). More specifically, the provisions in Division 12A have been identified as being “inconsistently applied” and “ultimately inadequate in many cases”, with alternative options (such as more precise use of subpoenas and uptake of alternative arrangements including permitting evidence to be given remotely) not commonly adopted (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, Submission 60, p. 135). This is compounded by what was described as a “long-standing reluctance” on the part of the judiciary to intervene in cross-examination (see e.g., Australian Law Reform Commission and New South Wales Law Reform Commission, 2010, p. 1,336; Bowden et al., 2014, pp. 549–550 and 565–566; Cossins, 2009, p. 68; Loughman, 2016, p. 27).

This judicial reluctance has been identified as stemming from the adversarial nature of the system rather than any insufficient authority for the judiciary to exercise their discretion pursuant to these provisions (Ellison, 2001, p. 370). Of note, the final report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (House of Representatives Standing Committee, 2017) indicated “deep” concern that the courts had not more actively used their existing power to regulate the direct cross-examination of victims of family violence by their unrepresented perpetrators in family law proceedings (2017, p. 158).

The Council of Australian Governments' (COAG) National Summit on *Reducing Violence Against Women and Their Children: Outcomes and Reflections. Connect. Act. Change* (2016) has recommended the elimination of direct cross-examination in the family law system (COAG, 2017, p. 30). Consistent with this recommendation, the House of Representatives Standing Committee has recommended that the Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill, 2017 (noted earlier in this section) be introduced into the Parliament for urgent consideration, to implement a prohibition against perpetrators of family violence from cross-examining the other party, and to enable consideration of the qualifications and funding arrangements for those that may be appointed to undertake such cross-examination” (Recommendation 12, p. xxxii, p. 158). In addition, having observed that families characterised by family violence who are parties to property/financial proceedings “also require protection from the potentially re-traumatising experience of being cross-examined by a perpetrator of violence”, the Standing Committee also recommended that the application of s 69ZN and s 69ZX be extended to those cases (2017, p. 181. See also e.g., Legal Aid NSW, 2017).

Together with the recommendations relating to extending the protections provided for in Division 12A, the House of Representatives Standing Committee also recommended that the examples set out in the definition of family violence in s 4AB(2) of the FLA be amended to include “abuse of process in the context of family law proceedings” (Recommendation 8, p. xxxi), and that the Australian Law Reform Commission develop proposed amendments to Part VII of the FLA, including that they consider the removal of the presumption of equal shared parental responsibility (Recommendation 19, p. xxxiii).

Protective measures in state and territory jurisdictions for matters involving domestic and family violence

The protective arrangements relating to direct cross-examination in the family law jurisdiction contrast with those arrangements relating to cross-examination in state and territory jurisdictions where restrictions have been imposed in relation to sexual offence proceedings, and in some jurisdictions where restrictions are in place for proceedings relating to family violence orders. This means that while an alleged victim may be protected from cross-examination in the state/territory system, in the family law system, cross-examination may be permitted of the same alleged victim on many of the same issues (WLSA, 2015, p. 3).

The amendments made to the sexual assault and family violence legislation vary between the states and territories and have been made largely in response to the recommendations of the Australian Law Reform Commission and NSW Law Reform Commission's (2010) final report of their Review of Legal Frameworks to Improve the Safety of Women and Their Children. These recommendations included that:

- all state and territory family violence legislation prohibits direct cross-examination by a respondent of a person against whom the respondent is alleged to have perpetrated family violence (2010, Recommendation 18-3); and
- all federal, state and territory legislation be amended to prevent complainants (and other vulnerable witnesses) in sexual assault matters being directly cross-examined, with a person to be appointed by the court to ask questions on the defendant's behalf (2010, Recommendation 28-5).

In most Australian jurisdictions, self-represented accused parties are not permitted to directly cross-examine the complainant in sexual assault proceedings, with provisions generally providing for a person to be appointed to undertake the cross-examination. In Victoria and Queensland, Legal Aid is the appointed body; in NSW, the court must appoint a specific person; and in Tasmania and South Australia, the right to cross-examination is forfeited if the self-represented litigant does not obtain representation.

In Victoria, Queensland, Western Australia, South Australia, Northern Territory and the Australian Capital Territory, legislation also prevents the direct cross-examination in proceedings for family violence orders. For example, the *Family Violence Protection Act 2008* (Vic.) stipulates special rules for the cross-examination of "protected witnesses" whereby the court must order Victoria Legal Aid to offer the respondent legal representation where they have not obtained their own legal representation and they have been given reasonable opportunity to do so (s 71). Where a respondent refuses representation and is not otherwise permitted to cross-examine the protected witness, restrictions are placed on the evidence that the respondent can give. Victoria Legal Aid is also required to provide legal representation to applicants in these cases where the respondent is prohibited from undertaking cross-examination and the police have not made the application.

The Productivity Commission (2014) in its Inquiry report on Access to Justice Arrangements recommended that the FLA be amended to be consistent with state and territory family violence legislation with regards to cross-examination (Recommendation 24.2). Consistent with this recommendation, the *Report of the Vulnerable Witnesses and Children Working Group* (Vulnerable Witnesses and Children Working Group, 2015) recommended considering the adoption of the protective measures from the criminal justice system before "rush(ing) forward to reinvent the wheel" (p. 2).

Of note, however, is Victoria Legal Aid's (2015) advice to the Victorian Royal Commission into Family Violence in 2013-14 that the protective measures were not widely invoked, with only 308 applicants and 192 adult respondents provided with court-ordered representation for cross-examination (p. 198). More generally, the provisions vary significantly between jurisdictions and in the absence of both evaluative and comparative research, it cannot be assumed that these approaches can be successfully transplanted between jurisdictions (Kaye, Wangmann, & Booth, 2017a).

Prevalence of direct cross-examination

At present, there is limited Australian empirical research regarding the prevalence of direct cross-examination involving self-represented litigants in family law proceedings. At the time of this research project, the Australian family law courts did not routinely collect data on the prevalence of direct cross-examination in matters where family violence had been alleged or substantiated.

The WLSA 2015/16 study surveying 338 women survivors of domestic and family violence provides some insight into prevalence, although the precise period during which their experiences of direct cross-examination occurred is unclear. The study identified that a majority of participants reported experiencing violence and 43% reported

that they were directly cross-examined by the perpetrator in their family law proceedings, with a substantial proportion of these reporting that they felt “frightened, unsafe, re-traumatised and intimidate(d)” (2017a, p. 27 and 2017b, p.3). Descriptions of the physical symptoms and of systems abuse in this process were also provided. Of the 22% of matters that settled before reaching a final judicial determination, more than one-half (57%) reported that their fear of direct cross-examination was a factor in their decision to settle, and a further 42% identified “other reasons” including fear of cross-examination (see also WLSA, 2017b, p. 3). Additionally, 11% reported having to directly cross-examine their perpetrator (WLSA, 2017a, p. 28).

More recently, the findings of the House of Representatives Standing Committee’s Parliamentary Inquiry Questionnaire provide some insight into prevalence (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, p. 362). Of the 5,490 (77% female; 22% male) participants in the questionnaire,³ under half ($n = 2,215$) provided a response to the question: “Were you subjected to cross-examination at court?” (p. 362). Of these participants, 46% reported that they had been cross-examined ($n = 1,018$) and 54% reported that they had not been cross-examined ($n = 1,197$). A minority of participants responded in the affirmative to the question of whether they had been *directly* cross-examined by a person accused of perpetrating family violence against them or a family member (18%; $n = 381$), with most reporting in the negative (80%; $n = 1,761$).

Again, a minority of participants answered in the affirmative when responding to the question of whether they were required to *directly* cross-examine a person accused of perpetrating family violence against them or a family member (13%; $n = 266$), while 87% reported in the negative ($n = 1,858$). When asked about their level of satisfaction with the handling of the process of cross-examination by the court, the majority of participants responding to this question reported that they were not satisfied (72%; $n = 952$), and 27% ($n = 357$) reported that they were satisfied. It is unclear, however, which proportion of these respondents were referring to direct cross-examination and which proportion were referring to cross-examination conducted by a legal professional.

In the United Kingdom, the absence of routinely collected administrative data regarding direct cross-examination has led the UK Ministry of Justice (Analytical Services) to undertake a study to collect both quantitative and qualitative data to examine the question of prevalence. The quantitative component involved the analysis of data relating to actual or potential cross-examination of vulnerable⁴ or intimidated witnesses by litigants in person accused of “domestic abuse” between March and May 2015, from all courts in England and Wales that heard private family law matters. In 34 of the 124 hearings in this period, direct or indirect cross-examination took place (Corbett & Summerfield, 2017).

Research and literature relating to the trauma associated with direct cross-examination

The trauma that may be experienced by a victim as a result of direct cross-examination by an alleged/substantiated perpetrator has been widely acknowledged (e.g., Bowden et al., 2014; Cossins, 2009; Douglas, 2017; Fitch and Easteal, 2017; Kaye, Wangmann, & Booth, 2017a; Family Law Council, 2016; Kaspiw et al., 2017; Kennedy, Easteal, & Bartels, 2012; Loughman, 2016; Royal Commission into Family Violence, 2016; Women’s Legal Services Australia, 2015; Women’s Legal Service Victoria, 2015a; Women’s Legal Service Victoria, 2015b). Some research and commentary observe that the process of direct cross-examination by a perpetrator or a victim may be as traumatic as the initial abuse (e.g., Cossins, 2009, p. 68; see also House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

In its final report, the Family Law Council (2016) noted the concerns of stakeholders arising from the substantial numbers of self-represented litigants in family law matters involving alleged or substantiated forms of family violence, including the facilitation of direct cross-examination in these circumstances. (p. 114). The Council referred to the “abundant evidence that for women and children who have been assaulted or psychologically abused, direct cross-examination ... can result in them being re-traumatised” (p. 114). This may, in turn, be identified as undermining procedural fairness in cases involving direct cross-examination—a concept that, as noted above, is a principal tenet of our adversarial legal system that may be broadly understood as the “fair procedure for decision-making.”⁵

It is reflected in the common law duty to accord procedural fairness to a person when a decision is being made that affects them (Australian Law Reform Commission, 2015, pp. 19 and 391; and see e.g., *Dietrich v*

³ The questionnaire was open for completion between March and September 2017.

⁴ Witnesses under 17 years of age, suffering from a mental disorder, impaired intelligence and social functioning or with a physical disability or disorder were defined as vulnerable witnesses (Corbett & Summerfield, 2017).

⁵ More specifically, procedural fairness is traditionally regarded as comprised of the fair hearing rule and the rule against bias (see e.g., *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

The Queen (1992) 177 CLR 292; *Minister for Immigration and Border Protection WZARAH* [2015] HCA 40). As observed by the Australian Law Reform Commission (2015) *Traditional Rights and Freedoms: Encroachment by Commonwealth laws*, there has been movement towards inferring procedural fairness as a constitutional right on the basis of the judicial power in Chapter III of the *Australian Constitution* (p. 33).⁶ This concept of procedural fairness will be considered in greater detail later in this chapter.

More recently, the final report of the Parliamentary Inquiry by the House of Representatives Standing Committee on Social Policy and Law Reform (2017) indicated that most participants in the inquiry “overwhelmingly supported” addressing the issue of direct cross-examination by perpetrators of family violence in family law matters (p. 158, and see list at footnote 256). Some submissions to this Committee characterised direct cross-examination by a perpetrator as an abuse of process (2017, p. 67), and a means by which perpetrators may continue to traumatise their victims (see also Coy, Perks, Scott, & Tweedale, 2012).

The Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report (Kaspiew et al., 2017) prepared by AIFS and colleagues similarly identified that the experience of direct cross-examination can be an abuse of process (see also e.g., Loughman, 2016). This mixed methods, multi-disciplinary study included a qualitative study with 50 women who had experienced domestic and family violence and had engaged services from the domestic and family violence (DFV), child protection or family law systems. More than half of the participating women described their involvement with multiple agencies and legal frameworks, with their former partners using the various aspects of these systems to perpetuate the dynamics of fear, coercion and control, in particular by extending the family’s engagement with the family law system (p. 180).

This potential for systems abuse has been widely acknowledged (see also Coy et al., 2012; Douglas, 2017; Family Law Council, 2016; Fitch, & Easta, 2017; Kaye, Wangmann, & Booth, 2017a; Women’s Legal Service Australia, 2015; Women’s Legal Service Victoria, 2015). The adversarial nature of the Australian family law system and the principles of procedural fairness were identified in this study as “support(ing) abusive dynamics in an environment where many professionals have insufficient expertise in family violence to recognise the misuse of their services, systems and processes” (Kaspiew et al., 2017, p. 181) (see next section of this report). The tactics nominated by the participants in this context included the use of cross-examination by self-represented perpetrators, with the trauma experienced by women in these circumstances described as deriving from:

The stress of facing an uncertain court outcome in the context of their own and their children’s trauma, the necessity of repeating their stories, to have their evidence tested in court, to come face-to-face with the perpetrator during court processes, and, in some cases, to be cross-examined by the perpetrator where they were self-represented. In some cases, this occurred in the context of processes, including litigation, that were deliberately being used abusively. (2017, p. 178)

Of particular relevance to this discussion was the finding that more than half ($n = 29$) of the sample in this study reported experiencing post-separation systems abuse by their ex-partner, including via repeated litigation and mediation, and via cross-examination about rape during their family law proceedings (Kaspiew et al., 2017, p. 148). One case study that is illustrative of the trauma that may be experienced in direct cross-examination involved a participant who reported that she had been raped by her former partner, who had also physically abused their child during contact. The litigation in this participant’s case took place over eight years and was initially precipitated when the father did not return the child at the cessation of contact. The mother is described by the authors as experiencing the court process as “an extension of the ex-partner’s abuse, including by being cross-examined by her ex-partner as a litigant in person over days about sexual matters of no relevance to the proceedings” (2017, p. 182).

Similar observations were also made in the Royal Commission into Family Violence (2016) in Victoria with the Commission relaying the experience of a victim of family violence whose ex-husband had chosen to represent himself and to cross-examine her. On the account provided to the Commission, the wife reported that she “was exhausted and suffering from extreme anxiety and negotiated for custody on the second day of the trial” in the context of the husband stating in court that he was “prepared to negotiate for custody of the children, if my wife drops the rape charges” (p. 197).

The WLSA (2015) research surveying survivors of domestic and family violence (2015), noted earlier, also provided insights into the experience of being directly cross-examined in family law matters. Responses included reports of feeling that the court did not adequately intervene and feeling let down by a system that was effectively “complicit in the abuse”. Some women described their fear; being “frozen”; not being able to

⁶ See e.g., *Dietrich v The Queen* (1992) 177 CLR 292; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 and *Leeth v Commonwealth* (1992) 174 CLR 455 as referred to in Australian Law Reform Commission (2015) p. 33 and Williams, and Hume (2013) p. 375.

speak very well and not being able to look at their former partner. The WLSA research also identified direct cross-examination as a means of asking “ostensibly valid questions but which can be deliberately loaded with hidden and sinister meaning or threats” (2015, p. 3). Insight from the WLSA research was also provided into the potential trauma associated with having to directly cross-examine an alleged perpetrator, describing the intimidation and fear experienced in these circumstances (2017a, p. 28). Fitch and Eastaer’s (2017) recent research in relation to vexatious litigation, primarily based on surveys with practitioners, also provides insight relevant to this discussion, with one participant stating that the “most harmful and unstoppable conduct” can take place during direct cross-examination (p. 107).

In addition to the issues associated with the subject matter to be covered in cross-examination and the experience of being cross-examined, the reports of both the House of Representatives Standing Committee and the Australian and New South Wales Law Reform Commissions identified (as noted above) the prospect of direct cross-examination as a factor leading parties to elect not to contest proceedings and to agree to consent orders that may not accord with the safety and best interests of the children (VLA Submission 60 to the Parliamentary Inquiry, 2017, p. 134; Kaye, Wangmann, & Booth, 2017b; Loughman, 2016; WLSA, 2015, p. 3. See also more generally ALRC and NSWLRC, 2010, p. 1,116; Coy et al., 2012).

Concerns about the potential for direct cross-examination in the context of family violence to give rise to poor quality and/or incomplete evidence have also been raised by both the Family Law Council (2016, p. 5 and p.113) and by the Australian and New South Wales Law Reform Commissions (2010) where it was identified that these dynamics are such that they “may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings” (p. 863) (see also Chisholm, 2009, p. 168; Kaye, Wangmann, & Booth, 2017a; Loughman, 2016; WLSA, 2015, p. 3). Similarly, based on both quantitative and qualitative data, Coy and colleagues (2012) identified barriers to victims giving their best evidence about histories of abuse, and that difficulties experienced with cross-examining their perpetrators may mean that they are unable to ask sufficiently probing questions or to adequately challenge responses.

Procedural fairness—a dynamic concept?

As noted earlier, the testing of evidence by cross-examination is widely identified as a right of the alleged perpetrator (e.g., Cossins, 2009, pp. 68 and 71; Ellison, 2001) and as a central tenet of our adversarial system that is directed at achieving procedural fairness (see e.g., *Lee v The Queen* (1998) 195 CLR 594 [32]; and more specifically *Browne v Dunn* [1894] 6 R 67; Australian Law Reform Commission, 2015, p. 237; Murray, 2014 and Wigmore as quoted in Bowden et al., 2014, p. 560). As the discussion earlier in this chapter foreshadowed, this right is not an inviolable, absolute right given the protective provisions in Division 12A FLA, and as illustrated in the amendments made in relation to cross-examination in sexual assault and family violence proceedings (Australian Law Reform Commission, 2015; Cossins, 2009; and see examples in case law including Spigelman CJ in *R v TA* (2003) NSWLR 444).

Guidelines for judicial officers in relation to procedural fairness with respect to self-represented litigants in the Australian family law context were developed initially in *Johnson v Johnson* (1997) FLC 92-764, with revisions by the Full Court of the FCoA in *Re F: Litigants in person guidelines* (2001) FLC 93-072. These guidelines include recommendations that:

- A judicial officer should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
- A judicial officer should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses.
- A judicial officer may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to enquire whether he or she so objects. A judicial officer is not obliged to provide this advice on each occasion that particular questions or documents arise.
- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, the judicial officer is to inform the litigant of his or her rights.
- Where the interests of justice and the circumstances of the case require it, a judicial officer may:
 - draw attention to the law applied by the court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the court;
 - suggest procedural steps that may be taken by a party; and
 - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

See also more recent applications in *Redmond & Redmond and Ors* (2013) FLC 93-557 and *Herold & Herold* (2015) FLC 93-628.

Subsequent Australian case law has also considered the applicability of these guidelines in the context of the less adversarial approach required by Division 12A FLA (detailed earlier) in the case management of Part VII FLA matters (child-related proceedings). In *Sheen v Paulo* [2007] FamCA 1175, Boland J noted that the *Re F* guidelines were not binding principles of law and further that “the guidelines must now be considered in light of the introduction of Division 12A”. In *Farmer v Rogers* [2010] FamCAFC 253, the Full Court of the FCoA affirmed that trial judges have certain responsibilities in relation to how a hearing is conducted when one or more parties are unrepresented, namely, to adopt the guidelines of *Johnson v Johnson* and *Re F: Litigants in person guidelines*. However, the Full Court noted that the nature of parenting litigation made it different to civil litigation and that in certain circumstances, “the rules of natural justice are qualified” so as to not frustrate the purpose of parenting proceedings [para 221]. The Full Court affirmed Boland J’s position in *Sheen v Paulo* that the *Re F* guidelines may need to be reviewed in light of the extensive case management powers for judicial officers in child-related proceedings under Division 12A, but that Division 12A did not reduce the obligation on judicial officers to afford procedural fairness to each party (see also *Truman v Truman* (2008) FamLR 614).

Appeal cases involving grounds of appeal relating to the denial of procedural fairness in the context of cross-examination at trial, in particular, include *Cameron v Walker* [2010] FamCAFC 168. In this case, the trial was not found to have miscarried on account of the trial judge’s decision not to permit the mother to be cross-examined remotely rather than in the presence of the father, whom she alleged had subjected her to sustained violence throughout the relationship. (See also *Wilde v Wilde (No. 2)* [2007] FamCA 880 where cross-examination was not permitted; *C v C* [1998] 1 FLR 154 where it was held that cross-examination had been inappropriately curtailed; *Caballes & Tallant* (2014) FLC 93-596 where it was held that the judicial officer had not explained to the litigant the process to be followed and *Doherty & Doherty* [2014] FamCAFC 20 where there was a failure to provide the litigant notice of the right to cross-examine witnesses).

Historically, Australian case law has viewed cross-examination as a “powerful and valuable weapon for the purpose of testing the veracity of a witness’ evidence and the accuracy and completeness of their story” (Bowden, 2014, p. 551). It has also been identified as having an important role in testing evidence in family law proceedings in order to inform decision-making in line with the paramount consideration—the best interests of the child (s 60CA FLA). However, as noted in the previous section of this report, concerns have been raised that “for vulnerable witnesses, traditional cross-examination may not expose unreliability so much as produce it” (Bowden et al., 2014, p. 560. See also Australian Law Reform Commission and New South Wales Law Reform Commission, 2010; Coy et al., 2012; Cossins, 2009; Family Law Council, 2016; Roberts & Hunter, 2012, p. 20). Doubts about the “capacity of the skilful cross-examiner to expose the dishonest, mistaken or unreliable witness, and to uncover inconsistency and inaccuracy in oral testimony” (Cossins, 2009, p. 70; see also Ellison, 2001), may be regarded as being compounded in circumstances where the cross-examiner is an untrained self-represented litigant, particularly where the relationship between the parties is characterised by family violence.

