



Direct cross-examination in family law

RESEARCH SUMMARY

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OVERVIEW

The **Direct Cross-Examination in Family Law Matters project** was commissioned and funded by the Australian Government Attorney-General's Department. The project examined court files, audio and transcripts from cases finalised in the Family Court of Australia and the Federal Circuit Court of Australia, together with relevant judgments of the Family Court of Western Australia, in 2015/16 and 2016/17.

In scope were cases involving one or more self-represented litigants, and allegations or substantiated instances of violence in family law matters that had progressed to a final hearing (and the hearing had commenced).

The main aims of the research were to establish the extent to which direct cross-examination was a feature in cases involving self-represented litigants in families characterised by alleged or substantiated family violence; and how these cases compared, factually and legally, to cases where direct cross-examination did not take place.



KEY FINDINGS

- The most common form of direct cross-examination was where the father directly cross-examined the mother.
- Typically, specific safeguards were not in place when direct cross-examination was