Although made in the context of a discussion relating to criminal proceedings, Bowden and colleagues (2014) observed that a potential source of judicial reluctance to intervene in the conduct of cross-examination, discussed earlier in this chapter, may derive from a “fear of jeopardising the defendant’s right to a fair trial and because they are conscious of the risks of an appeal” (Bowden et al., 2014, p., 550; see also Loughman, 2016, p. 27). Bowden and colleagues (2014) further observed that limitations arising from the discretionary nature of judicial intervention to accommodate the interests of the witness were curtailed by the adversarial system.

However, as noted above, Division 12A FLA and the legislative amendments relevant to cross-examination at state and territory level suggest that procedural fairness is not a “fixed and immutable” concept and this is reflected in the jurisprudence of the High Court. In *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38 [177], the High Court identified fairness as an “essentially practical” concept that is intended to “avoid practical injustice” (*Re Minister for Immigration and Multicultural Affairs: Ex parte Lam* (2003) 214 CLR 1 [37]) and that what was fair, “very often depended on the circumstances of the particular case, and that notions of fairness are inevitably bound up with prevailing values” (*Dietrich v The Queen* (1992) 177 CLR 292, p. 364; see also e.g., *Jago v The District Court of NSW* (1989) 168 CLR 23 [5]). While Kennedy and colleagues (2012) have argued that the principle of the fair trial is still conceptualised in terms of the rights of the alleged perpetrator, and that this is influential in the exercise of judicial discretion in decision-making (p. 340), the High Court’s stated position is consistent with a notion of fairness that “may vary with changing social values and circumstances— it is inextricably bound up with prevailing social values” (Cossins, 2009, p. 71; see also Australian Law Reform Commission, 2015, p. 222) and is a “constantly evolving concept” (Bowden et al., 2014, p. 559).

The less adversarial trial principles enshrined in Division 12A FLA and the qualified right to cross-examination in the family violence and criminal jurisdictions provide an example of this dynamism by accounting for the interests of alleged victims and the community, as well as the alleged perpetrator’s right to procedural fairness. They seek

to accommodate the interests of all parties to the proceedings, including via the protection of witnesses against the experience of further trauma and shaped by the public interest, specifically community confidence in the proper administration of justice (Bowden, et al., 2014, p. 558; Cossins, 2009, pp. 70–71). This approach has been referred to in the UK commentary as the “triangulation of interests” whereby fairness accounts for the interests of the parties, their families and the public (Bowden et al., 2014, p. 559 referencing Lord Steyn, Attorney General’s Reference (No. 3 of 1999); Vulnerable Witnesses and Children Working Group, 2015, pp. 17–18).

Reflecting this “triangulation of interests”, the Australian and New South Wales Law Reform Commissions have drawn a clear distinction between the right to test evidence and “any perceived right to conduct cross-examination in any manner or format” (2010, p. 1,118). The Commissions’ recommendations were directed at “ensuring fairness—both to victims of family violence and to those who have used it” (2010, p. 63; see also Roberts & Hunter, 2012). Limits to cross-examination; for example, those introduced in sexual assault matters, were not the subject of criticism in submissions to the Australian Law Reform Commissions in their 2015 inquiry into encroachment on traditional rights and freedoms by Commonwealth laws, and indeed submissions sought the extension of their application to family law matters (Australian Law Reform Commission, 2015, p. 240). Potential measures in the family law context such as those involving the appointment of a third party to undertake cross-examination (see for e.g., Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017; Ellison, 2002, pp. 364–365) and the counsel-assisting model proposed by the Family Law Council, 2016, p. 134), may also be considered to reflect this dynamism and triangulation of interests. Murray’s (2014) recent analysis *The Remaking of the Courts: Less Adversarial Practice and the Constitutional Role of the Judiciary* observes the “rise in initiatives ... (as) positioned towards the inquisitorial end of the judicial spectrum and which involve the judge more actively in the conduct of cases”, and that these less adversarial approaches “have at their core the recognition that traditional adversarialism is not necessarily the ideal in all cases” (p. 22). This evolution is identified by Murray as reflecting the constant change of institutions shaped by their environment and as reflecting neo-institutionalism, noting, however, that while dynamic, courts are nevertheless constrained by their constitutional limitations (2014, pp. 43–44). Courts of family law jurisdiction are no exception to these constraints and Murray observes that while the constitutional framework can accommodate reforms such as Division 12A FLA, clarification of the uncertainty as to “how far the Constitution allows judges to ‘manage cases’ is required” (pp. 135–136).

1.2 Methodology

So far in this report we have outlined the research aims and relevant legislative frameworks, jurisprudential and research literature and noted the policy developments informing this study. In this next section, the focus will turn to the research design employed to implement this study.

This project focused on collecting and analysing data relevant to cases involving direct cross-examination in matters involving a self-represented litigant where the matter was characterised by alleged or substantiated family violence, with an emphasis on comparing the nature and features of these family law cases with those cases included in the sample where direct cross-examination did not take place.

The data include information sourced from relevant court files drawn from all registries of the Family Court of Australia (FCoA) and Federal Circuit Court of Australia (FCCoA), together with audio and transcripts of proceedings. Additionally, access to unreported judgments of the Family Court of Western Australia (FCoWA) was also provided.

Sampling strategy

The sampling strategy employed for the Direct Cross-examination in Family Law Matters project was to sample all FCoA and FCCoA matters in *all* case categories finalised in the 2015/16 financial year and the 2016/17 financial year that involved:

- one or more self-represented litigants;
- allegations of (or substantiated) family violence; and
- that had progressed through to a final hearing and the hearing had commenced with the matter finalised either by consent during the proceedings or by judicial determination.

The AIFS research team provided these requirements to senior court staff at the FCoA and FCCoA who then liaised with the court data technician/s to extract a sample from the court CaseTrack database according to the criteria stated above.

From this sample, the research team perused the court files (and audio or transcript of proceedings where available) to identify the matters where a self-represented party was involved in direct cross-examination during the final hearing. This enabled the data to be analysed by whether the party conducting the direct cross-examination or the party being directly cross-examined was an alleged perpetrator of family violence, an alleged victim of family violence or both.

Cases were deemed to be out of scope where a file had been incorrectly identified as involving a self-represented litigant at the final hearing stage (or where the matter had progressed through to the final hearing stage but the final hearing had not commenced ($n = 15$)). There were a small proportion of files that were not available for the data collectors to access during the data collection period ($n = 4$).

In addition, the project sample included all judgments of the FCoWA involving direct cross-examination in *all* case categories in the 2015/16 financial year and the 2016/17 financial year that involved:

- one or more self-represented litigants;
- allegations of (or substantiated) family violence; and
- that had progressed through to a final hearing and the hearing had commenced with the matter finalised either by consent during the proceedings or by judicial determination.

The AIFS research team provided these requirements to senior court staff at the FCoWA who then provided the research team with a list of judgments meeting the criteria stated above.

For the main court file data sample, the appointed court data technician extracted 1,198 family law court files in the two financial years of 2015/16 and 2016/17 from the FCoA and FCCoA applying the criteria nominated above to a search of court file records in CaseTrack. Concurrent with the processes employed by the court staff to identify the relevant sample of in-scope files, a small number of cases nominated by court staff were used by the research team for pilot testing the data collection instrument ($n = 12$). The research team received advice from court staff that a closer examination of a small number of selected cases on this list of extracted court files suggested that substantial numbers were in fact out of scope for various reasons (e.g., the case did not proceed to a hearing or the CaseTrack data was incomplete). A designated member of court staff was therefore appointed to examine additional CaseTrack data fields for the files identified as in scope and 104 cases were identified as clearly in scope. These cases comprised the main data collection.

Given that the initial CaseTrack selection process could not clearly identify all in-scope files or out-of-scope files without a further review of the initial court file extraction against the CaseTrack notes (as the extraction process cast the net more widely than required), the project team requested that court staff review all cases identified in the initial court file extraction again. It was through this process that an additional 138 court files were identified as having high likelihood of being in scope. It is on this basis that a total of 254 court files were ultimately identified as largely meeting the research team's selection criteria. This larger sample of 254 court files included the 104 court files that comprised the main data collection and the 12 cases provided to the research team for pilot testing.

During the main data collection, the research team collected data from 85 of the 104 court files. As noted earlier, 15 court files (14% of the sample) were out of scope and there were four court files where the physical file could not be retrieved. Combined with the data collected during the pilot-test phase, the research team collected data from 97 cases, with 70 cases (or 72%) involving direct cross-examination with at least one party who was self-represented and who was either directly cross-examined or conducted direct cross-examination. In order to better understand the nature of the remaining 138 court files and in order to ascertain the extent to which the data collected were representative of all the court files identified as largely in scope, the research team decided to draw a further sample from the remaining 138 court files and to manually examine the physical files to ascertain whether they were actually in scope and, if so, whether any direct cross-examination took place. This process would provide a more accurate picture of how common direct cross-examination was among the court files from which we were unable to collect data.

Due to the time required to retrieve files and for them to be delivered to the Melbourne registry, the research team randomly selected a sample of 30 from the remaining 138 court files. Of the 30 court files, five court files were identified as being out of scope (or 17% of the 30 cases) and two court files did not have sufficient information in the file to determine whether they were in scope. Of the remaining 23 court files, 17 files (74% of 23 cases, or 57% of the 30 cases) involved direct cross-examination and there were six court files where no direct cross-examination took place. It is important to note that the proportions of cases that fell out of scope were similar between the random sample of 30 cases and the sample of the 104 cases drawn for this project (17% vs 14%), and the extent to which direct cross-examination took place among the 23 court files from the random sample was similar to that among the sample from which complete data was collected (74% vs 72%). This

assessment indicated that this supplementary sample mirrored the study sample in terms of the extent to which files were in scope and involved direct cross-examination.

These similarities mean that the findings made in relation to the study sample may be regarded as representative of overall in-scope cases. If we approximate the in-scope cases and the occurrence of direct cross-examination from the 30 cases to the remaining files from which the random sample was drawn, this suggests that among 138 court files, 90–130 cases would be in-scope and 52–103 cases may have involved direct cross-examination.⁷ When considered as a whole, of 254 court files identified by the courts' CaseTrack system, approximately 187–227 cases would be in scope and 122–173 cases across the two courts over two financial years may have involved direct cross-examination. The prevalence of direct cross-examination as emerging from the main data sample is considered in detail in Chapter 3 below.

Data collection

As noted above, the aim of this research was to collect data providing insight into:

- the extent of direct cross-examination involving self-represented litigants in family law matters proceeding to a final hearing where family violence has been alleged or substantiated; and
- the factual and legal context characterising these family law matters where direct cross-examination took place as compared to those matters where direct cross-examination involving self-represented litigants did not take place.

In family law matters where direct cross-examination took place, data collection from the relevant court files and audio/transcripts of proceedings was aimed at providing an understanding of any specific safeguards implemented by the court to protect the alleged victim of family violence.

In family law matters where direct cross-examination did not take place, data collection from the relevant court files and audio/transcripts of proceedings was aimed at providing an understanding of the reasons for that outcome, and of any alternative arrangements that might have been made.

To this end, a project-specific data collection instrument was developed using Microsoft Excel and adapted from the data collection instruments applied in the Court Files component of the Court Outcomes Project that formed part of the *Evaluation of the 2012 Family Violence Amendments*.⁸ This data collection tool was refined prior to the commencement of data collection with support from both senior management and judicial associate staff at the FCCoA to facilitate access to examples of court files and audio of proceedings and answer queries to assist in the finalisation of the data collection tool.

Data collection for this study from the court and audio files was undertaken between October 2017 and January 2018. Two law graduates and a senior year law student were appointed to collect data from the files and audio recordings working under the supervision of senior AIFS staff members of the Family Law and Family Violence Team. Recruitment of the data collectors followed a thorough interview and careful vetting process, and only those with appropriate academic records and experience were employed. As AIFS employees, the data collectors were bound by the same confidentiality and security requirements as members of the AIFS Family Law and Family Violence Team.

Following intensive data collection training the researchers were equipped to understand the material in the court file and to understand the data collection instrument and the coding frame. Guided by the data collection instrument (outlined below) and assisted via ongoing supervision, the data collectors read sampled case files and listened to audio/read transcripts of proceedings and recorded the incidence and (where relevant) details of key data items outlined in the data collection instrument.

Data collected from the audio/transcripts of proceedings and court files, in consultation with relevant judicial associates where required, related to the following broad categories:

- basic demographic data of applicants and respondents—age, gender, occupation, region and citizenship; date of cohabitation, marriage, separation and divorce; information on whether the parties were legally represented during the proceedings;
- basic demographic data relating to children—age, gender, their relationship to the applicant and respondent and their living arrangements;

⁷ The approximations are derived from the 95% confidence interval of the 30 cases for proportion of cases in scope and proportion of cases involving direct cross-examination.

⁸ Note that the Court Files Project instrument was adapted from the instrument employed for the Court Files component of the Legislation and Court Project that formed part of the AIFS Evaluation of the 2006 Family Law Reforms (Kaspiew et al., 2009).

- the nature of the proceedings—orders sought by the applicant/respondent for parenting and property/financial matters;
- the factual issues in the case, including allegations concerning family violence and child safety;
- any available information regarding whether one or both self-represented litigants participated in direct cross-examination;
- any available details of any arrangements for, and any conduct of, direct cross-examination and any available details of arrangements made as an alternative to direct cross-examination;
- relevant details from Notices of Risk relating to alleged/substantiated family violence;
- information regarding whether an independent children’s lawyer (ICL) had been appointed;
- any other available information to substantiate allegations of family violence including details of any Family Violence Orders (FVOs) in place; and
- details of any pending or finalised criminal investigations.

Limited demographic, direct cross-examination and outcome data were also collected from 39 unreported judgments from the FCoWA. However, as information was collected through the analysis of judgments rather than directly from FCoWA Court files, it is not possible to ascertain conclusively whether direct cross-examination may have been undertaken in all or some of these cases where this was not mentioned in the judgment. Accordingly, these cases were analysed separately from the main data analysis but they do provide insight into the FCoWA experience.

Ethical considerations

The Human Research Ethics Committees of AIFS, the FCoA and the FCCoA provided ethical clearance of the Direct Cross-examination in Family Law Matters project, including all aspects of the methodology and data collection protocols. Access to identifiable court records (including files, transcripts and audio of proceedings) from the FCoA and FCCoA occurred only on site at the Commonwealth Law Courts, Melbourne, under supervision of relevant court staff. All AIFS staff who accessed court records were bound by strict confidentiality agreements and complied with Police Checks and Working with Children Checks.

Access to court records was granted by the FCoA and the FCCoA pursuant to rule 24.13 of the Family Law Rules 2004 and rule 2.08 of the Federal Circuit Court Rules 2001 respectively. Court records are maintained for legal purposes and are public documents subject to certain restrictions, specifically the prohibition of publishing information on parties to, or children subject to, litigation under s 121 of the FLA. In these circumstances, separate consent was not sought from families whose files, transcripts or audio of proceedings were selected as it would have been impracticable to obtain consent from all individual parties to proceedings in each court record included in the sample and given that strict safeguards were in place to protect confidentiality (see further below). Previous research studies have been based on data from court records, including most recently the Court Files Study component of the AIFS *Evaluation of the 2012 Family Violence Amendments* (Kaspiew et al., 2015) and the initial Court Files Study that formed part of the AIFS *Evaluation of the 2006 Family law Reforms* (Kaspiew et al., 2009). Earlier AIFS research based on court records also includes the *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings* (Moloney et al., 2007).

The availability of rigorous research on family law proceedings is also of significant public interest as it supports government, community and professional understanding of the operation of the FLA and the family law court system. It is also consistent with the underlying principle of open justice that is a cornerstone of the Australian legal system. The research team established arrangements to protect the privacy and confidentiality of parties whose court records were accessed as part of this research project. All information collected from the court records was de-identified at first reading by substituting court identification numbers with an artificial research number generated for each case, with an identification key developed for this substitution process. This approach assisted in respecting the privacy of families whose court records were reviewed while also enabling follow-up review of a file where any queries arose in the course of analysis. In addition, members of the research team were instructed not to access any court records if the names of any of the parties were known to them through professional or personal association. Privacy and confidentiality were also emphasised in data collector training, the data collection manual and in supervision discussions throughout the fieldwork period.

In relation to the Western Australian sample, access to identifiable judgments of the FCoWA was provided only to specified AIFS research staff via the PLEAS Online (Family Court) service. Access to this database was by engagement with relevant judicial officers of the FCoWA and following agreement with the terms and conditions required by the Government of Western Australia Department of Justice upon completion of the requisite

schedules (including a confidentiality agreement) and their submission to the Law Library of Western Australia. Once again, all AIFS staff who accessed court judgments via PLEAS were bound by strict confidentiality agreements and complied with Police Checks and Working with Children Checks.

The data collection for this project involved subject matter of a sensitive nature. Family law proceedings are recognised as particularly sensitive matters because they deal with relationship breakdown and disputes that come before the courts, often involving particularly difficult issues such as family violence, child abuse, substance addiction and mental illness. In these circumstances, researchers employed to conduct data collection were provided with opportunities to de-brief with a supervisor and counselled to access support through the AIFS Employee Assistance Program if required.

The AIFS Ethics Committee, together with the FCoA and FCCoA committees, considered each of these issues and determined that the procedures outlined above were sufficient to mitigate any potential ethical issues arising in the context of this research.

Data verification and preparation for analysis

From the time of the delivery of the first batch of data from the court files, a number of processes were employed to prepare the data for analysis. The data collection records were backed up on the AIFS server each week of the data collection period with both completed and semi-completed files included in this process. Semi-completed files required either the collection of further data from the court file or data from the audio recordings of proceedings. Data from the audio recordings enabled data collectors to determine whether direct cross-examination took place when this could not be determined from perusing the documents contained on the court file and, if so, how that direct cross-examination was conducted.

Various cross-checking procedures were developed by the research team and then set in place to detect inconsistent data or implausible (e.g., a party being listed as both legal represented and as having conducted direct cross-examination) and missing data (e.g., unclear or no information from the court file vs data collector failing to enter response in a data field). These procedures enabled the research team to detect data errors faster as more of the collected data were delivered. For the efficiency of retrieving audio files and data entry, the data entry from audio files was conducted at the final stage of data collection. Inconsistent or suspected data errors were reconciled or corrected by cross-checking with relevant notes from the data collectors. Sometimes this data verification required the data collectors to clarify data entered by referencing the court files, which was facilitated by the courts agreeing to retain the files until the end of the data verification process.

As noted earlier, comprehensive data were collected from 97 in-scope cases, which formed the basis of the detailed data analyses. The analyses concerning subgroups are therefore based on smaller numbers, which increases the possibility of error in the analyses. It is also worth noting that some court locations are not represented in the in-scope sample. For these reasons, no attempt was made to test statistical significance in the analysis with comparison of subgroups.

1.3 Structure of this report

In this chapter, the research aims and research design of the Direct Cross-examination in Family Law Matters project were outlined, together with relevant literature, legislative frameworks and case law, providing context to the analyses in the substantive chapters of this report.

Chapter 2 provides an overview of the demographic profile of parties and case characteristics from both the FCoA and FCCoA primary court file sample and from the FCoWA judgment sample. Chapter 3 provides analyses relating to the extent to which the sampled cases involved direct cross-examination and examines the relationship between direct cross-examination and claims made about each party (including claims made about family violence, family violence orders and criminal history). Chapter 4 considers the extent to which risk assessments were conducted in the files included in the primary court file sample, together with the evidentiary profiles in these cases. In particular, the discussion examines the extent to which allegations of family violence may have been substantiated and considers those findings according to whether direct cross-examination took place. Chapter 5 explores the range of arrangements made to accommodate and manage direct cross-examination in the data samples, including the presence of any specific safeguards for either party. The discussion in Chapter 6 provides an analysis of findings in relation to any association between the case outcomes for parenting, property or other cases and the extent of direct cross-examination. A summary of the key findings and a discussion of the conclusions arising from this research are provided in Chapter 7.

2 Sample and demographic profile

This section of the report provides an overview of the in-scope sample and demographic profile of the sampled court cases and the parties to these proceedings.

2.1 Sample characteristics

The data presented below provides a profile of the in-scope cases across a range of variables, including registry; the year the matter was heard; the types of matters in dispute; how the case was concluded; whether an ICL was appointed; and if there were prior proceedings. Table 2.1 outlines these characteristics, further analysed by court: the Federal Circuit Court of Australia (FCCoA) and the Family Court of Australia (FCoA) as well as by the combined sample from both courts.

The total number of in-scope sampled cases (spanning the 2015/16 and 2016/17 financial years) was 97 cases (comprising of 74 from the FCCoA and 23 from the FCoA).

In terms of registry location, almost half of the total number of cases originated from Brisbane and Melbourne (24% and 22% respectively), while the greatest proportion of cases from the FCoA originated from Brisbane (44%).

The vast majority of cases filed involved children/parenting matters being listed as one of the matters in dispute (99%), followed by 21% involving financial matters. A higher proportion of FCoA cases involved a financial matter in dispute (30%) compared with 18% of FCCoA cases.

The data show that a higher proportion of cases in the FCoA involved the appointment of an ICL compared to the FCCoA (91% to 72%) with 76% of all files involving an ICL. This may indicate a greater level of complexity in cases that proceed to the FCoA as compared to the FCCoA, further supported by the larger proportion of cases in the FCoA that involved two or three matters in dispute (39% compared to 27% in the FCCoA).

The majority of in-scope sampled cases proceeded to full judicial determination (68%) compared with 32% where the proceedings were either partially or completely resolved by consent.

Table 2.2 outlines the case characteristics of the in-scope sample both by court and by whether direct cross-examination took place. As noted in chapter 1, direct cross-examination took place in 72% of in-scope cases. In relation to the preliminary issue of the extent to which the FCCoA cases in the sample involved direct cross-examination, of the cases involving direct cross-examination in the sample, 27% were from the Melbourne registry; and 21% were from the Brisbane registry; with a further 11% at each of the Adelaide and Parramatta registries. Of the FCCoA cases in the sample that did not involve direct cross-examination, 33% were from the Parramatta registry, with 22% from each of the Adelaide and Melbourne registries. In the FCoA, the vast majority of cases in the sample were from the Brisbane registry. Cases from this registry made up 56% of the FCoA sample where there was no direct cross-examination and 36% of the sample involving direct cross-examination, with 21% from the Sydney registry of the FCoA involving direct cross-examination. The overwhelming majority of the cases in the sample involved children/parenting matters in both the FCoA and FCCoA.

Of note, the vast majority of matters in both courts proceeded to full or partial judicial determination whether or not direct cross-examination took place (67% where direct cross-examination did *not* take place and 91% where it did take place). An ICL had been appointed in the majority of the in-scope sample (82% where direct cross-examination did not occur and 74% where direct cross-examination took place).

Table 2.1: Sample characteristics, by court

Sample characteristic	FCCoA	FCoA	All
Registry location	%	%	%
Adelaide	13.5	4.4	11.3
Brisbane	17.6	43.5	23.7
Dandenong	8.1	0.0	6.2
Melbourne	25.7	8.7	21.7
Parramatta	16.2	8.7	14.4
Sydney	1.4	13.0	4.1
Other location ^a	1.4	21.8	18.6
Year of hearing			
2015	40.5	47.8	42.3
2016	54.1	47.8	52.6
2017	5.4	4.4	5.2
Matters in dispute^b			
Financial (property and/or maintenance)	17.6	30.4	20.6
Children/parenting matters	98.6	100.0	98.9
Child support matters	5.4	0.0	4.1
Declaration	0.0	4.3	1.0
Other	8.1	13.0	9.3
Number of matters in dispute			
One	73.0	60.9	70.1
Two	24.3	30.4	25.8
Three	2.7	8.7	4.1
Case conclusion			
Consent during proceedings	16.2	13.0	15.5
Proceeded to partial judicial determination	13.5	26.1	16.5
Proceeded to full judicial determination	70.3	60.9	68.0
ICL appointed?			
Yes	71.6	91.3	76.3
No	28.4	8.7	23.7
Prior proceedings			
Yes	35.1	39.1	36.1
No	63.5	60.9	62.9
Missing	1.4	0.0	1.0
Number of cases	74	23	97

Notes: ^a Other registries include: Albury, Cairns, Canberra, Hervey Bay, Hobart, Launceston, Lismore, Newcastle, Townsville, Wangaratta, Wollongong. ^b Multiple response options could be chosen for this item so percentages do not sum to 100.0%. The number of cases in 2017 is small, which likely reflects the fact that some cases were still being finalised or the CaseTrack information was still in the process of being updated and as a result they were not in the database when the sample of this study was extracted.

Table 2.2: Sample characteristics, by court and whether direct cross-examination occurred

Sample characteristic	FCCoA		FCoA		All	
	No cross-examination	Cross-examination	No cross-examination	Cross-examination	No cross-examination	Cross-examination
Registry location	%	%	%	%	%	%
Adelaide	22.2	10.7	0.0	7.1	14.8	10.0
Brisbane	5.6	21.4	55.6	35.7	22.2	24.3
Dandenong	5.6	8.9	0.0	0.0	3.7	7.4
Melbourne	22.2	26.8	22.2	0.0	22.2	21.4
Parramatta	33.3	10.7	11.1	7.1	25.9	10.0
Sydney	5.6	0.0	0.0	21.4	3.7	4.3
Other location ^a	5.6	21.5	11.1	28.6	7.4	21.5
Year of hearing						
2015	33.3	42.9	33.3	57.1	33.3	45.7
2016	66.7	50.0	55.6	42.9	63.0	48.6
2017	0.0	7.1	11.1	0.0	3.7	5.7
Matters in dispute^b						
Financial (property and/or maintenance)	22.2	16.1	11.1	42.9	18.5	21.4
Children/parenting matters	100.0	98.2	100.0	100.0	100.0	98.6
Child support matters	0.0	7.1	0.0	0.0	0.0	5.7
Declaration	0.0	0.0	0.0	7.1	0.0	1.4
Other	0.0	10.7	0.0	21.4	0.0	12.9
Number of matters in dispute						
One	77.8	71.4	88.9	42.9	81.5	65.7
Two	22.2	25.0	11.1	42.9	18.5	28.6
Three	0.0	3.6	0.0	14.3	0.0	5.7
Case conclusion						
Consent during proceedings	33.3	10.7	33.3	0.0	33.3	8.6
Proceeded to partial judicial determination	5.6	16.1	11.1	35.7	7.4	20.0
Proceeded to full judicial determination	61.1	73.2	55.6	64.3	59.3	71.4
ICL appointed?						
Yes	77.8	69.6	88.9	92.9	81.5	74.3
No	22.2	30.4	11.1	7.1	18.5	25.7
Prior proceedings						
No	22.2	39.3	33.3	42.9	25.9	40.0
Yes	77.8	58.9	66.7	57.1	74.1	58.6
Missing	0.0	1.8	0.0	0.0	0.0	1.4
Number of cases	18	56	9	14	27	70

Notes: ^a Other registries include: Albury, Cairns, Canberra, Hervey Bay, Hobart, Launceston, Lismore, Newcastle, Townsville, Wangaratta, Wollongong. ^b Multiple response options could be chosen for this item so percentages do not sum to 100.0%.

As described in section 1.2, along with information collected directly from court files from the FCCoA and FCoA, an analysis of 39 unreported judgments from the FCoWA was also undertaken. Where possible, basic demographic data and information relating to direct cross-examination was identified and collected from these judgments. As data collectors did not directly examine court files from the FCoWA, this information is not as comprehensive as the data collected from the FCCoA and FCoA data collection and for some items, data was not available or was unclear in the judgment.

Demographic information collected in the WA judgments is presented in Table 2.3 and shows that children and parenting matters were in dispute in around three quarters of judgments (77%) with little difference in this proportion between the Magistrates and Family Courts of Western Australia. Financial matters were in dispute in a further third of the cases (33%), and these disputes were more likely in the Family Court (39%) compared to the Magistrates Court (29%). The Family Court judgments were also more likely to involve multiple matters when compared to those in the Magistrates Court (22% compared to 10%). Direct cross-examination was a feature of around half of the judgments (44%). However, as noted, because information was not collected directly from court files, it is possible that direct cross-examination may have been undertaken in a given case but if it was not mentioned in the judgment; the data collectors would have had no way of identifying this as a feature of the case.

Table 2.3: Sample characteristics of Western Australian judgments, by court

Sample characteristic	Magistrates Court	Family Court	All judgments
Year of hearing			
2015	28.6	61.1	43.6
2016	57.2	27.8	43.6
2017	14.3	11.1	12.8
Matters in dispute^a			
Financial (property and/or maintenance)	28.6	38.8	33.3
Children/parenting matters	76.2	77.7	76.9
Child support matters	4.7	5.6	5.1
Declaration	4.7	0.0	2.6
Other	4.7	0.0	2.6
Number of matters in dispute			
One	90.5	77.8	84.6
Two	4.8	22.2	12.8
Three or more	4.8	0.0	2.6
Case conclusion			
Consent during proceedings	0.0	0.0	0.0
Proceeded to partial judicial determination	9.5	0.0	5.1
Proceeded to full judicial determination	90.5	100.0	94.9
ICL appointed?			
Yes	33.3	50.0	41.0
No/Not available	66.6	50.0	59.0
Prior proceedings			
Yes	28.6	16.7	23.1
No	14.3	11.1	12.8
Unclear	57.1	72.2	64.1
Direct cross-examination			
Cross-examination	38.1	50.0	43.6
No cross-examination and/or not mentioned in judgment	61.9	50.0	56.4
Number of cases	21	18	39

Notes: ^a Multiple response options could be chosen for this item so percentages do not sum to 100.0%.

Table 2.4 outlines the division of cases in the FCoA and FCCoA sample by applicant and respondent type and parties' roles in the family. A majority of cases had an applicant father and respondent mother (67%), whereas 31% of cases had an applicant mother and respondent father. In a minority of cases (2%), the applicant involved another party such as foster parents.

Table 2.4: Summary of applicant and respondent status, by role in family

Applicant and respondent type	<i>n</i>	%
Applicant mother and respondent father	30	30.9
Applicant father and respondent mother	65	67.0
Applicant other party, respondent mother	2	2.1
Total	97	100.0

Note: Other parties included a paternal aunt and foster parents.

Looking at the characteristics of the parties in the in-scope sampled cases, Table 2.5 presents the demographic profile of parties split by each court and as a proportion of all in-scope files in the sample.

There was little variation in the mean age of parties across both courts. The mean age of fathers was slightly higher at 42 years compared with mothers at 38 years. Across all in-scope sampled files the proportion of people who identified as Aboriginal and/or Torres Strait Islander was similar with 7% of both fathers and mothers identifying as Indigenous. These rates were higher in the FCoA (10% of fathers and 17% of mothers) compared with the FCCoA, where the corresponding proportions were 7% and 4% respectively.

Less than one-fifth of parties from all files were born overseas, with little differences in these rates between mothers and fathers (15% vs 13% respectively).

There were clear differences in the pattern of employment status and main source of income between mothers and fathers. A higher proportion of fathers than mothers were employed full-time (53%; cf. 14% of mothers), whereas mothers were more likely to be employed part-time (24%; cf. 12% of fathers). When compared to fathers, a higher proportion of mothers in the sampled files were unemployed or not in the labour force.

The available data for the main income source of parties reflected these employment trends, with a higher proportion of fathers having their main income source as wages (58%) than mothers (36%), while mothers were more likely than fathers to have their main income source as pensions or allowances (22%; cf. 13%).

In this next section, the characteristics of the in-scope sample files in terms of children are presented. The data is presented both at the case level (number of children, age of the youngest child in the case, and whether any of these children had special needs) and at the individual child level (gender and age group) of all of the children in these cases. This information is shown in Table 2.6. In total, there were 185 children in the 97 in-scope sampled cases.

Firstly, looking at the case level. The majority of cases had one child involved in the proceedings (41%). This was followed by two children, which represented 34% of cases, then three children making up 18% of the cases and four children 7%. Of the children in these cases, the youngest child was most likely to be aged 5-11 years of age (59% of cases).

In terms of any special needs of children, the most commonly identified special need was psychological (32% of all cases). Special needs involving physical needs were less commonly reported; however, they still comprised 11% of cases.

Secondly, looking at the data at the individual child level, there was a similar split of children across genders with 49% of male children and 51% of female children. Overall, there was a higher representation of children under the age of 11 in proceedings (with 60% of children under 11 years and 40% aged 12 and above.)

Table 2.5: Selected demographics of parties, by court

	FCCoA		FCoA		All	
	Fathers	Mothers	Fathers	Mothers	Fathers	Mothers
Age (years)						
Mean	42.4	38.2	42.4	38.7	42.4	38.3
(SD)	8.4	7.1	8.2	8.7	8.3	7.5
	%	%	%	%	%	%
Labour force status						
Full-time employed	52.7	12.2	52.4	21.7	52.6	14.4
Part-time employed	8.1	23.0	23.8	26.1	11.6	23.7
Unemployed	25.7	41.9	14.3	26.1	23.2	38.1
Not in labour force	5.4	10.8	9.5	26.1	6.3	14.4
Not available	8.1	12.2	0.0	0.0	6.3	9.3
Main income source						
Wages/salaries	55.4	32.4	66.7	47.8	57.9	36.1
Business/private income	2.7		9.5		4.2	0.0
Pensions/allowances	14.9	23.0	4.8	17.4	12.6	21.7
Super/worker compensations	1.4				1.1	0.0
Child support		1.4			0.0	1.0
Current partner/relatives	1.4	2.7			1.1	2.1
Other	1.4	4.1	9.5		3.2	3.1
No income				4.4	0.0	1.0
Not available	23.0	36.5	9.5	30.4	20.0	35.1
Other						
Indigenous	6.8	4.1	9.5	17.4	7.4	7.2
Overseas born	13.5	14.9	19.1	8.7	14.7	13.4
Joint or supporting application? ^a	4.1	2.7	4.8	17.4	4.2	6.2
Number of cases	74	74	23	23	97	97

Notes: ^aIndicates if there was a support applicant/respondent on the file (e.g., maternal grandparent).

Table 2.6: Children's characteristics, case and child level

Case level characteristics (<i>n</i> = 97 cases)	<i>n</i>	%
Case level		
Number of children in case		
One	40	41.2
Two	33	34.0
Three	17	17.5
Four	7	7.2
Age of youngest child (years)		
0-4	14	14.4
5-11	57	58.8
12-16	26	26.8
Whether children had any of the following special needs ^a		
Physical	11	11.3
Psychological	31	32.0
Cultural	2	2.1
Indigenous	4	4.1
Number of cases	97	
Child level		
Gender		
Male	90	48.7
Female	95	51.4
Age (years)		
0-4	14	7.8
5-11	95	52.4
12-17	69	38.1
18-19	3	1.7
Missing	4	
Number of children	185	100.0

Notes: ^a Multiple response options could be chosen for this item so percentages do not sum to 100.0%.

Table 2.7 provides a summary of the legal representation status of parties to the proceedings at the final hearing stage, further analysed by whether they were the applicant or the respondent and the father or the mother respectively. A similar number of cases involved either one of the applicant or respondent being self-represented, whereas 19 cases involved both the applicant and respondent being self-represented. When separated by gender, the father was more likely to be self-represented than the mother (50 cases cf. 28 cases, noting that in two cases the legal representation status of the father was unclear).

Table 2.8 further analyses the legal representation status of parties (at the final hearing stage) by their gender. The data suggests that males were less likely to have legal representation than females, regardless of whether they were the applicant or the respondent. The data show that 29% of male applicants had legal representation compared with 59% of female applicants while only 23% of male respondents had legal representation compared with 49% of female respondents. Of note, 16% of female applicants and 11% of female respondents had publicly funded solicitors compared with 6% of male applicants and 3% of male respondents.

Correspondingly, male applicants were more likely to be self-represented than female applicants (71% cf. 41% of females) while male respondents were more likely to be self-represented (77% cf. 51% of females). As previously outlined in Table 2.4, there were a larger proportion of male applicants than female applicants (67% to 31%).

Table 2.7: Legal representation by applicant/respondent and father/mother

	<i>n</i>	%
Applicant and respondent		
Both self-represented	19	19.6
Applicant alone self-represented	40	41.2
Respondent alone self-represented	38	39.2
Total	97	100.0
Father and mother		
Both self-represented	19	19.6
Father alone self-represented	50	51.5
Mother alone self-represented	26	26.8
Mother self-represented, father unclear	2	2.1
Total	97	100.0

Table 2.8: Legal representation by gender of applicants and respondents

	Males (%)	Females (%)
Applicants		
Private solicitor	23.1	43.8
Publicly funded solicitor	6.2	15.6
No representative/self-represented	70.8	40.6
Total	100.0	100.0
Number of cases	65	32
Respondent		
Private solicitor	20.0	38.8
Publicly funded solicitor	3.3	10.5
No representative/self-represented	76.7	50.8
Total	100.0	100.0
Number of cases	30	67

Insight was also available in relation to the legal representation of the parties in the Western Australian judgment sample. The data from the 39 judgments show that in 41% of the judgments both the applicant and respondent were self-represented ($n = 16$). In 38% of judgments, the respondent alone was self-represented ($n = 14$) and in a further 18% of judgments, the applicant alone was self-represented ($n = 7$).⁹ When looking at this information by the parties' roles in the family, 41% of both the mothers and fathers were self-represented, with the same proportion of fathers alone self-represented. In 13% of the judgments, the mother alone was self-represented ($n = 5$).¹⁰

2.2 Summary

This chapter has provided an overview of the sample characteristics and demographic profile of the in-scope cases in the main data sample. The total number of in-scope cases (spanning the 2015/16 and 2016/17 financial years) was 97 cases (comprising of 74 from the FCCoA and 23 from the FCoA), with the vast majority of cases filed involving children/parenting matters (99%) and with 21% involving financial matters. Direct cross-examination took place in more than two-thirds of in-scope cases (72%; $n = 70$) and the vast majority of matters in both courts proceeded to partial or full judicial determination whether or not direct cross-examination took place (67% where direct cross-examination did *not* take place and 91% where it did take place). An ICL had been appointed in the majority of the in-scope sample (82% where direct cross-examination did not occur and 74% where direct cross-examination took place). More specifically, a higher proportion of FCoA cases involved a financial matter in dispute (30% vs 18%) and the appointment of an ICL (91% vs 72%), which may indicate a

⁹ The respondent's legal representation was unclear in one judgment.

¹⁰ The legal representation of two fathers was unclear in the judgments.

greater level of complexity in cases that proceeded to the FCoA, an observation that was further supported by the larger proportion of cases in the FCoA that involved two or three matters in dispute (39% compared to 27% in the FCCoA).

In relation to the FCoWA judgment sample ($n = 39$), children and parenting matters were in dispute in around three-quarters of judgments (77%). Financial matters were in dispute in a further third of the cases (33%), and these disputes were more likely to have been heard in the Family Court (39%) compared to the Magistrates Court (29%). Direct cross-examination was a feature of around one-half of the judgments (44%), although it is noted that access to judgments rather than to court files in the sampling process must be accounted for when considering these findings.

The mean age of parties in the in-scope cases in the court file sample was 42 years for fathers and 38 years for mothers, with similar proportions born overseas. While mothers and fathers were identified as being from Indigenous backgrounds in equal proportions (7%), a higher proportion of parties were identified as Indigenous in the FCoA compared with the FCCoA sample (mothers: 17% vs 4%; fathers: 10% vs 7%). In addition, fathers were more likely to be employed full-time compared to mothers, who were more likely than fathers to report pensions and allowances as their main source of income. Further analysis was undertaken of the demographic profile of children at both the child and case level (including by number of children involved in the proceedings, the age of the youngest child and any special needs). For the 185 children in the 97 in-scope cases, a majority of cases involved one child (41%) and the age of the youngest child in the majority of cases was between 5 and 11 years old (59%). In 32% of the cases, special needs involving the children's psychological wellbeing were identified.

Finally, the analysis of legal representation according to whether the party was an applicant or respondent as well as by gender was also considered, with male applicants and respondents more likely to be self-represented than female applicants and respondents (male applicants: 71% vs female applicants: 41%, and male respondents: 77% vs female respondents: 51%).

3 Matters involving direct cross-examination

This section of the report focuses on information collected about direct cross-examination from the in-scope sample and extends the analysis in the previous section outlining the factual circumstances characterising the cases in the sample. Insights are drawn from both the quantitative and qualitative data. Analysis of the quantitative data provides an overview of the parties undertaking direct cross-examination and the relationship between direct cross-examination and allegations of family violence on the court files.

3.1 Occurrence of direct cross-examination

Characteristics relating to direct cross-examination from the in-scope population are described in Table 3.1. This table shows that the most common form of direct cross-examination was where fathers cross-examined the mother only (33% of cases). In a further 28% of cases, mothers directly cross-examined fathers only, and in 11% of cases both parents directly cross-examined each other. No direct cross-examination was identified in 28% of the files sampled. It appeared that direct cross-examination was a slightly more common feature of files sampled from the FCCoA (76%) when compared to the FCoA (61%), although the small number of files from FCoA should be kept in mind when considering these data.

Table 3.1: Occurrence of direct cross-examination, by court

Form of direct cross-examination	FCCoA (%)	FCoA (%)	All (%)
No direct cross-examination	24.3	39.1	27.8
Father cross-examined mother only	37.8	17.4	33.0
Mother cross-examined father only	28.4	26.1	27.8
Parents cross-examined each other	9.5	17.4	11.3
Total	100.0	100.0	100.0
Number of cases	74	23	97

Notes: It is noted that in one of the cases, the mother also cross-examined the maternal grandfather and in one other case, the mother was also cross-examined by the paternal grandfather (both appeared as a joint/supporting respondent in the respective cases).

As noted in Chapter 1, of the cases that did not involve direct cross-examination, a substantial proportion settled prior to direct cross-examination (37%; $n = 10$) (37% of these files with no direct cross-examination). In some instances, direct cross-examination did not take place because the opposing party did not appear in court (19%; $n = 5$) (19% of these type of files). In the remaining cases, the reason that direct cross-examination did not take place was unclear or unavailable from the court or audio file. It was not necessarily clear from the files whether family violence was a factor in direct cross-examination not taking place; however, notably, in one case, substantiated family violence appeared to be a reason why it did not take place.

The qualitative data provided some insight (albeit limited) into an approach taken by the court in one case when considering whether or not to permit direct cross-examination. In this case (Case 10), the ICL and mother's lawyer submitted to the court that given the evidence as to the father's history of family violence (including concessions by the father that he had been violent towards the mother) and his lack of insight into his behaviour, there was a real risk that allowing the father to cross-examine the mother would traumatise her. The mother's lawyer further submitted that the mother was fearful of the father and that allowing the father to directly cross-examine her would be a form of "secondary abuse". The judicial officer raised concerns about procedural fairness

for the father but found that due to the circumstances of the particular case and the evidence already available to the court (and given the father's inability to file further material in accordance with court orders) that the proceedings were to continue without further evidence, and that no cross-examination by the father of the mother would take place given the history of family violence and the risk of psychological harm to the mother. In this case, an injunction was ultimately granted by the court restraining the father from approaching or contacting the mother.

In another case (Case 11, discussed further in section 5.2, page 45), the judicial officer made specific reference to principle 3 of s 69ZN, being the requirement for proceedings to be conducted in a way that would safeguard parties against family violence. The judicial officer appeared aware of the fact that if the hearing continued to proceed, the case may require the direct cross-examination of a victim of serious family violence (the mother) by her perpetrator (the unrepresented father, who was convicted of family violence offences involving the mother and children). The judicial officer in this case informed the mother and her legal representative that they may wish to consider options such as being cross-examined from a remote location or choosing not to rely on her affidavit material so that cross-examination would not be required. Ultimately, this case did not involve any direct cross-examination as both the ICL and the father agreed to the mother's proposed consent orders.

Table 3.2 presents information on direct cross-examination identified from analysis of the Western Australian judgments. As noted earlier, one of the caveats relevant to interpreting the Western Australian data is that as information was not collected directly from court files, direct cross-examination could only be identified if it was mentioned in the judgment. With this in mind, the data show that direct cross-examination was a feature of around one-half of the judgments. There were similar rates of both parents cross-examining each other in the Magistrates and Family Courts (14% and 17% respectively). A higher proportion of mothers cross-examined the father only in the Family Court (28% compared with 5% of judgment in the Magistrates Court). Conversely, a higher proportion of fathers cross-examined the mother only in the Magistrates Court (19%) compared with 6% of judgments in the Family Court.

Table 3.2: Western Australia judgments: Occurrence of direct cross-examination, by court

Form of direct cross-examination	Magistrates Court (%)	Family Court (%)	All (%)
No direct cross-examination and/or unclear	61.9	50.0	56.4
Father cross-examined mother only	19.1	5.6	12.8
Mother cross-examined father only	4.8	27.8	15.4
Parents cross-examined each other	14.3	16.7	15.4
Total	100.0	100.0	100.0
Number of cases	21	18	39

3.2 Factual issues characterising the cases in the sample

Data was also collected to identify cases involving claims made about specific factual issues. Table 3.3 outlines the incidence of claims made about the mother, father, both parents and overall (including claims made about other persons) as well as the frequency of direct cross-examination occurring separated by claims about each factual issue (excluding claims about family violence covered in Tables 3.3 and 3.4). The incidence of claims about each parent on each factual issue includes cases where the claim was made about both parents.

The most commonly made claim about mothers in proceedings was about their mental health (38%), followed by protecting the child from psychological abuse (36%) and the possibility that the child's views were influenced (32%). In contrast, the most frequently made claim about fathers was the need to protect the child from psychological abuse (62%), followed by the benefit to the child of a meaningful relationship with the father (50%) and protecting the child from physical abuse (45%). Other common claims made about the father included alcohol and or substance abuse (43%), the child's views against having contact with the parent (42%), and regarding the parents' capacity to meet the child's needs (41%). Protecting the child from psychological abuse was also the most common claim raised about both parents (18%).

The data in Table 3.3 highlight that mothers were more likely to directly cross-examine fathers when a claim relating to the impact of parenting arrangements on the child was made about the mother (37% of cases) compared with 21% of cases overall, or about a parent's mental health (52%) compared with 38% of all cases or when a claim about a parent's capacity to meet the child's needs was made (44%) compared with 31% overall.

Table 3.3: Factual issues claimed about mother,^a by direct cross-examination

Claim about mother	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All (%)
Benefit to child of meaningful relationship with parent	22.2	9.4	22.2	18.2	15.7	17.5
Protect child from abuse or risk of abuse—physical abuse	14.8	21.9	18.5	36.4	22.9	20.6
Protect child from abuse or risk of abuse—psychological abuse	33.3	34.4	33.3	54.5	37.1	36.1
Protect child from abuse or risk of abuse—sexual abuse	3.7	0.0	0.0	9.1	1.4	2.1
Protect child from abuse or risk of abuse—neglect	22.2	15.6	33.3	36.4	25.7	24.7
Protect child from abuse or risk of abuse—not available	3.7	3.1	7.4	9.1	5.7	5.2
Protect child from “high conflict”	18.5	31.3	18.5	27.3	25.7	23.7
Views expressed by child (e.g., child doesn’t want contact with a parent)	11.1	15.6	25.	9.1	18.6	16.5
Possibility that child’s views were influenced	22.2	34.4	40.7	27.3	35.7	32.0
Parent’s facilitation of child’s relationship with other parent	18.5	40.6	33.3	27.3	35.7	30.9
Impact of parenting arrangements on child	22.2	6.3	37.0	18.2	20.0	20.6
Special needs of child with regards to maturity, sex, culture, lifestyle or background	11.1	12.5	14.8	18.2	14.2	13.4
Facilitation for child to enjoy Indigenous culture	3.7	0.0	0.0	0.0	0.0	1.0
Parent’s capacity to meet child’s needs	33.3	21.9	44.4	18.2	30.0	30.9
Parent’s mental health	44.4	28.1	51.9	18.2	35.7	38.1
Parent’s alcohol and/or substance abuse	33.3	21.9	40.7	18.2	28.6	29.9
Parent’s history engagement	7.4	3.1	11.1	9.1	7.1	7.2
Parent’s history: financial/child support	11.1	0.0	7.4	18.2	5.7	7.2
Housing/environmental neglect	29.6	3.1	25.9	18.2	14.2	18.6
Number of cases	27	32	27	11	70	97

Notes: Percentages are based on court files with each characteristic, for example 22.2% of court files with no cross-examination on the file had a claim about the benefit to the child of a meaningful relationship with the mother. ^a Regardless whether same claim was made about the father.

On the other hand, as the data in Table 3.4 show, fathers were more likely to directly cross-examine the mother when a claim about their children’s protection was made. In 75% of cases where a claim was made about

the father relating to the need to protect the child from abuse or risk of psychological abuse, the father also cross-examined the mother in these cases. This compared to 62% of court files overall where this claim was made about the father. Fathers undertook direct cross-examination in 47% of cases where a claim was made of needing to protect the child from high conflict. The corresponding proportion in all files was lower at 29%. The same analysis shown for when there was a claim made about both the mother and father is detailed in Table 3.5.

Table 3.4: Factual issues claimed about the father,^a by direct cross-examination

Claim about father	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All (%)
Benefit to child of meaningful relationship with parent	55.6	53.1	40.7	45.5	47.1	49.5
Protect child from abuse or risk of abuse—physical	44.4	50.0	37.0	54.5	45.7	45.4
Protect child from abuse or risk of abuse—psychological	66.7	75.0	48.1	45.5	60.0	61.9
Protect child from abuse or risk of abuse—sexual abuse	11.1	9.4	25.9	18.2	17.1	15.5
Protect child from abuse or risk of abuse—neglect	37.0	9.4	33.3	27.3	21.4	25.8
Protect child from abuse or risk of abuse—not available	7.4	3.1	0.0	27.3	5.7	6.2
Protect child from “high conflict”	22.2	46.9	22.2	9.1	31.4	28.9
Views expressed by child (e.g., child doesn’t want contact with a parent)	44.4	43.8	33.3	54.5	41.4	42.3
Possibility that child’s views were influenced	14.8	12.5	7.4	9.1	10.0	11.3
Parent’s facilitation of child’s relationship with other parent	11.1	9.4	22.2	36.4	18.6	16.5
Impact of parenting arrangements on child	25.9	34.4	14.8	36.4	27.1	26.8
Special needs of child with regards to maturity, sex, culture, lifestyle or background	18.5	18.8	11.1	18.2	15.7	16.5
Facilitation for child to enjoy Indigenous culture	0.0	3.1	3.7	0.0	2.9	2.1
Parent’s capacity to meet child’s needs	59.3	43.8	14.8	54.5	34.3	41.2
Parent’s mental health	22.2	34.4	18.5	63.6	32.9	29.9
Parent’s alcohol and/or substance abuse	44.4	46.9	40.7	36.4	42.9	43.3
Parent’s history engagement	25.9	31.3	14.8	27.2	24.3	24.7
Parent’s history: financial/child support	29.6	34.4	25.9	36.3	31.4	30.9
Housing/environmental neglect	7.4	6.2	18.5	18.2	12.9	11.3
Number of cases	27	32	27	11	70	97

Notes: Percentages are based on court files with each characteristic; for example, 55.6% of court files with no cross-examination on the file had a claim about the benefit to the child of a meaningful relationship with the father. ^a Regardless whether same claim was made about the mother.

Table 3.5: Factual issues claimed about both mother and father, by direct cross-examination

Claim about both mother and father	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All files (%)
Benefit to child of meaningful relationship with parent	11.1	6.3	11.1	9.1	8.6	9.3
Protect child from abuse or risk of abuse—physical abuse	0.0	9.4	7.4	27.3	11.4	8.2
Protect child from abuse or risk of abuse—psychological abuse	18.5	25.0	7.4	18.2	17.1	17.5
Protect child from abuse or risk of abuse—sexual abuse	0.0	0.0	0.0	0.0	0.0	0.0
Protect child from abuse or risk of abuse—neglect	7.4	0.0	7.4	9.1	4.3	5.2
Protect child from abuse or risk of abuse—not available	0.0	0.0	0.0	0.0	0.0	0.0
Protect child from “high conflict”	11.1	21.9	14.8	9.1	17.1	15.5
Views expressed by child (e.g., child doesn’t want contact with a parent)	0.0	0.0	3.7	0.0	1.4	1.0
Possibility that child’s views were influenced	0.0	3.1	0.0	0.0	1.4	1.0
Parent’s facilitation of child’s relationship with other parent	0.0	0.0	3.7	0.0	1.4	1.0
Impact of parenting arrangements on child	0.0	0.0	0.0	0.0	0.0	0.0
Special needs of child with regards to maturity, sex, culture, lifestyle or background	3.7	0.0	0.0	0.0	0.0	1.0
Facilitation for child to enjoy Indigenous culture	0.0	0.0	0.0	0.0	0.0	0.0
Parent’s capacity to meet child’s needs	3.7	0.0	3.7	9.1	2.9	3.1
Parent’s mental health	3.7	3.1	3.7	0.0	2.9	3.1
Parent’s alcohol and/or substance abuse	7.4	9.4	11.1	0.0	8.6	8.2
Parent’s history engagement	0.0	3.1	0.0	0.0	1.4	1.0
Parent’s history: financial/child support	0.0	0.0	0.0	0.0	0.0	0.0
Housing/environmental neglect	0.0	0.0	7.4	0.0	2.9	2.1
Number of cases	27	32	27	11	70	97

3.3 Prevalence and nature of allegations of family violence

Table 3.6 describes information on direct cross-examination in the court files, further analysed by claims of violence and who the claim of violence was made about. This information can shed further light on the extent to which direct cross-examination is being undertaken where there are allegations concerning family violence and child safety.

Information was collected covering three domains of family violence. Data collectors could indicate if there was an allegation of physical; emotional/psychological; and/or children exposed to family violence on the file.¹¹

¹¹ Information was also recorded about allegations of family violence where no further information was available on the nature of the family violence.

Table 3.6: Claim of family violence, by direct cross-examination

Claim of family violence and who claim made about	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All (%)
Claim about mother (all)^a						
Family violence alleged—physical	22.2	15.6	22.2	45.5	22.9	22.7
Family violence alleged—emotional/psychological, fear, coercion or control	14.8	25.0	33.3	36.4	30.0	25.8
Family violence alleged—child(ren) exposed to family violence	14.8	12.5	29.6	36.4	22.9	20.6
Family violence alleged—not available	0.0	0.0	7.4	0.0	2.9	2.1
Any of the above claims ^b	25.9	28.1	55.6	63.6	44.3	39.2
Claim about father (all)^c						
Family violence alleged—physical	55.6	68.8	66.7	54.5	65.7	62.9
Family violence alleged—emotional/psychological, fear, coercion or control	70.4	81.3	59.3	72.7	71.4	71.1
Family violence alleged—child(ren) exposed to family violence	59.3	71.9	48.1	63.6	61.4	60.8
Family violence alleged—not available	0.0	0.0	7.4	0.0	2.8	2.1
Any of the above claims ^b	88.9	87.5	70.4	81.8	80.0	82.5
Claim about both mother and father						
Family violence alleged—physical	0.0	6.3	22.2	27.3	15.7	11.3
Family violence alleged—emotional/psychological, fear, coercion or control	7.4	18.8	18.5	27.3	20.0	16.5
Family violence alleged—child(ren) exposed to family violence	3.7	6.3	11.1	18.2	10.0	8.2
Family violence alleged—not available	0.0	0.0	3.7	0.0	1.4	1.0
Any of the above claims ^b	18.5	21.9	48.2	45.5	35.7	30.9
Number of cases	27	32	27	11	70	97

Notes: Percentages are based on court files with each characteristic; for example, 22.2% of court files with no cross-examination on the file had a claim about the mother of alleged physical violence. ^aRegardless whether same claim was made about the father. ^bIncludes family violence orders. ^cRegardless whether same claim was made about the mother.

Table 3.6 shows that allegations of family violence were most commonly made about fathers. Over eight-in-ten cases (83% of all files) had at least one of the three types of allegations of family violence made against the father (regardless of whether any claim was made about the mother). This was twice the proportion of allegations of family violence claimed about the mother (39%). Sometimes allegations of family violence were claimed about both the mother and father and this applied to 31% of the files. Regardless of whether there was direct cross-examination, the rate of allegations of family violence against the father was higher than that against mother (70-89% to 26-64%).

One of the most noticeable findings was the higher rates of allegations of violence against both parents in files where there was direct cross-examination. For example, of the files where both parents cross-examined each other, there were 46% of files where an allegation of family violence was made against both parents. This proportion was higher than the 19% of files where there was no direct cross-examination. This may suggest that direct cross-examination was linked with allegations and counter allegations of family violence and/or with more contested or complex cases. Of note, as shown in Chapter 5, in a majority of cases, no specific safeguards were in place when cross-examination was undertaken. These results are shown and described later in Table 5.1 (on page 45).

3.4 Involvement in direct cross-examination by alleged and substantiated victims and perpetrators

Table 3.7 presents further analyses of information on direct cross-examination in the court files by examining who the alleged victim of family violence was. In 75% of cases, the mother was the alleged victim of family violence, and this was higher than the corresponding proportion of cases where the father was the alleged victim (31%). This pattern is consistent with the higher rate of allegations of family violence against the father than against the mother. In 44% of the court files, children were also the alleged victim of family violence.

The association between direct cross-examination and who was the alleged victim of family violence was not as pronounced as the data presented in Table 3.5, which looked at direct cross-examination information according to the party that the family violence was claimed against. This may reflect the fact that family violence could be directed at others (e.g., children or other close family member) to achieve the same effect. In 69% of cases where the father cross-examined the mother, the mother was also the alleged victim of family violence. This proportion was similar to the overall rate in all files (75%). In 30% of cases where the mother cross-examined the father, the father was also the alleged victim of family violence.

The data presented below allows consideration of the association between direct cross-examination and whether family violence orders are in place or whether there was a history of criminal charges or convictions indicated on the file. Table 3.8 shows that:

- fathers were more likely to have a family violence order made against them (45% of cases) compared with 9% of mothers; and
- a higher proportion of fathers also had a history of criminal charges or convictions (24-35%) compared with (6-10%) of mothers.

Table 3.8 also shows that, overall, fathers were more likely than mothers to directly cross-examine the other parent only in circumstances where the cross-examiner had an FVO or a criminal charge or conviction against them (FVO: fathers 53% and mothers 18.5%; criminal charges: fathers 38% and mothers 26%; convictions: father 31% and mothers 15%). While there were no clear patterns emerging in relation to fathers who did or did not undertake direct cross-examination where they had an FVO, criminal charge or conviction against them, the data indicated that mothers with an FVO, criminal charge or conviction were more likely to undertake direct cross-examination than not.

Table 3.7: Victim of family violence, by direct cross-examination

Claim of family violence and alleged victim	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All (%)
Mother victim of family violence						
Family violence alleged—physical	51.9	53.1	51.9	36.4	50.0	50.5
Family violence alleged—emotional/psychological, fear, coercion or control	70.4	43.8	48.1	27.3	2.9	50.5
Family violence alleged—child(ren) exposed to family violence	55.6	50.0	37.0	36.4	42.9	46.4
Family violence alleged—not available	0.0	0.0	3.7	0.0	1.4	1.0
Any of the above claims	81.5	68.8	77.8	72.7	72.9	75.3
Father victim of family violence						
Family violence alleged—physical	22.2	6.3	11.1	9.1	8.6	12.4
Family violence alleged—emotional/psychological, fear, coercion or control	14.8	21.9	18.5	9.1	8.6	17.5
Family violence alleged—child(ren) exposed to family violence	14.8	6.3	14.8	18.2	11.4	12.4
Family violence alleged—not available	0.0	0.0	7.4	0.0	2.9	2.1
Any of the above claims	25.9	34.4	29.6	36.4	32.9	30.9
Children victims of family violence						
Family violence alleged—physical	25.9	18.8	11.1	45.5	20.0	21.6
Family violence alleged—emotional/psychological, fear, coercion or control	25.9	31.3	18.5	54.5	30.0	28.9
Family violence alleged—child(ren) exposed to family violence	14.8	18.8	25.9	18.2	21.4	19.6
Family violence alleged—not available	0.0	0.0	3.7	0.0	1.4	1.0
Any of the above claims	40.7	46.9	40.7	54.5	45.7	44.3
Number of cases	27	32	27	11	70	97

Table 3.8: Claim of family violence order and parent's history of crime charges and conviction, by direct cross-examination

Claim of family violence and who claim made about	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All files (%)
Claim about mother^a						
Family violence order (personal protection or additional FV orders)	11.1	0.0	18.5	9.1	8.6	9.3
Parent's history: crime—charges	7.4	0.0	25.9	9.1	11.4	10.3
Parent's history: crime—convicted	7.4	0.0	14.8	0.0	5.7	6.2
Claim about father^b						
Family violence order (personal protection or additional FV orders)	55.6	53.1	37.0	18.2	41.4	45.3
Parent's history: crime—charges	33.3	37.5	29.6	45.5	35.7	35.1
Parent's history: crime—convicted	25.9	31.3	14.8	18.2	22.9	23.7
Claim about both mother and father						
Family violence order (person protection or additional FV orders)	7.4	0.0	3.7	9.1	2.9	4.1
Parent's history: crime—charges	0.0	0.0	7.4	0.0	2.9	2.1
Parent's history: crime—convicted	0.0	0.0	0.0	0.0	0.0	0.0
Number of cases	27	32	27	11	70	97

Notes: ^aRegardless whether same claim was made about the father. ^bRegardless whether same claim was made about the mother.

The data were also examined to explore whether the party being directly cross-examined was legally represented or whether there was an ICL in the relevant case, and whether this may have been associated with a lower likelihood of direct cross-examination.

Of the fathers who were self-represented and thus potentially able to directly cross-examine the mother, approximately two-thirds (62%) did directly cross-examine the mother. Table 3.9 depicts cases where the male party (most likely the father) was self-represented and therefore potentially able to directly cross-examine the other party (most likely the mother) according to these selected legal characteristics, the family violence allegation, and according to whether the father directly cross-examined the mother. The table demonstrates that where the father was self-represented, the likelihood that he directly cross-examined the mother was associated with the mother having legal representation. It may be that in these circumstances, judicial officers were more inclined to allow direct cross-examination when the witness was legally represented with the potential for the legal representative to intervene and object to any inappropriate or irrelevant direct cross-examination.

Another notable pattern depicted in Table 3.9 is that the father was more likely to conduct direct cross-examination where the allegation of family violence involved a child as the victim. This may suggest that judicial officers were more inclined to allow direct cross-examination when a claim was related to the children (e.g., as direct or indirect victims).

On the other hand, of the mothers who were self-represented and potentially able to directly cross-examine the father, eight in ten (81%) did directly cross-examine the father, which is higher than the proportion of self-represented fathers who conducted direct cross-examination (62%). It would be helpful to make a similar comparison of these selected legal characteristics and family violence allegations according to whether the father was directly cross-examined when the mother was self-represented and thus potentially able to conduct direct cross-examination. Unfortunately, the data does not allow this comparison because as noted in Section 2, the number of mothers without legal representation was substantially smaller compared to the number of fathers without legal representation, and the number of cases where mothers did not directly cross-examine the other party was also small ($n = 9$). As such, Table 3.10 shows only the data where the female party (usually the mother) did cross-examine the male party (usually the father).

Table 3.9: Cases where fathers were self-represented: FV allegation and mother's legal representation status by whether father directly cross-examined mother

Legal characteristics & FV allegation	Whether father cross-examined mother	
	No (%)	Yes (%)
She had legal representation	69.2	74.4
Independent children's lawyer	76.9	76.7
FV allegation against him	92.3	81.4
FV allegation against her	36.8	33.3
FV victim—children	21.1	50.0
FV victim—her	84.2	61.9
FV victim—him	36.8	19.1
Number of cases	26	43

Table 3.10: Cases where mothers were self-represented: FV allegation and father's legal representation status by whether mother directly cross-examined him

Legal characteristics & FV allegation	Whether mother cross-examined father	
	No ^a	Yes (%)
He had legal representation	-	57.9
Independent Children's Lawyer	-	73.7
FV allegation against him	-	71.1
FV allegation against her	-	52.6
FV victim—children	-	44.7
FV victim—her	-	57.9
FV victim—him	-	26.3
Number of cases	9	38

Note: ^aResults are not shown due to small subsample numbers.

3.5 The operation of direct cross-examination where there is alleged or substantiated family violence: Insights from the qualitative data

The qualitative data collected from the audio recordings of the direct cross-examination and from the transcripts of proceedings provided substantial insight into the operation of the cross-examination in circumstances characterised by alleged or substantiated family violence.

As noted previously, in total, almost three-quarters of the 97 cases ($n = 70$) involved direct cross-examination. Of the 70 cases where direct cross-examination took place, almost two-thirds of these cases ($n = 43$) involved an alleged or substantiated perpetrator of family violence undertaking direct cross-examination of an alleged or substantiated victim, whereas almost half involved the alleged or substantiated victims of family violence

undertaking the direct cross-examination of the alleged or substantiated perpetrators ($n = 34$), noting that there was an overlap with 22 cases involving mutual allegations. Nearly one half of all cases involving direct cross-examination involved allegations of family violence that were substantiated by criminal proceedings (in particular, related to an offence involving violence or a threat of violence), judicial determination (as identified through the accompanying judgment) or via medical evidence (47%, $n = 33$).

Direct cross-examination in cases involving family violence orders or criminal charges or convictions

Table 3.8 (on page 31) indicates that 9% of all cases in the sample involved a family violence order against the mother, that 45% involved a family violence order against the father and that 4% of all cases involved a family violence order against both parties. More specifically, a final family violence order (however determined) was in place against one or both of the parties in the proceedings in almost one-third of all cases involving direct cross-examination ($n = 23$).

In cases where a final family violence order applied, judicial officers were observed to be more likely to be engaging in a high level of intervention in the process of direct cross-examination (52% of cases as opposed to an average of 40% across all cases, see section 5.3, page 46). For example, in Case 12, a case involving a particularly lengthy cross-examination of approximately three hours, the father cross-examined the mother asking her about her assertions that he was violent during their relationship and why there were no reports to the police to provide support to these allegations. The judicial officer interjected frequently and requested that the father reframe his questions, indicating that they were not appropriate and/or too lengthy for the witness to answer. The existence of the family violence order emerged as a focal point in this process of cross-examination with the father asking several questions about it and about the mother's complaints that he breached the order, with the questions becoming repetitive and involving the same question reworded in a number of ways.

The challenges in this context were for both the witness (who indicated that she had answered the same question three times) and for the judicial officer who repeatedly reprimanded the father in relation to the questions that he posed and for making statements rather than asking questions, observing in relation to the latter that "this is taking free kicks". Following his review of the family violence order, the judicial officer asked the father to "move on" from this line of questioning.

Table 3.8 also outlines the number of cases where direct cross-examination took place in cases where a criminal charge or conviction was identified as being in place. A closer analysis of the nature of charges and convictions enabled the researchers to identify those cases where either party was charged or convicted of an offence involving violence or a threat of violence towards the other party to the proceedings and towards a third party ($n = 23$) or only towards the other party to the proceedings ($n = 14$) (as opposed to driving, drug-related charges or convictions or other miscellaneous charges or convictions). A substantial proportion of these cases also involved a final family violence order being in place ($n = 12$).

Examples of direct-cross-examination taking place where the cross-examining party had been charged or convicted of offences related to the family violence allegations against the other party provided insight into the dynamics of cross-examination in this context. In Case 01, the father was convicted of the attempted murder of the mother (and a final family violence order was in place protecting the mother). At the commencement of the direct cross-examination, the judicial officer acknowledged the difficulty associated with the father being self-represented and explained that where cross-examination did not take place, the evidence of the witness would be accepted untested and then urged the father to seek legal advice. During the course of the direct cross-examination, the father was described by the judge as "aggressive" and "emotional", yelling at the witness a number of times. Substantial judicial intervention was required with the judicial officer telling the father to compose himself, to stop yelling at the witness and to ask questions rather than making statements.

A similarly interventionist approach was observed in another case involving allegations of severe family violence and where the father held a conviction for breaching an intervention order (Case 13). The judicial officer explained the process of cross-examination to the self-represented father and guided him as to how to ask questions. As with the previous example, concern to afford procedural fairness was apparent with the judicial officer permitting the involvement of a McKenzie friend¹² on behalf of the father and noting that being conscious that the case involved allegations of family violence, the father must ask his questions in a respectful manner.

¹² The duties of a McKenzie friend were described in *Watson and Watson* (2002) FLC 93-094 to be: "taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court" but importantly, not to "act as an advocate for the litigant" (except in exceptional circumstances and with leave of the Court).

As noted earlier in this section, not all of the cases involving charges or convictions of violent offences or family violence orders were characterised by significant judicial involvement. In Case 14, the mother was alleged to have engaged in violent behaviour towards the father and the children. At the time of cross-examination, the mother was incarcerated in relation to an incident of violence against a third party and was permitted to directly cross-examine the father via audio-visual link. This case involved a short cross-examination and was noted by the data collector to have very limited judicial involvement, save for a reminder to the mother to ask questions and not make comments.

In another case that involved minimal judicial intervention, Case 05, the self-represented party (the father) had been convicted of a breach of intervention order against the mother. During the course of the cross-examination, the judicial officer occasionally interjected to reiterate to the father that his questions must be relevant and proper although it was noted that repetitive questions were permitted over a lengthy period of direct cross-examination.

Effect of direct cross-examination on the parties

As the discussion in the previous section begins to illustrate, the engagement in direct cross-examination suggests that this affected parties whether they were the witness or the cross-examiner. By undertaking an analysis of the behaviour and interaction of parties during direct cross-examination from the transcripts and audio of proceedings, it was identified that from the total sample, a majority of direct cross-examinations involved one or both parties being (one or more of) aggressive ($n = 14$), argumentative ($n = 22$) or emotional ($n = 10$). Approximately one-quarter of the direct cross-examinations were identified as being neutral ($n = 16$) while in the remaining cases, the interaction of parties was unclear from the data ($n = 20$).

As noted above, of the 70 cases where direct cross-examination took place, almost two-thirds ($n = 43$) involved an alleged or substantiated perpetrator of family violence undertaking direct cross-examination of the alleged or substantiated victim, and almost one-half involved the alleged or substantiated victim of family violence undertaking the direct cross-examination of the alleged or substantiated perpetrator ($n = 34$), noting again that 22 cases involved mutual allegations. In a substantial proportion of these cases ($n = 20$), the direct cross-examination appeared to give rise to distress or to an otherwise negative experience on the part of the party undertaking the cross-examination or the party being cross-examined or both. The direct cross-examination was coded to be negative or distressful where it involved one or both parties becoming distressed or emotional in the course of the direct cross-examination.

Of the 34 cases where the alleged or substantiated victim of family violence undertook the direct cross-examination of the alleged or substantiated perpetrator, slightly more than one-quarter ($n = 9$) were identified as experiencing distress or to an otherwise negative experience on the part of the party undertaking the direct cross-examination or both parties. Of the total 20 cases where distress or otherwise negative experiences emerged during direct cross-examination, judicial intervention occurred in the majority of cases (see further, section 5.3, page 46).

The following descriptions illustrate examples of distressing or otherwise negative experiences apparent in the sample where the alleged/substantiated victim was being directly cross-examined by the alleged or substantiated perpetrator, and these will be followed by a consideration of experiences where the alleged or substantiated victim is undertaking the direct cross-examination. Several of the cases involved extensive and prolonged questioning about the alleged incidents of family violence.

In Case 02, the respondent mother became audibly nervous and upset when answering questions in her cross-examination by the respondent father, in circumstances where the cross-examination related to his assault of her (for which he had been convicted) and in relation to her allegation of rape against him. Although very softly spoken in tone, the respondent mother provided answers of a factual nature. This contrasted with what the data collector reviewing the audio of the proceedings identified as an intimidating, aggressive and condescending tone on the part of the father, with all questions directed at the mother's credibility rather than to the primary issue that was the subject of the proceedings, namely the father's relationship with the child. During the direct cross-examination, both the ICL and the respondent mother's lawyer objected to the line of questioning, which was identified by both as being harassing of the witness. Of note, although not permitted, the respondent mother's lawyer had initially sought for the mother's evidence to be provided by submission rather than her being subject to cross-examination.

In another case (Case 15), the father (whose criminal trial for sexual assault of a third party was pending at the time of the family law hearing) posed questions in direct cross-examination including:

Do you allege I sexually abused you? Why didn't you tell anyone?

When the mother responded that she was fearful of him, the father followed with the question: "So, you were happy to put up with it for 12 years?" In this case, the father's questions of the mother also related to the alleged abuse of the child and included the question:

How is it possible that from the ages of 9 to 14 I was doing these acts to the child and you did not know?

Analysis of the FCoWA judgment sample also provided insight into the nature of cases that involved direct cross-examination characterised by allegations and/or substantiated family violence. It is important to note again, however, that these data were derived solely from unreported judgments, which limited the ability of the data collectors to gather comprehensive information about each case for the project data collection instrument.

In a Case (WA01) the mother (the alleged victim of family violence) was extensively cross-examined by the father. It is noted in the judgment that the mother became noticeably upset when recounting the incidents of family violence perpetrated on her and her children by the father. The judgment documents the mother's reaction to the father raising his voice, whereupon she lowered her head and became visibly distressed. The judicial officer noted that, at times, the mother was unable to remember the events associated with the violent incidents and suggested that the trauma that the mother had experienced had affected her ability to answer questions. In this case, the judicial officer found that the father had committed extensive family violence against the mother including physical assault and ordered injunctive relief restricting the father from approaching the vicinity immediate to the mother's residence.

In the context of substantiated allegations of family violence against the husband, the judicial officer in Case WA04 observed that the mother was vague in some of her recollections when being directly cross-examined and found that her demeanour indicated that she found the experience of being questioned by the husband traumatic. Of significance in this case, the judicial officer made an adjustment for contributions in the wife's favour when determining the distribution of property.

Although data from the UK context, the Ministry of Justice (Corbett & Summerfield, 2017) in their report *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-examination of Vulnerable and Intimidated Witnesses* may provide some insight into the challenges experienced by judicial officers in managing direct cross-examination of victims of abuse (see Corbett & Summerfield, 2017, p. 36; Vulnerable Witnesses and Children Working Group, 2015, p. 13). Judicial participants in that research raised concerns that the evidence of victims was likely to be "diminished due to fear or distress in connection with giving the evidence" (p. 38). Participants identified sexual abuse and rape, in particular, to be harder to case manage than those cases with allegations of physical or emotional abuse (Corbett & Summerfield, 2017, p. 36).

As noted above, cases in the sample also provide examples of the stressful and/or traumatising effect of undertaking direct cross-examination, which may, in turn, raise questions as to the accuracy and quality of the evidence yielded in this process. In one instance, a mother was audibly upset during her cross-examination of the father, culminating in her asking him why he assaulted her. In this case (Case 03) there were mutual allegations of family violence, and the father had also been convicted of criminal offences, including the assault of a third party and the breach of a family violence order. Both parties were unrepresented at the final hearing and cross-examined each other. The judicial officer interrupted the mother's cross-examination of the father on a number of occasions to remind her to rephrase her statements into questions and to stop the parties from responding to questions with another question. It was also observed that the mother was distressed and broke down while questioning the father about abuse that she alleged that she had suffered due to his conduct— including asking the father why he had sexually abused her. The judicial officer stopped the mother at this point and notified the father that he need not answer questions that may incriminate him. Of note, the judicial officer also intervened during the father's cross-examination of the mother to rephrase questions and to reprimand him for being abusive during questioning and reminding him that he must only ask relevant questions. The father's cross-examination of the mother ceased when he was unable to implement the advice of the judicial officer to express his statements as questions.

This and other cases suggest that the distress and other negative experiences associated with a self-represented litigant conducting their own case, and direct cross-examination in particular, may be compounded by pre-separation experiences whether they were a victim or perpetrator of family violence or both. For example, in Case 06, (which involved mutual allegations of family violence and two apprehended violence orders against the mother and a charge of malicious damage), the self-represented respondent mother began conducting the cross-examination by stating, "I have no idea what to say". To this the presiding judicial officer responded by suggesting that the mother consider:

the important parts of evidence that you disagree with. Things like how many nights the child should spend with the father, that's the issue here. So, ask him questions to help me determine what's best for your child.

In response, the mother commenced in a very timid manner that suggested that she was unsure and quite confused about the process, stating, "I'm sorry I'm floundering, it's very, very nerve racking", to which the judicial officer in a reassuring tone stated, "take your time, think of any specific reason", whereupon the mother replied, "I'm very nervous, anxious". Despite the mother's best efforts and the supportive judicial officer, the mother's open-ended questions simply served to provide a platform for the father to outline his preferred parenting arrangements, with the mother indicating that "she doesn't like not being able to articulate herself", ultimately indicating that she had "run out of mental steam".

It is important to note, however, that the distress outlined above did not characterise all experiences of direct cross-examination in the sample. For example, in Case 07, the judicial officer intervened and adopted a guiding role by pointing out issues for consideration relevant to the determination of orders, posing questions of both parties and positing solutions to encourage the parties to consent on minor contentious issues. In this case, the parties responded to this intervention in a cooperative manner.

3.6 Summary

The discussion in this chapter focused on analysing the sample characteristics relating to direct cross-examination. The analysis identified that more commonly, fathers cross-examined mothers only (33%), while in a further 28% of cases, mothers cross-examined fathers only, and in 11% of cases, both parents cross-examined each other. No direct cross-examination was identified in 28% of the files sampled. In some of these cases the matter settled prior to cross-examination ($n = 10$) and, in some other instances, cross-examination did not take place because the opposing party did not appear in court ($n = 5$). In the remaining cases, the reason that direct cross-examination did not take place was unclear or unavailable from the audio file.

While it was not necessarily clear from the files whether family violence was a factor in direct cross-examination not taking place, in one case, substantiated family violence appeared to be a reason why the direct cross-examination did not occur. Some insight was also provided from the qualitative data derived primarily from the audio of proceedings into circumstances where matters characterised by family violence did not involve direct cross-examination. In relation to the FCoWA sample, direct cross-examination was a feature of around one-half of the judgments. There were similar rates of both parents cross-examining each other in the Magistrates and Family Courts (14% and 17% respectively). A higher proportion of mothers cross-examined the father only in the Family Court (28% compared with 5% of judgment in the Magistrates Court). Conversely, a higher proportion of fathers cross-examined the mother only in the Magistrates Court (19%) compared with 6% of judgments in the Family Court.

The data available from the main in-scope court file sample relating to the incidence of direct cross-examination was examined by exploring the factual circumstances of each case. This provided insight into the relationship between direct cross-examination and claims made about each party relating to certain factual issues. The data show that mothers who directly cross-examined the father alone were more likely to:

- have a claim relating to the impact of parenting arrangements on the child made against her (37%; cf. 21% of all cases);
- have a claim about her mental health made against her (52%; cf. 38% of all cases); or
- have a claim made against her capacity to meet the child's needs (44%; cf. 31% of all cases).

The data show that fathers were more likely to directly cross-examine the mother only when a claim about their children's protection was made against him including:

- a claim was made about the father relating to the need to protect the child from abuse or risk of psychological abuse (75% cf. 62% of all files); and
- a claim was made against the father on the basis that the child needed to be protected from high conflict (47%; cf. 29% of all files).

Consistent with this, another notable pattern that emerged was that the father was also more likely to conduct direct cross-examination where the allegation of family violence involved a child as the victim.

Overall, the rate of allegations of family violence against the father was higher than against the mother (83% vs 39%) and this was regardless of whether direct cross-examination took place. Notably, there were higher rates of allegations of family violence against both parents in files where there was direct cross-examination compared to

files with no direct cross-examination. More specifically, in three-quarters of the cases (75%), the mother was the alleged victim of family violence, with the father being the alleged victim in over one-quarter of cases (31%), with this pattern consistent with the higher rate of allegations of family violence against fathers than against mothers. Of note, the data showed that in 44% of the court files, children were also alleged victims of family violence.

When considered in the context of whether direct cross-examination took place, of the 70 cases involving direct cross-examination, almost two-thirds ($n = 43$) involved an alleged or substantiated perpetrator of family violence undertaking direct cross-examination of the alleged or substantiated victim, and almost one-half involved the alleged or substantiated victim of family violence undertaking the direct cross-examination of the alleged or substantiated perpetrator ($n = 34$), noting again that 22 of the cases involved mutual allegations. The mother was the alleged victim in more than two-thirds of cases where the father cross-examined the mother (69%), whereas the father was the alleged victim of family violence in 30% of cases where the mother cross-examined the father.

Overall, fathers were more likely than mothers to directly cross-examine the other parent only even though having a family violence order or a criminal charge or conviction against them (FVO: fathers 53% and mothers 18.5%; criminal charges: fathers 38% and mothers 26%; convictions: father 31% and mothers 15%). Nearly one half of all cases with direct cross-examination involved allegations of family violence that were substantiated either by criminal proceedings (related to an offence involving violence or a threat of violence), judicial determination (as identified through the accompanying judgment) or via medical evidence (47%, $n = 33$).

The majority of both self-represented fathers and mothers conducted direct cross-examination. While fathers were more likely than mothers to be self-represented; interestingly, self-represented mothers were more likely than self-represented fathers to conduct direct cross-examination in the in-scope sample (81% vs 62%). The data were also examined to explore whether the party being cross-examined was legally represented or whether there was an ICL in the relevant case, and whether this may have been associated with a lower likelihood of direct cross-examination. This analysis indicated that where the father was self-represented, the likelihood that he would directly cross-examine the mother was associated with her having legal representation, with a higher proportion of cases involving direct cross-examination in these circumstances. It may be that in these circumstances, judicial officers were more inclined to allow direct cross-examination when the witness was legally represented, with the potential for the legal representative to intervene and object to any inappropriate or irrelevant questions in direct cross-examination.

Insight into the operation of direct cross-examination in cases involving alleged or substantiated family violence available from the qualitative data was also provided in this chapter. In cases where a final family violence order applied, judicial officers were observed to be more likely to be highly interventionist in the process of direct cross-examination (52% of cases as opposed to an average of 40% across all cases). Examples of direct cross-examination taking place where the cross-examining party had been charged or convicted of offences related to the family violence allegations against the other party provided insight into the dynamics of direct cross-examination in this context. In some cases substantial judicial intervention took place either to control aggressive behaviour or to guide the appropriate formulation of questions. By examining the behaviour and interactions taking place during the audio of the cross-examination, the effect on parties participating in direct cross-examination was also considered, both in cases where it was the alleged perpetrator undertaking the direct cross-examination as well as in those cases where it was the alleged victim undertaking the direct cross-examination. Notably, the examples discussed illustrated the stressful and/or traumatising effect that may be experienced when participating in direct cross-examination whether as a witness or the cross-examiner.

4 Risk assessments and evidentiary profiles

This section of the report considers the extent to which risk assessments were conducted by family consultants in the in-scope sample of cases and whether there were any features distinguishing cases involving direct cross-examination in this regard. The data considered in this section will also more broadly examine the evidentiary profiles of the cases in the sample according to whether direct cross-examination took place or not.

4.1 Prevalence and outcomes of risk assessments

Information on the extent to which risk assessments in relation to family violence, abuse and adult and child safety were conducted by family consultants and the outcome of these risk assessments are presented in Table 4.1. This analysis also considers the court in which the case was heard. In almost 60% of in-scope files, a risk assessment was undertaken by a family consultant, with this being more likely in the FCoA (74%) compared with the FCCoA (54%). In cases where a risk assessment was undertaken, it was more likely than not that a presence of risk was indicated (67% of files). In a further 23% of cases, an absence of risk was indicated, and this was unclear or missing in 11% of files. The presence of risk was more commonly identified in cases heard in the FCCoA (73%) compared to 53% of files in the FCoA where a risk assessment was undertaken.

There was little difference in the outcomes of the risk assessment when this data was further analysed according to whether direct cross-examination took place. In files where a risk assessment was undertaken and there was no direct cross-examination, 69% of these cases had a risk assessment that indicated the presence of risk. This compared to 66% of files where direct cross-examination had occurred (data not reported).

Table 4.2 shows whether claims of family violence were substantiated by child protection agencies. It appears that family violence or safety risk was more likely to be substantiated among cases where the mother directly cross-examined the father than among cases where the father directly cross-examined the mother and cases without direct cross-examination. As a result, the involvement of a state child welfare authority/child protection agency was higher among the former cases (i.e., where mother cross-examined father) than among the cases involving direct cross-examination in the opposite direction.

It is also interesting to note that the incidence of family violence or other risks to safety that were not substantiated was also higher among cases where the mother cross-examined the father than in other cases. Overall, cases where the mother directly cross-examined the father were more likely than other cases to have family violence or safety risk addressed (i.e., either substantiated or not substantiated rather than not applied). The data also show that in a small proportion of cases, children in this subsample had been the subject of out-of-home care orders as a result of substantiated family violence, abuse or safety risk.

Table 4.1: Family violence/abuse/safety risk assessments undertaken by family consultants and outcome of risk assessment, by court

Whether family consultant undertook a risk assessment	FCCoA (%)	FCoA (%)	All (%)
Yes	54.1	73.9	58.8
No	41.9	17.4	36.1
Unclear/missing	4.1	8.7	5.1
Total	100.0	100.0	100.0
Number of cases	74	23	97
Outcome of risk assessment			
Indicated <i>presence</i> of risk	72.5	52.9	66.7
Indicated <i>absence</i> of risk	20.0	29.4	22.8
Indicated unable to form a view about presence or absence of risk/unclear/missing	7.5	17.7	10.5
Number of cases	40	17	57

Table 4.2: Substantiation of claims of family violence or safety risk and involvement of state child protection, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	All cross-exam. (%)	All (%)
Not substantiated	18.5	15.6	29.6	27.3	22.9	21.7
Substantiated	14.8	12.5	29.6	18.2	20.0	18.6
<i>No subsequent order</i>	0.0	9.4	7.4	9.1	8.6	6.2
<i>Subsequent order, child(ren) remain(s) at home</i>	3.7	0.0	7.4	9.1	4.3	4.1
<i>Subsequent order, child(ren) in out-of-home care</i>	11.1	3.1	14.8	0.0	7.1	8.3
Involvement not specified	11.1	3.1	11.1	0.0	5.7	7.2
Unclear	0.0	0.0	3.7	0.0	1.4	1.0
NA	55.6	68.8	25.9	54.6	50.0	51.6
Number of cases	27	32	27	11	70	97

The Tables 4.3 and 4.4 provide more detailed findings on family violence or abuse and safety risks alleged against fathers and mothers. Overall, findings on allegations of family violence or abuse or safety risks were similar for fathers and mothers. In relation to allegations against mothers, for close to one-half of cases where the mother cross-examined the father, the courts upheld the allegations either in part or in full, and this was more common than in other cases. In relation to allegations against fathers, findings that upheld the allegations in part or in full were more common among cases where fathers directly cross-examined mothers than among other cases. It should be kept in mind, however, that some groups had very small numbers of files.

Table 4.3: Findings on allegations of family violence, child abuse or neglect against mother, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	All cross-exam. (%)	All (%)
FV did occur/risk upheld in part or full	7.1	4.8	45.0	0.0	20.0	17.2
FV did occur but current risk not upheld	0.0	4.8	5.0	22.2	8.0	6.3
FV did not occur/risk not upheld	0.0	9.5	5.0	11.1	8.0	6.3
Not able to determine family violence allegations	0.0	0.0	0.0	11.1	2.0	1.6
Not addressed	14.3	28.6	5.0	22.2	18.0	17.2
No FV alleged: FV did occur/risk upheld in part or full	0.0	4.8	0.0	0.0	2.0	1.5
No FV alleged: FV did occur but current risk not upheld	0.0	4.8	5.0	0.0	4.0	3.1
No FV alleged: Not addressed ^a	0.0	4.8	10.0	0.0	6.0	4.7
FV alleged: No judgment available	78.6	38.1	25.0	33.3	32.0	42.2
Total	100.0	100.0	100.0	100.0	100.0	100.0
Number of cases	14	21	20	9	50	64

Note: FV = family violence. ^aThis includes cases where mother was alleged having problem with substance, or father expressed about child's safety but no explanation given.

Table 4.4: Findings on allegation of family violence, child abuse or neglect against father, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	All cross-exam. (%)	All (%)
FV did occur/risk upheld in part or full	18.5	31.0	13.0	10.0	21.0	20.2
FV did occur but current risk not upheld	3.7	13.8	17.4	20.0	16.1	12.4
FV did not occur/risk not upheld	0.0	3.5	21.7	0.0	9.7	6.7
Not able to determine family violence allegations	0.0	0.0	0.0	20.0	3.2	2.3
Not addressed	3.7	17.2	8.7	20.0	14.5	11.2
No alleged FV: Not able to determine family violence allegations	3.7	0.0	0.0	0.0	0.0	1.1
FV alleged: No judgment available	70.4	34.5	39.1	30.0	35.5	46.1
Total	100.0	100.0	100.0	100.0	100.0	100.0
Number of cases	27	29	23	10	62	89

Notes: FV = family violence.

Table 4.5 further revealed four in ten cases had court findings that specified the need to protect children. Such findings were more common among cases involving direct cross-examination than those cases without direct cross-examination.

Table 4.5: Findings on needing to protect children, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	All cross-exam. (%)	All (%)
Need to protect child(ren)	25.9	50.0	44.4	54.6	48.6	42.3
No need to protect child(ren)	11.1	15.6	29.6	9.1	20.0	17.5
NA	63.0	34.4	25.9	36.4	31.4	40.2
Total	100.0	100.0	100.0	100.0	100.0	100.0
Number of cases	27	32	27	11	70	97

4.2 Evidentiary profiles of cases involving direct cross-examination

Table 4.6 provides a profile of the types of evidence used to support family violence or abuse allegations, including evidence available via risk assessments. The data presented in the table is further analysed by court and shows that family violence orders and evidence from a family consultant (be that via a s 11F memorandum of advice or a s 62G family report or viva voce evidence) were the types of evidence most commonly provided in the case files. Over one-half of the in-scope files relied on evidence of a family violence order (57%), followed by evidence from family consultants (42%). In around one-quarter of the files, evidence from police and psychological counselling were identified (29% and 25% respectively). Differences between the courts were also observed. For most of the categories of evidence about which data were collected, a higher proportion of cases in the FCoA had each evidence type supporting family violence allegations when compared to the FCCoA. The largest difference was the reliance on psychological counselling as evidence, in 52% of cases in the FCoA compared to 16% of cases in the FCCoA.

As Table 4.7 shows, the vast majority of cases (84%) had at least one evidence type used to support allegations of family violence. In 63% of cases at least two types of evidence were identified on the file, and this was more common in cases heard in the FCoA (78%) compared with 58% of cases in the FCCoA.

Table 4.6: Types of evidence, by court

Type of evidence	FCCoA (%)	FCoA (%)	All (%)
Family violence order/Personal protection order	59.5	47.8	56.7
Family consultant s 11F memorandum s 62G family report/evidence	44.6	34.8	42.3
Police record/evidence	27.0	34.8	28.9
Psychological counselling evidence	16.2	52.2	24.7
Criminal proceedings	23.0	13.1	20.6
Affidavit of witness to FV/abuse other than victim	14.9	17.4	15.5
Medical evidence	9.5	30.4	14.4
State child protection evidence	9.5	26.1	13.4
Separate expert witness evidence	4.1	13.1	6.2
FLA s 69ZW (in any court) or s 202K (FCoWA only)	4.1	13.1	6.2
School/kinder/child care evidence	4.1	0.0	3.1
Children's Contact Service evidence	0.0	0.0	0.0
Other evidence	8.1	21.7	11.3
Number of cases	74	23	97

Notes: FV = family violence. Multiple response options could be chosen for this item so percentages do not sum to 100.0%.

Table 4.7: Number of types of evidence, by court

	FCCoA (%)	FCoA (%)	All (%)
No evidence used in the case to support family violence or abuse allegations	17.6	13.1	16.5
1 evidence type	24.3	8.7	20.6
2 evidence types	23.0	39.1	26.8
3 or more evidence types	35.1	39.1	36.1
Number of files	74	23	97

Table 4.8: Summary of direct cross-examination on court files, by type of evidence presented in the case file

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-exam. (%)	All files (%)
Type of evidence^a						
Family violence order/Personal protection order	66.7	56.3	51.9	45.5	52.9	56.7
Family consultant	44.4	46.9	40.7	27.3	41.4	42.3
Police	33.3	21.9	25.9	45.5	27.1	28.9
Psychological counselling evidence	25.9	28.1	22.2	18.2	24.3	24.7
Criminal proceedings	29.6	18.8	18.5	9.1	17.1	20.6
Affidavit of witness to FV/abuse other than victim	18.5	18.8	11.1	9.1	14.3	15.5
Medical evidence	18.5	18.8	3.7	18.2	12.9	14.4
State child protection	11.1	12.5	14.8	18.2	14.3	13.4
Separate expert	3.7	3.1	11.1	9.1	7.1	6.2
S 69ZW (in any court) or s 202K (FCoWA only)	7.4	3.1	7.4	9.1	5.7	6.2
School/kinder/child care	0.0	9.4	0.0	0.0	4.3	3.1
Children's Contact Service	0.0	0.0	0.0	0.0	0.0	0.0
Other evidence	14.8	9.4	14.8	0.0	10.0	11.3
Number of types of evidence						
No evidence used in the case to support family violence or abuse allegations	7.4	12.5	22.2	36.4	20.0	16.5
1 evidence type	18.5	25.0	18.5	18.2	21.4	20.6
2 evidence types	29.6	28.1	29.6	9.1	25.7	26.8
3 or more evidence types	44.4	34.4	29.6	36.4	32.9	36.1
Number of cases	27	32	27	11	70	97

Note: ^a Multiple response options could be chosen for this item so percentages do not sum to 100.0%.

Information on the types of evidence available in the case file was further analysed according to the direct cross-examination characteristics of the cases and is presented in Table 4.8. The most noticeable finding from this

analysis was that for most of the evidence types, a higher proportion of cases where no direct cross-examination occurred had each evidence type on the file compared to cases where direct cross-examination took place. The largest differences in this pattern of results related to family violence orders. In approximately two-thirds (67%) of cases with no direct cross-examination, a family violence order was also identified in the case file, compared to just over one-half (53%) of cases where direct cross-examination was undertaken. In 30% of cases where criminal proceedings in relation to a party formed part of the evidence supporting family violence allegations, no direct cross-examination occurred. This compared to 17% of cases where direct cross-examination occurred.

This is particularly interesting to consider in the context of the finding noted in Chapter 3 that there were higher rates of *allegations* of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination. In addition, compared to cases with no direct cross-examination, cases with direct cross-examination were more likely to have no evidence (20% vs 7%) and less likely to have three or more types of evidence (33% vs 44%). These findings may suggest that the availability of evidence supporting family violence allegations discouraged a self-represented offending party from undertaking direct cross-examination, avoided the necessity for a self-represented victim to cross-examine the perpetrator or gave rise to judicial officer discouraging or disallowing the direct cross-examination.

4.3 Summary

In this chapter, the extent to which risk assessments were conducted by family consultants in the in-scope sample of cases was considered to identify whether there were any features distinguishing cases involving direct cross-examination in this regard. The evidentiary profiles of the cases in the sample were also considered according to whether direct cross-examination took place or not. In almost 60% of sampled files, a risk assessment was undertaken by a family consultant, (FCoA: 74%; FCCoA: 54%) and in cases where a risk assessment was undertaken, it was more likely than not that a presence of risk was indicated (67% of files). There was little difference in the outcomes of the risk assessment when this data was further analysed according to whether direct cross-examination took place. The data also showed that family violence/safety risk assessments by child protection agencies were more likely to be substantiated and that cases were more likely to have the involvement of child protection agencies where the mother directly cross-examined the father.

The analysis of findings made by judicial officers in relation to allegations of family violence, child abuse or neglect and of the need to protect children against harm or the risk of harm were similar for fathers and mothers. In relation to allegations against mothers, for close to one-half of cases where the mother directly cross-examined the father, the courts upheld the allegations either in part or in full, and this was more common than in other cases. In relation to allegations against fathers, the findings that upheld the allegations in part or in full were more common in cases where fathers directly cross-examined mother than among other cases. The analysis also revealed that four-in-ten cases involved court findings that specified the need to protect children and that these findings were more common among cases involving direct cross-examination than in those cases without direct cross-examination.

The evidentiary profiles of the cases were also further explored in this chapter. Family violence orders and evidence from a family consultant (be that via a s 11F memorandum of advice or a s 62G family report or viva voce evidence) were the types of evidence most commonly provided in the case files. In around one-quarter of the files, evidence from police and psychological counselling were identified (29% and 25% respectively). Differences between the courts were also observed. A higher proportion of cases in the FCoA had each evidence type supporting family violence allegations when compared to the FCCoA. Multiple types of evidence were commonly used to support allegations and in nearly two-thirds (63%) of cases, at least two types of evidence were identified on the file (the most frequently used evidence type was family violence orders in 57% of cases).

It was also observed that a higher proportion of cases where no direct cross-examination occurred had each evidence type on the file, compared to those cases where direct cross-examination did take place. The largest differences in this pattern of results related to family violence orders (67% vs 53%) and in relation to cases where criminal proceedings formed a part of the evidence supporting family violence allegations (30% vs 17%). In addition, compared to cases with no direct cross-examination, cases with direct cross-examination were more likely to have no evidence (20% vs 7%) and less likely to have three or more types of evidence (33% vs 44%).

It was observed that this was particularly interesting to note in the context of the finding in Chapter 3 relating to higher rates of *allegations* of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination. Together these findings may suggest that the availability of evidence supporting family violence allegations discouraged a self-represented offending party from undertaking direct cross-examination, avoided the necessity for a self-represented victim to cross-examine the perpetrator or gave rise to the judicial officer discouraging or disallowing the direct cross-examination.

5 Arrangements made to accommodate direct cross-examination

This section of the report considers the range of arrangements made to accommodate direct cross-examination in the in-scope sample. Following an overview of the specific safeguards employed, closer consideration will be given to remote witness facilities/screens and to judicial intervention (including by relaying questions) and monitoring of the direct cross-examination process, as well as interventions by legal representatives and ICLs. Particular insight into judicial approaches to direct cross-examination to accommodate procedural fairness are provided in an analysis of the qualitative component of the fieldwork collected from both the court files and the audio/transcripts of proceedings.

5.1 Overview of specific safeguards employed in sampled cases

Table 5.1 outlines the extent to which specific safeguards were in place when direct cross-examination occurred in the in-scope sample, and the types of safeguards that were employed in these circumstances. The data indicate that for the majority of cases in the sample, specific safeguards were not in place (58% of overall court files; data not presented in Table 5.1). Where mothers were directly cross-examined by fathers, there was a slightly lower likelihood that specific safeguards would be in place for their protection as the witness than when fathers were directly cross-examined by the mothers (24% cf. 23% for mothers when directly cross-examined by fathers). Of note, however, is that in close to 14% of cases in the sample it was unclear on the basis of both the court file and court audio or transcript (if available) whether specific safeguards were in place for the protection of the mother as a witness being cross-examined by the father. In reviewing the court files and audio of proceedings, the data collectors assessed the protection afforded by the safeguard on the basis of how it operated in each case and which party was protected from the operation of the safeguard in the circumstances of each case.

Where the specific safeguards were for the protection of the cross-examiner, there were substantially more cases where the safeguards were for the protection of the mother when she was directly cross-examining the father (42%), as compared to instances where safeguards were in place for the father when directly cross-examining the mother (33%). Together these data demonstrate that specific safeguards were more likely to be in place for the parties undertaking the direct cross-examination than for the witnesses being directly cross-examined, regardless of their gender. Where specific safeguards were in place, these safeguards overwhelmingly involved judicial intervention, and specifically the judicial officer actively intervening in the cross-examination to relay questions.

This judicial intervention safeguard was most likely to be put in place for the protection of the mother when directly cross-examining the father (18%), followed by instances of when she was being cross-examined by the father (16%). Other safeguards engaged were the use of a video link for the protection of the mother when cross-examining the father (3%) and the granting of permission to a McKenzie friend to act as a third-party questioner for the protection of the mother when cross-examining the father (11%) and for the protection of the father when cross-examining the mother (2%).

A broadly similar pattern emerged in the uptake of protective measures apparent in the UK Ministry of Justice (2017) report of alleged perpetrators of abuse as litigants in person in private family law, *The Cross-examination of Vulnerable and Intimidated Witnesses*. In that study, the most common arrangement involved the presiding judge relaying the questions to the witness ($n = 25$) or for the litigant in person to do so ($n = 15$). Of note, also, in seven hearings a screen was used to physically separate the parties and in one case the video link was used to facilitate the cross-examination remotely. There were four cases where a legal advisor undertook the cross-examination and one where a McKenzie friend acted as the third-party questioner (Corbett & Summerfield,

2017, p. 11). When considering these data, however, it is important to bear in mind that the sampling approach engaged for this UK research varied substantially with that employed for this study, as outlined in Chapter 1.

The qualitative data collected from the audio or transcripts for this current study provides more specific insight into the application and operation of these safeguards in the Australian context and will be discussed further below.

Table 5.1: Direct cross-examination safeguards

	Mother cross-examined father		Father cross-examined mother	
	Safeguard for mother	Safeguard for father	Safeguard for father	Safeguard for mother
Were there specific safeguards in place?				
Yes	42.1	23.7	32.6	23.3
No	55.3	73.7	60.5	62.8
Unclear	2.6	2.6	7.0	14.0
Total	100.0	100.0	100.0	100.0
Type of safeguard in place^a				
Judge actively intervening to relay questions	18.4	10.5	16.3	16.3
Screen used	0.0	0.0	0.0	0.0
Questions approved in advance	0.0	0.0	0.0	0.0
Video link used	2.6	0.0	0.0	0.0
McKenzie friend as 3rd party questioner	10.5	0.0	2.3	0.0
Legal adviser as 3rd party questioner	0.0	0.0	0.0	0.0
Other safeguard not listed above/unclear ^b	15.8	15.8	18.6	9.3
Number of cases	38	38	43	43

Notes: ^a Percentage based on number of cases where cross-examination occurred; for example, in 18% of cases where the mother cross-examined the father, a safeguard of the judge relaying questions was used.

^b Other safeguards include additional forms of judicial intervention; for example, limiting or stopping questioning (for further analysis of the various forms of judicial intervention employed during direct cross-examination, refer to section 5.3).

5.2 Remote witness facilities and other security arrangements

While audio records provided a wealth of insight in relation to the content and process of direct cross-examination where it occurred, these data (together with the court file records) did not always shed light on the consideration that may have been given by the courts and the parties to the potential employment of the range of security measures associated with the giving of evidence. Where apparent on the available court file and audio data, this was recorded in our data collection instrument and, as indicated in Table 5.1, these data identified a small number of cases in the sample where it was apparent that remote witness facilities or particular security arrangements had been considered.

In Case 11, where there were convictions for family violence perpetrated against the respondent mother and children and an existing family violence order in place, a safety plan was in place providing for staggered arrival and departure times and for the availability of safe rooms. The audio review in this case indicated that the presiding judicial officer had confirmed with the respondent mother, who was legally represented, that she had chosen to be in the court room in the presence of the applicant father who was attending the court in person rather than by remote video or phone link from prison. At the commencement of the audio recording of proceedings, the judicial officer asked the respondent mother if she was comfortable to remain in the court in the event that she was cross-examined and the respondent mother responded in the affirmative. It appeared from the available audio recording that had the respondent mother indicated that she was not comfortable remaining in the same room, that alternative arrangements would have been made.

In this case, the judicial officer also stated that procedural fairness required an unbiased decision-maker and that each party be provided with the opportunity to present their case and to respond to the case presented

by the other side. The judicial officer indicated that the applicant father would be given an opportunity to do this and that assistance would be provided from the bench with the giving and taking of evidence to the extent permissible. In this case, evidence did not commence and such assistance was not required to be provided. Of note, it was apparent from the content of the audio recording of this particular case, that the judicial officer was considering options that may be invoked to prevent the necessity for the respondent mother to be cross-examined by the applicant father, or that if direct cross-examination was to take place, the judicial officer indicated that the mother would be permitted to do so by means of a remote room. Specific reference was made by the judicial officer to Division 12A and to principle three of s 69ZN FLA in the context of the judicial officer indicating that the mother and her counsel should consider whether it was necessary for the mother's case to rely on her affidavit (and specifically to consider whether the evidence could be made available from other sources), with the judicial officer noting that if the affidavit was relied on, the respondent father would be entitled to test the evidence by cross-examination. This was in relation to matters apart from those connected to his current incarceration that had already been accepted into evidence as a result of his guilty plea. Ultimately, no direct cross-examination occurred in this case as the court was informed following a break that the father had agreed to the no-contact orders proposed by the wife and consented to by the ICL.

Other security arrangements were also in place in Case 16. In this case, a safety plan was in place in circumstances where, at the time of the hearing, there was an interim s 68B FLA order restraining the father from being within 100 metres of the mother's residence or workplace or from the child's care/education facilities. In this case, the father had been found guilty of breaching an apprehended violence order and had been charged with stalking or intimidating the mother with intent to cause physical harm. The safety plan in this case involved the allocation of a court support person to the family, safe rooms being made available and staggered arrival and departure times. The security notes on file also noted that the father had made threats to abduct the child during mediation, that he had demanded the child's address from client services, and behaved in an extremely angry and demanding manner at court. On the basis of the content of the file and audio, it appeared that the primary safeguard during cross-examination in this case involved the judicial officer intervening to rephrase questions (see discussion of judicial management and intervention further below), many of which focused on challenging the mother's allegations of family violence. Some of the father's questions were phrased "If I was so violent, why did you do ...?" and repeatedly asked whether the mother could verify her allegations of family violence. The mother's responses included that she could not verify her allegations because the violence mainly occurred at home with only the two of them present and that even if there were witnesses, they would be too afraid to testify against him knowing what he was capable of by way of retaliation (referencing her allegations that he engaged in stalking and threatening behaviour).

Although the researchers in this current study did not have the opportunity to engage with judicial officers via interviews to gain an insight into the experiences of using these protective measures, as noted in the previous section, some insight into challenges faced by judicial officers in the UK is available from the 2017 Ministry of Justice research. In the UK, remote witness arrangements, including arrangements to give evidence via video links, and privacy screens were also identified as tools to assist with the management of direct cross-examination. Judicial participants in that study identified these options as inconsistently available and/or inadequate for the protection of vulnerable witnesses. For example, some participants described the booking arrangements as unsatisfactory as arrangements for video link were not always honoured or the security screen was "so peculiar and antiquated that it falls over half way through or you can see round it" (Corbett & Summerfield, 2017, p. 24) or its preclusion of visual cues potentially disadvantaged both parties (p. 25).

Most judicial participants in the Ministry of Justice study identified video links rather than screens to be the appropriate measure in "the most serious of cases, as there would be physical distance between the parties, rather than just the visible and psychological distance that a screen provides" (Corbett & Summerfield, 2017, p. 25). Interestingly, while some judicial officers identified these measures as standard, others identified requests for their application by witnesses as "chest beating" or as a means of seeking "preferential treatment" (p. 25), with some judicial officers reticent to employ them because it would require their determination of the vulnerability of a witness prior to the consideration of evidence in the matter (p. 25). In this context, legal and non-legal practitioners participating in the workshop component of that study considered the potential benefits associated with undertaking vulnerability assessments for all parties at the outset of family law proceedings.

5.3 Judicial monitoring and intervention

Principle two of s 69ZN FLA (specifically s 69ZN(4) FLA) provides that the court is to actively direct, control and manage the conduct of proceedings. A substantial proportion of cases analysed in this study provided insight into the role of judicial monitoring and intervention to facilitate the process of direct cross-examination.

Of the 70 cases involving direct cross-examination, judicial officers, legal representatives or ICLs identified issues with the relevance of questions posed during direct cross-examination in a majority of cases ($n = 41$). These issues of relevance were identified by an analysis of the qualitative data to examine the judicial intervention and objections raised by ICLs or lawyers representing the party being directly cross-examined, with consideration also given to the nature of the topics considered during cross-examination. Further qualitative analysis of the data from audio files and transcripts enabled a closer consideration of the levels of judicial involvement in the proceedings. In 40% ($n = 28$) of the 70 cases, the judicial officer engaged in a high level of intervention during the process of direct cross-examination, with a slightly greater proportion ($n = 29$) of cases involving what was identified as a moderate level of intervention. The level of intervention was coded based on the frequency and nature of judicial involvement; for example, a high level involved the judicial officer frequently interjecting to facilitate cross-examination, reprimand parties or relay and/or rephrase questions.

More specifically, in the cases where the alleged or substantiated perpetrator cross-examined the alleged or substantiated victim (noting that there may be overlap where the alleged or substantiated victim cross-examined the alleged or substantiated perpetrator due to mutual allegations of family violence), a significant proportion of cases involved judicial intervention to assist the cross-examining party compared with judicial intervention for the party being cross-examined. The most common form of judicial intervention for all cases involved judicial officers relaying or rephrasing questions followed by intervening in the direct cross-examination due to questions being inappropriate or irrelevant.

The level of judicial intervention was lower for the cases where the alleged or substantiated victim was cross-examining the alleged or substantiated perpetrator. One-half of the cases involved judicial intervention to assist the cross-examining party whereas fewer cases had judicial intervention for the party being cross-examined. Once again, the most common form of judicial intervention was relaying or rephrasing questions followed by the judicial officer interjecting during cross-examination.

Of the 43 cases involving direct cross-examination by an alleged or substantiated perpetrator, there were issues identified with the relevance of the questions posed in just under three-quarters ($n = 31$) of these cases. A high level of judicial intervention took place in more than one-third ($n = 18$) of these 43 cases and intervention by the examined party's legal representative or the ICL took place in more than one-third ($n = 14$) of the cases involving direct cross-examination by an alleged or substantiated perpetrator (see further, section 5.4, page 49).

Of the 34 cases involving direct cross-examination by the alleged or substantiated victim, there were issues identified with the relevance of the questions posed in almost two-thirds ($n = 21$) of these cases, and a high level of judicial intervention took place in 41% ($n = 14$) of these 34 cases, as well as intervention by the examined party's legal representative or by the ICL ($n = 13$).

While in most cases direct cross-examination proceeded with low to moderate judicial intervention, as noted above, a high level of intervention by the presiding judicial officer in the conduct of the direct cross-examination was apparent in a substantial proportion of cases. A closer examination of these cases in the sample provided insight into the monitoring process undertaken by judicial officers during direct cross-examination, and into the support provided by judicial officers by way of rephrasing or clarifying questions. The discussion below illustrates that some judicial officers in the sampled cases acknowledged the difficulties associated with self-represented litigants engaging in direct cross-examination, with these difficulties identified both from:

- the perspectives of the parties' who lacked the skills of experienced litigators and for whom the stress and distress arising from direct cross-examination may be substantial; and
- the perspective of the court in ensuring that the direct cross-examination was appropriate and respectful, that there was procedural fairness and proper testing of relevant evidence and that litigants were afforded the right to cross-examine the opposing party.

The analysis of the qualitative data illustrated the ways in which judicial officers managed and limited irrelevant lines of questioning in the sample. For example, in Case 17, the judicial officer interrupted the father's cross-examination of the mother on numerous occasions on the basis of the relevance of his questions. The judicial officer eventually required the father to return to his seat while the judicial officer questioned the mother, doing so on the basis that the father had failed to ensure that his questions were relevant and properly put to the witness. In Case 08, the judicial officer intervened in the father's cross-examination of the mother. The judicial officer repeatedly challenged the mother's stated position and also challenged the father's questioning of the mother in relation to his alleged sexual aggression on the basis that this was irrelevant. In this case the judicial officer engaged in the cross-examination process, in large part in place of the father, stating that the court was "not going to treat him special just because he doesn't have representation". In contrast, in Case 04, the judicial officer noted that the mother was a "lay person" and indicated that the approach taken would be tolerant of

“clumsy” approaches to questioning the witness and more lenient when the mother asked irrelevant or tangential questions. Despite several objections from the father’s lawyer, the judicial officer stated that he was going to be more patient and to allow more time for the mother to figure out what she was trying to ask and how she was going to make her questions relevant.

The challenges associated with judicial monitoring and guidance and facilitating procedural fairness in this context were prominent features of the sample of cases involving direct cross-examination. For example, in Case 18, the judicial officer began by outlining the cross-examination process and setting some ground rules:

This is not where you have an argument in court, it is a question and answer procedure ... I insist you both be polite to each other, and there is not raised voices on either side. To tailor this to the two of you, it's important not to interrupt the other person, and wait until you've been asked a question.

The father was immediately warned when interrupting the mother’s response to the father’s first question. The mother, who was heavily pregnant at the time of the final hearing, spoke in a quiet and timid tone in contrast to the forceful delivery of questions by the father who stated, “I’m asking a simple question”, with the judicial officer interrupting in an attempt to clarify what the father was attempting to ask. At numerous points in the direct cross-examination of the mother, the judicial officer intervened to ask clarifying questions, to calm the father down and to advise him to “do one thing at a time as it doesn’t make sense to jump around ... from one topic to another”. In spite of this advice, the judicial officer took issue with a number of the father’s questions, stating that the “witness couldn’t possibly be aware of the answer” and asking the father, “Where is this going? This is not a fundamental issue.” Ultimately the judicial officer stated:

I'm going to help improve the flow of cross-examination for you. If you think at any time I'm interrupting, I invite you to tell me, I don't want you to feel at a disadvantage.

The judicial officer proceeded to correct the form of the father’s questions and became heavily involved, conducting substantial proportions of the cross-examination. When the father resumed asking questions, the judicial officer indicated that he had “done a good job of making his point and to let it go now”. The father replied that he felt stressed, with the judicial officer enquiring if the father felt okay. After the judicial officer resumed formulating the questions, the father interrupted the judicial officer stating:

Please. When you think you're helping you're actually confusing me.

During the course of the cross-examination it became apparent to the judicial officer that the mother was distressed and the judicial officer asked the mother:

Are you feeling alright, you look like you're in some distress. Do you need a break?

The mother was crying, and the judicial officer stated:

Tell me if you need a break at any stage.

As it was apparent that the mother was distressed at the father’s questioning, the judicial officer assumed responsibility for the cross-examination entirely.

After conducting a significant period of cross-examination, the judicial officer invited the father to ask questions in the format that had been demonstrated. When the father asked a range of questions considered to be irrelevant by the judicial officer, it was stated that the court was “not going to allow the witness to be cross-examined for an entire day” and the judicial officer shared concerns about the nature in which the father communicated with the mother. The cross-examination concluded shortly thereafter.

Similarly, in Case 21 the relevance of questions emerged as a major issue throughout the direct cross-examination and the father was repeatedly told by the judicial officer to be more specific with his questions and to focus on the issues at hand. The judicial officer also directed the father to s 60CC(3) and the best interests considerations in the FLA in an attempt to guide the father’s questioning. The father eventually stated that he did not wish to ask any further questions because every time he did, the judicial officer intervened. The judicial officer suggested that the father continue as certain issues had not been covered; however, the judicial officer eventually asked the questions on the father’s behalf.

As indicated in the discussion above, the judicial intervention extended to judicial officers providing warnings or reprimanding parties for their behaviour during direct cross-examination. For example, in Case 09, the judicial officer reminded the father that she was “watching [his] interaction with the mother” and explained that by denigrating the mother in court, this may be considered to be reflective of how the father treats the mother outside of court. In Case 19, the judicial officer halted direct cross-examination upon describing the

father's approach as a "fishing expedition to satisfy [his] curiosity" that would not be permitted in court. In Case 12, the judicial officer expressed frustration with both parties at points during the direct cross-examination, noting their inability to ask proper questions or to answer questions clearly and, on occasion, described the cross-examination as "self-indulgent" and a "waste of court time".

Although it was not within the scope of this study to canvas the views of Australian judicial officers, the UK Ministry of Justice (2017) study provides some insight into the challenges facing judicial officers in these circumstances. Cited concerns were primarily associated with judicial officers putting questions to the witness on behalf of the self-represented litigant, which was identified as raising the issue of compromising judicial impartiality. A number of participating judicial officers identified this as an option of "last resort" with "no acceptable way to facilitate a cross-examination of an alleged perpetrator without acting as the intermediary in these cases" (Corbett & Summerfield, 2017, p. 17).

The complexities in this approach were illustrated by the contrast in the relative positions of the parties, with the judicial officers participating in the Ministry of Justice study describing how they could not put questions in the same manner as an advocate who would be directed at undermining the witness, which may be regarded as being to the disadvantage of the self-represented party (Corbett & Summerfield, 2017, p. 17). Judicial officers participating in that study also identified a need to reassure the witness that they were not taking sides against them albeit that they were putting the questions on behalf of the opposing party. Although not apparent on the face of the data examined for this current study, participants in the Ministry of Justice study described receiving the list of questions from the litigant in advance as a "useful judicial tool", albeit that the value was dependent on the conduct of the self-represented litigant and, in turn, the appropriateness of the listed questions (Corbett & Summerfield, 2017, p. 18).

5.4 Third-party intermediaries

Of the 70 cases involving direct cross-examination, nearly one-third (31%) involved some form of intervention by a legal representative (for the represented party) or the ICL ($n = 22$). More specifically, of the 43 cases involving direct cross-examination by an alleged or substantiated perpetrator, intervention by the examined party's legal representative or the ICL occurred in more than one-third ($n = 18$) of the cases involving direct cross-examination by an alleged or substantiated perpetrator. Of the 34 cases involving direct cross-examination by the alleged or substantiated victim (noting that 22 of these cases involved mutual allegations of family violence), intervention by the examined party's legal representative or by the ICL occurred in more than one-third of cases ($n = 13$).

It appeared that the presence of a legal representative for the party being cross-examined may operate as a safeguard for that party against improper or inappropriate questioning by the self-represented party. For example, in Case 22, the mother's counsel adopted an interventionist role in objecting to the father's questions (on account of the questions being speculative or irrelevant). The father was also told to conduct himself appropriately by the mother's counsel and refrain from making "side comments" about the mother. Case 23 provides another example of a case where the legal representation for the party being cross-examined was important for the protection of their client in this case as the judicial officer appeared to intervene only upon the objection by counsel, at which point the judicial officer assisted the self-represented father to formulate the questions and refer to evidence. Similarly, in a case discussed in section 3.5, Case 02, the mother's legal representative intervened throughout the direct cross-examination and during certain lines of questioning on grounds that the questioning was akin to harassment of the client.

In Australia, a self-represented litigant may also be assisted by a McKenzie friend, a legally unqualified person who is permitted to support and assist a litigant in court (derived from the old English case of *McKenzie v McKenzie* (1970) 3 WLR 472). The duties of a McKenzie friend were described by Lindenmayer J in *Watson and Watson* (2002) FLC 93-094 to be: "taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the court, provided that that person does not disrupt the proper conduct of the proceedings". However, a McKenzie friend may not act as an advocate for the client or speak on the client's behalf unless, as noted in *Watson and Watson* (2002) FLC 93-094, there are exceptional circumstances and there is express leave of the court.

In *Cooke v Stehbens* (1999) FLC 92-839, for example, the court granted leave for the McKenzie friend to address the court and speak on the mother's behalf, citing the following reasons: the other party did not object; the court considered the mother to be unable to represent herself effectively due to her emotional state; and the interests of the children required the hearing to not be adjourned for the mother to seek legal aid funding. However, the

court was clear that this permission was to be granted strictly in consideration of the particular circumstances of the case.

A small number of cases in the sample provided insight into the support provided by third-party questioners in the process of direct cross-examination. In Case 20, the mother had alleged physical and psychological family violence by the father towards her. During the direct cross-examination, the mother was permitted to have a McKenzie friend present to “assist with taking notes”. This case involved a particularly difficult direct cross-examination for the cross-examining party (the mother), who appeared to struggle with asking questions and became progressively flustered, confused and angry as the direct cross-examination continued. It was audible that the mother’s McKenzie friend was becoming increasingly vocal, whispering to the mother as to what questions she should ask. Eventually, the father’s counsel objected and said, “the McKenzie friend is becoming quite intrusive ... [they are] essentially a conduit for mother”. The judicial officer agreed and reminded the McKenzie friend that they were not a party to proceedings, were only here to take notes and were not the mother’s instructing solicitor.

Insight was also available from the FCoWA sample. In Case WA02, which involved severe allegations of family violence perpetrated by the father on the mother (and where the allegations were ultimately upheld by the trial judge), the trial was adjourned following the mother’s distress at cross-examining the father regarding family violence. When the matter resumed, the mother had the assistance of a McKenzie friend as the judicial officer noted that the mother found it difficult to conduct the proceedings on her own. A similar approach was taken in Case WA03 where a mother raised concerns about directly cross-examining the father (given the allegations of family violence, which were upheld by the trial judge), with the judicial officer offering the mother the opportunity to prepare her proposed questions first, following which the judicial officer could then provide her with appropriate assistance while maintaining the requisite impartiality. The judicial officer indicated that this assistance was an important part of affording the mother procedural fairness.

Some insight in the use of intermediaries such as the McKenzie friend may also be gleaned from the UK Ministry of Justice (2017) study. In a minority of cases discussed by judicial participants in that study, a McKenzie friend had been permitted to represent the self-represented litigant in court and to cross-examine the vulnerable/intimidated witness. Although rarely adopted, judicial participants expressed uncertainty as to the appropriateness of this practice (Corbett & Summerfield, 2017, p. 21). Both positive and negative views were expressed on this option. While some viewed the McKenzie friend as having a “calming influence” on the self-represented litigants (Corbett & Summerfield, 2017, p. 22), others emphasised the potential for negative outcomes where they may be partisan, “confrontational and lacking professional distance” and with no duty to the court, as lawyers have (Corbett & Summerfield, 2017, p. 22).¹³ More generally, intermediaries were also identified as sources of assistance in relation to facilitating direct cross-examination. Their role was perceived by judicial officers as aiding vulnerable witnesses to communicate in court. However, legal and non-legal workshop participants in the UK Ministry of Justice (Corbett & Summerfield, 2017, p. 20) study identified ICLs as inappropriate to undertake cross-examination in place of the self-represented litigant on the basis that their role was to represent the best interests of the child, and the Family Law Council (2016, p. 5) has identified that given their existing obligations and roles, ICLs would have a limited capacity to accommodate the cross-examination of vulnerable witnesses in the Australian context.

5.5 Summary

The analysis in this chapter examined the arrangements that were made to accommodate and manage direct cross-examination in the samples by first considering the extent to which safeguards were in place when direct cross-examination took place and whether the safeguard was in place for the party undertaking the direct cross-examination or the party being directly cross-examined. The data indicate that for the majority of cases in the sample, safeguards were not in place and, where the safeguards were in place, they were provided more commonly for the protection of mother cross-examiners (42%) than for father cross-examiners (33%) or for either mothers (23%) or fathers (24%) as witnesses.

The most common safeguard for all cases involved judicial officers actively intervening to relay questions. Other safeguards engaged were the use of a video link for the protection of the mother when cross-examining the father (3%) and the granting of permission to a McKenzie friend to act as a third-party questioner for the protection of the mother when cross-examining the father (11%) and for the protection of the father when cross-examining the mother (2%).

¹³ For an analysis on the growing trend of the professional McKenzie friend in family law proceedings, see Melville (2017).

The discussion in this chapter also provided more detailed insight into the application of the Division 12A provisions and, in particular, in relation to the:

- conduct of proceedings in a manner that safeguards parties to proceedings against family violence (s 69ZN(5) FLA) and “with as little formality, and legal technicality and form, as possible” (s 69ZN(7) FLA; see also s 69ZT);
- role in “actively direct(ing), control(ling) and manag(ing) the conduct of proceedings” (s 69ZN(4) FLA);
- options to limit or preclude cross-examination of a witness or to admit and draw conclusions from transcripts of evidence from other proceedings (s 69ZX FLA).

These measures included the exploring of alternative means by which matters may be admitted into evidence aside from reliance on affidavit material, which the opposing party would then be entitled to test by way of cross-examination, as well as facilitating the direct cross-examination by relaying questions to the witness or by interjecting or reprimanding parties where required.

These data provided insight into judicial approaches to procedural fairness including:

- the position that each party be provided with the opportunity to present their case and to respond to the case presented by the other side; and
- the assistance to be provided from the bench with the giving and taking of evidence to the extent that was permitted with respect to self-represented litigants.

The analysis identified that this judicial intervention safeguard was more likely to be put in place for the protection of the mother when directly cross-examining the father (18%), followed by instances when she was being cross-examined by the father (16%). Of particular note from this analysis were the mixed practices associated with judicial intervention identified in the sample. The analysis distinguished between high, moderate or low levels of judicial intervention. In more than one-third ($n = 28$) of the 70 cases, the judicial officer played a highly interventionist role in monitoring and intervening where deemed appropriate in the process of direct cross-examination, with a slightly greater proportion ($n = 29$) of cases involving what was identified as a moderate level of intervention and just over one-sixth ($n = 13$) of cases involving a low level of intervention on the part of the judicial officer.

The analysis also explored the challenges associated with self-represented litigants engaging in direct cross-examination, with these identified challenges both from:

- the perspectives of the parties who lacked the skills of experienced litigators and for whom the stress and distress arising from direct cross-examination may be substantial; and
- from the perspective of the court in ensuring the conduct was appropriate and respectful and that there was procedural fairness with the process, enabling the testing of relevant evidence and affording litigants the right to cross-examine the opposing party.

This analysis of the qualitative data illustrated mixed practices in the ways judicial officers managed and limited irrelevant or inappropriate lines of questioning in the sample. The discussion in this chapter concluded with an analysis of cases that involved intervention by the cross-examined parties' legal representative or by the ICL or where assistance was provided by a McKenzie friend.

6 Final parenting property and financial orders

In this final substantive section of the report, we consider the outcomes by way of both parenting and property and financial orders and any association that may arise between these outcomes and the parties' engagement in direct cross-examination.

6.1 Parenting and property orders

Table 6.1 provides an overview of the final care-time arrangements for children, further analysed according to court type. This analysis is based on 163 children in the 97 sampled court files that had information on care-time arrangements identified. The most common care-time arrangements were arrangements that involved children spending 0–34% of their time with the father—30% of all children had this type of parenting arrangement. Care-time arrangements involving the father having no-contact with the child, or arrangements where fathers spent 66–100% of time with the child were the next most common arrangement. Each of these arrangements represented 22% of all children's care-time arrangements. Shared care arrangements were made for 10% of children. This arrangement was more commonly identified for children in the FCCoA file sample (11%) compared with children in cases in the FCoA file sample (5%).

Table 6.1: Children's care-time arrangements, by court

Care-time arrangements	FCCoA (%)	FCoA (%)	All children (%)
Father nil	22.2	18.9	21.5
Father 0–34%	32.5	21.6	30.1
Shared care (35–64%)	11.1	5.4	9.8
Father 66–100%	18.3	32.4	21.5
Mother nil	0.0	10.8	2.5
Other arrangement	15.9	10.8	14.7
Number of children	126	37	163

Table 6.2: Children's care-time arrangement, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross exam. (%)	All children (%)
Father nil	31.3	21.7	9.6	29.4	17.4	21.5
Father 0–34%	35.4	37.0	17.3	35.3	27.8	30.1
Shared care (35–64%)	2.1	17.4	13.4	0.0	13.1	9.8
Father 66–100%	12.5	8.7	42.3	17.7	25.2	21.5
Mum nil	0.0	0.0	3.9	11.8	3.5	2.5
Other arrangement	18.8	15.2	13.5	5.9	13.0	14.7
Number of children	48	46	52	17	115	163

Table 6.2 shows how children's care-time arrangements varied by the type of direct cross-examination that was undertaken. An association was found between orders for fathers' time with children and cases where mothers cross-examined the father. In 42% of cases where the mother directly cross-examined the father, the care arrangement made for children involved them spending 66–100% of time with the father. This compared to 22% of cases overall. There was a similar but less pronounced pattern when fathers undertook direct cross-examination. In 37% of cases where the father cross-examined the mother, the orders provided for the mother to spend more than 35% of time with the child, compared to 30% of all children's arrangements in the sample.

Table 6.3 shows that final parenting orders were made for almost all the files examined in this study, with close to one-in-ten making provision for supervised contact. Orders relating to property or financial matters were made in one-fifth of cases and orders relating to a party's contravention of existing orders were made in only a small proportion of cases. The patterns of final orders were overall similar across the groups of direct cross-examination, though contravention orders were made more commonly in cases where the mother cross-examined the father.

Table 6.3: Final judgments, by direct cross-examination

Final parenting order	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross exam. (%)	All (%)
Parenting	100.0	100.0	96.3	100.0	98.6	99.0
Relocation	0.0	3.1	3.7	0.0	2.9	2.1
Supervised contact	11.1	12.5	3.7	0.0	7.1	8.2
Property-related	18.5	15.6	18.5	18.2	17.1	17.5
Contravention	0.0	0.0	7.4	18.2	5.7	4.1
Number of cases	27	32	27	11	70	97

6.2 Financial orders

Overall, judicial findings on financial matters were uncommon, applying to one-in-ten cases. This reflects the fact that financial matters were not key issues in dispute in the great majority of cases. Table 6.4 shows that findings in judgments on financial matters were similar across the cross-examination groups.

Table 6.4: Findings in judgments on financial arrangements, by direct cross-examination

	No cross-exam. (%)	Father cross-exam. mother only (%)	Mother cross-exam. father only (%)	Parents cross-exam. each other (%)	Any cross-examination (%)	All (%)
Contributions						
Specified	3.7	15.6	14.8	9.1	14.3	11.3
Not specified	11.1	28.1	29.6	27.3	28.6	23.7
Unclear or not applicable	85.2	56.3	55.6	63.6	57.1	65.0
Total	100.0	100.0	100.0	100.0	100.0	100.0
Future needs						
Specified	0.0	15.6	7.4	9.1	11.4	8.3
Not specified	18.5	28.1	37.0	27.3	31.4	27.8
Unclear or not applicable	81.5	56.3	55.6	63.6	57.1	63.9
Total	100.0	100.0	100.0	100.0	100.0	100.0
Other						
Specified	3.7	6.3	7.4	9.1	7.1	6.2
Not specified	18.5	34.4	37.0	36.4	35.7	30.9
Unclear or not applicable	77.8	59.4	55.6	54.6	57.1	62.9
Total	100.0	100.0	100.0	100.0	100.0	100.0
Any of above	7.4	15.6	18.5	9.1	15.7	13.4
Number of cases	27	32	27	11	70	97

6.3 Summary

The analysis presented in this chapter identified that the most common care-time arrangement ordered in the in-scope sample was for children to spend 0–34% with the father (30%). Care-time arrangements involving the father having no contact with the child, or arrangements where fathers spent 66–100% of time with the child were the next most common arrangement (22% each).

It was found that children's final care arrangements varied by the type of direct cross-examination that was undertaken. In particular, in 42% of cases where the mother directly cross-examined the father, the care arrangement made for children involved them spending 66–100% of time with the father (compared with 22% overall). Similarly, in 37% of cases where the father cross-examined the mother, the care arrangement made for children involved them spending 66–100% of time with the mother (compared with 30% overall).

Final parenting orders were made in almost all cases in the in-scope sample and property orders in one-fifth of cases. While the patterns of final orders in parenting and property-related matters were similar across the groups of direct cross-examination, contravention orders were more common in cases where the mother cross-examined the father and supervised contact orders were more common in cases without direct cross-examination or where the father directly cross-examined the mother.

7 Summary and conclusions

This report has presented the findings from the Direct Cross-examination in Family Law Matters project, which was commissioned and funded by the Australian Government, Attorney-General's Department. The project explored quantitative and qualitative data relevant to direct cross-examination involving self-represented litigants in family law matters, derived from court files and audio and transcripts of proceedings, collected from the FCoA and the FCCoA, together with an analysis of relevant unreported judgments of the FCoWA.

The project was aimed at developing a robust, evidence-based understanding of:

- the extent of direct cross-examination involving self-represented litigants in family law matters that proceed to a final hearing and where family violence has been alleged or substantiated; and
- the factual and legal context characterising these family law matters (including the arrangements made by the courts to safeguard litigants where direct cross-examination took place) as compared to those matters where direct cross-examination involving self-represented litigants did not take place (including any alternative arrangements made where direct cross-examination was not permitted).

The focus of the analyses was on cases where:

- the self-represented party undertaking the direct cross-examination was the alleged perpetrator of the family violence and the witness was the alleged victim; and
- the self-represented party undertaking the direct cross-examination was the alleged victim of the family violence and the witness was the alleged perpetrator.

While there is presently limited empirical research available that considers the extent and prevalence of direct cross-examination in Australian family law matters, the relevant literature, legislative provisions and case law were considered in Chapter 1. Division 12A of the FLA provides broad powers to the court to manage the conduct of child-related proceedings and, in particular, allows the court to limit or preclude cross-examination of a witness. Additional provisions in the FLA together with the uniform evidence legislation operate to curtail the manner in which cross-examination proceeds.

The testing of evidence by cross-examination has been widely identified as an important element of procedural fairness for parties in proceedings, while the trauma that may be experienced by a victim of family violence as a result of participating in direct cross-examination has also been acknowledged and reported in the literature. In July 2017, the Australian Government Attorney-General's Department released the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Exposure Draft), which provides for the prevention of direct cross-examination involving self-represented litigants where allegations of family violence have been made and either party has been charged or convicted with an offence involving family violence or threat of violence to the other party, or a final family violence order or injunction under s 68B or 114FLA applies to both parties.

7.1 Prevalence of direct cross-examination in the sample

This study collected comprehensive data from 97 court files as outlined above, where one or both parties was a self-represented litigant, and where the case involved allegations of (or substantiated) family violence and proceeded to a final hearing. Direct cross-examination took place in more than two-thirds of in-scope cases (72%; $n = 70$) in our court file sample and the vast majority of matters in both courts proceeded to judicial determination whether or not direct cross-examination took place (67% where direct cross-examination did *not* take place and 91% where it did take place: Table 2.2, page 16). Direct cross-examination was a feature of

just under one-half of the judgments in the FCoWA sample (44%) (Table 2.3, page 17) but as noted, access to judgments rather than to court files in the sampling process must be noted when considering these findings. Additionally, an ICL had been appointed in the majority of the in-scope sample, and in a greater proportion of the cases where direct cross-examination did not take place (82% vs 74% where direct cross-examination took place).

Fathers in the court file sample were older than mothers on average and they were more likely to be employed full-time compared to mothers, who were more likely than fathers to report receiving pensions and allowances as their main source of income. In addition, the analysis of legal representation indicated that male applicants and respondents were more likely to be self-represented than female applicants and respondents (male applicants: 71% vs female applicants: 41% and male respondents: 77% vs female respondents: 51%) (Table 2.8, page 21). Together, these findings in relation to income source and self-representation may suggest that fathers were self-represented for reasons other than lack of financial means or that fathers were unable to secure legal aid funding or legal representation on their income levels. Given that more fathers than mothers were self-represented, it is not surprising that there were more cases where the father directly cross-examined the mother only, than cases where the mother directly cross-examined the father only (33% vs 28%) (Table 3.1, page 23).

The data were also examined to explore whether the party being cross-examined was legally represented or whether there was an ICL in the relevant case, and whether these may have been associated with a lower likelihood of direct cross-examination (Tables 3.9 and 3.10) This analysis indicated that where the father was self-represented, the likelihood that he would directly cross-examine the mother was associated with her having legal representation. It may be that in these circumstances, judicial officers were more inclined to allow direct cross-examination when the witness was legally represented, with the potential for the legal representative to intervene and object to any inappropriate or irrelevant direct cross-examination. It is notable that the majority of both self-represented fathers and mothers *did* conduct direct cross-examination.

While fathers were more likely than mothers to be self-represented (in fact, as noted above the majority of fathers were self-represented), interestingly, self-represented mothers were more likely than self-represented fathers to conduct direct cross-examination in the in-scope sample (81% vs 62%).

While the analyses in this report identified that direct cross-examination did not take place in just over one-quarter of in-scope court files (28%; Table 3.1, page 23), it was challenging to identify the underlying reasons for why direct cross-examination did not take place. In a substantial proportion of these cases the matter settled prior to cross-examination ($n = 10$) and, in some instances, cross-examination did not take place because the opposing party did not appear in court ($n = 5$). In the remaining cases, the reason that cross-examination did not take place was unclear or unavailable from the audio file. It was therefore not possible for the research team to identify from the files whether family violence was a factor in whether direct cross-examination took place or not. Some insight was provided from the qualitative data derived primarily from the audio of proceedings, and in one case the substantiated family violence appeared to be a reason why the direct cross-examination did not take place. More specific analyses of the patterns emerging in relation to cases characterised by allegations or substantiated family violence are provided in the next section.

7.2 Patterns emerging in relation to cases characterised by allegations or substantiated family violence

The examination of the factual circumstances of each case provided insight into the relationship between direct cross-examination and the claims made about each party. The data (Table 3.3, page 25) showed that mothers who directly cross-examined the father only were more likely to have claims against them related to:

- the impact of parenting arrangements on the child (37% of cases cf. 21% of all files);
- her mental health (52% cf. 38% of all files); and
- her capacity to meet the child's needs (44% cf. 31% of all files).

The data (Table 3.4, page 26) also show that fathers who directly cross-examined the mother alone were more likely to have a claim about their children's protection made against them and, in particular, in relation to:

- the need to protect the child from psychological abuse or risk of psychological abuse (75% cf. 62% of all files); and
- the need to protect the child from high conflict (47% cf. 29% of all files).

More specific consideration was given to the nature of allegations of family violence (separated into three domains: physical, psychological and children exposed to family violence) by outlining the claims of family

violence and who the alleged perpetrator or victim of family violence was, and considering this in the context of the data relating to direct cross-examination. Overall, the rate of allegations of family violence against the father were higher than that against the mother (83% vs 39%) and this was regardless of whether or not direct cross-examination took place (Table 3.6, page 28).

Notably, the analyses also showed that there were higher rates of allegations of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination. These data were more specifically considered in the context of which party was the alleged victim and alleged perpetrator. In approximately three-quarters of all cases (75%), the mother was the alleged victim of family violence, with the father being the alleged victim in over one-quarter of cases (31%), with this pattern consistent with the higher rate of allegations of family violence against the father than against the mother. This pattern was reflective of cases with and without direct cross-examination. Of the 70 cases where direct cross-examination took place, almost two-thirds ($n = 43$) involved an alleged or substantiated perpetrator of family violence undertaking direct cross-examination of the alleged or substantiated victim and almost one-half involved the alleged or substantiated victim of family violence undertaking the direct cross-examination of the alleged or substantiated perpetrator ($n = 34$), noting again that 22 cases involved mutual allegations.

These data may suggest that both parties are likely to seek to challenge by way of cross-examination the allegations made against them that have the potential to affect the parenting orders made, although it is noted that this approach was considerably more common for self-represented fathers than for self-represented mothers. In these circumstances where the parties are self-represented, the presiding judicial officers may be particularly attuned to according procedural fairness to enable the parties to test the allegations of relevance to the orders to be made.

It is also interesting to consider the findings made in relation to direct cross-examination in the context of the broader range of evidence types submitted in support of family violence or abuse allegations in each case. Evidence in the form of family violence orders and evidence from a family consultant (be that via a s 11F memorandum of advice or a s 62G family report or viva voce evidence) were the types of evidence most commonly provided in the court files. In around one-quarter of the files, evidence from police and psychological counselling were also identified (29% and 25% respectively: Table 4.6, page 41).

It was also observed (Table 4.8, page 42) that a higher proportion of cases where no direct cross-examination occurred had each evidence type on the file compared to those cases where direct cross-examination took place (20% vs 7%), as well as having three or more types of evidence (44% vs 33%). The largest differences in these patterns of results related to family violence orders (67% vs 53%) and in relation to cases where criminal proceedings formed a part of the evidence supporting family violence allegations (30% vs 17%). This was particularly interesting to note in the context of the finding noted above regarding the higher rates of *allegations* of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination. Together, these findings may suggest that the availability of evidence supporting family violence allegations discouraged a self-represented offending party from undertaking direct cross-examination, avoided the necessity for a self-represented victim to cross-examine the perpetrator or gave rise to the judicial officer discouraging or disallowing the direct cross-examination.

The data did, however, show that family violence/safety risk assessments were more likely to be substantiated where the matters involved cross-examination (Table 4.2, page 39). The analysis of findings made by judicial officers in relation to allegations of family violence, child abuse or neglect and of the need to protect children against harm or the risk of harm were similar for fathers and mothers (Table 4.3, page 40, and Table 4.4, page 40). In relation to allegations against mothers, for close to one-half of cases where the mother cross-examined the father, the courts upheld the allegations either in part or in full. This was more common than in other cases and applied to nearly one-third of fathers who conducted direct cross-examination where the allegations against them were upheld in part or full. It is also of note that the analysis revealed that four-in-ten cases had court findings that specified the need to protect children, and that these findings were more common among cases involving direct cross-examination than in those cases without direct cross-examination (Table 4.5, page 41).

7.3 Mixed judicial practices and responses

The analysis of qualitative data in the direct cross-examination cases in the sample provides a complex picture of mixed practices and responses. The analysis considered the arrangements that were made to accommodate and manage direct cross-examination in the samples by first considering the extent to which specific safeguards were in place when direct cross-examination occurred. Consideration was also given to whether the specific

safeguard was in place for the protection of the party undertaking the cross-examination or for the party being cross-examined. The data indicate that for the majority of cases in the sample, specific safeguards were not in place, and where the safeguards were in place, they were provided more commonly for the protection of mother cross-examiners (42%) than for father cross-examiners (33%) or for either mothers (23%) or fathers (24%) as witnesses (Table 5.1, page 45).

When considering more specifically the cases where the alleged or substantiated perpetrator cross-examined the alleged victim, a greater proportion of cases involved safeguards for the cross-examining party than for the party being cross-examined (Chapter 5). The rates of specific safeguards were also lower for the cases where the alleged victim was cross-examining the alleged perpetrator.

The analysis considered the types of specific safeguards employed and showed that one of the most common safeguards for all cases involved judicial officers actively intervening to relay questions. Other specific safeguards engaged were the use of a video link for the protection of the mother when directly cross-examining the father (3%) and the granting of permission for a McKenzie friend to act as a third-party questioner for the protection of the mother when directly cross-examining the father (11%) and for the protection of the father when directly cross-examining the mother (2%).

The analysis provided insight into the application of the s 69ZN FLA principles and related Division 12A principles, in particular in relation to the:

- conduct of proceedings in a manner that safeguards parties to proceedings against family violence (s 69ZN(5) FLA) and “with as little formality, and legal technicality and form, as possible” (s 69ZN(7) FLA; see also s 69ZT);
- role in “actively direct(ing), control(ing) and manag(ing) the conduct of proceedings” (s 69ZN(4) FLA); and
- options to limit or preclude cross-examination of a witness or to admit and draw conclusions from transcripts of evidence from other proceedings (s 69ZX FLA).

These measures included exploring the alternative means by which matters may be admitted into evidence aside from reliance on affidavit material (which the opposing party would be entitled to test by way of cross-examination), as well as facilitating the direct cross-examination by relaying questions for the witness as noted above, providing guidance about how to phrase or rephrase questions, or by interjecting or reprimanding parties where required.

The challenges associated with judicial monitoring and guidance and facilitating procedural fairness were prominent features of the sample of cases involving direct cross-examination. In particular, the qualitative data provided insight into judicial approaches to procedural fairness including:

- the position that each party be provided with the opportunity to present their case and to respond to the case presented by the other side; and
- assistance be provided from the bench with the giving and taking of evidence to the extent that was permitted, particularly with respect to self-represented litigants.

Overall, the analysis identified that the safeguard involving the judicial officer actively intervening by relaying questions was more likely to arise for the protection of the mother when directly cross-examining the father (18%), followed by instances when she was being directly cross-examined by the father (16%).

As foreshadowed above, of particular note from this analysis were the mixed practices associated with judicial intervention identified in the sample. In over one-third ($n = 28$) of the 70 cases involving direct cross-examination, the judicial officer engaged in a high level of intervention, in monitoring and intervening where deemed appropriate in the process of direct cross-examination, with a slightly greater proportion ($n = 29$) of cases involving what was identified as a moderate level of intervention, and just over one-sixth ($n = 13$) of cases involving a low level of intervention on the part of the judicial officer.

The analysis also explored the challenges associated with self-represented litigants engaging in direct cross-examination, both from the perspectives of the self-represented parties and from the perspective of the court in ensuring that the conduct was appropriate and respectful, and that procedural fairness had been afforded via the right to test the evidence by cross-examination. This analysis of the qualitative data also illustrated mixed practices in the ways that judicial officers managed and limited irrelevant lines of questioning in the sample. Consideration was also given to cases that involved intervention by the cross-examined parties' legal representative or by the ICL or the assistance provided by a McKenzie friend.

Insight into the practical operation of direct cross-examination in cases involving alleged or substantiated family violence was also available from the qualitative data (Chapter 3). In cases where a final family violence

order applied, judicial officers were observed to be more likely to be engaging in a high level of intervention in the process of direct cross-examination (52% of cases as opposed to an average of 40% across all cases). Examples of direct cross-examination taking place where the cross-examining party had been charged or convicted of offences that related to the family violence allegations, provided insight into the dynamics of direct cross-examination in this context, with some cases involving substantial judicial intervention either to control aggressive behaviour or to guide the appropriate formulation of questions.

To the extent that was possible via review of the audio of direct cross-examinations, the analysis also considered the effect on parties of participating in direct cross-examination, both in cases where it was the alleged perpetrator undertaking the cross-examination as well as in those cases where it was the alleged victim undertaking the cross-examination. This analysis was informed by an examination of the behaviour and interactions taking place during the direct cross-examination. Notably, the examples discussed illustrated the stressful and/or traumatising effect that may arise when participating in direct cross-examination whether as a witness or the cross-examiner.

7.4 Summary

Overall, the findings from the Direct Cross-examination in Family Law Matters project allow important insights into:

- the extent of direct cross-examination involving self-represented litigants in family law matters that proceed to a final hearing and where family violence has been alleged or substantiated; and
- the factual and legal context characterising these family law matters (including the arrangements made by the courts to safeguard litigants where direct cross-examination took place) as compared to those matters where direct cross-examination involving self-represented litigants did not take place (including any alternative arrangements made where direct cross-examination was not permitted).

The data highlight that the most common form of direct cross-examination was one where fathers directly cross-examined mothers only. Notably, the analyses showed that there were higher rates of allegations of family violence against both parents in files where there was direct cross-examination compared to files with no direct cross-examination. The data suggest that specific safeguards were typically not in place when direct cross-examination was permitted. If specific safeguards were in place, one of the most common forms involved judicial officers actively intervening to relay questions. It was also observed that a higher proportion of cases where no direct cross-examination occurred had each evidence type on the file or three or more types of evidence compared to those cases where direct cross-examination took place. The data also provided insight into the operation of direct cross-examination and into the nature of the safeguards employed during direct cross-examination as they emerged in the project sample.

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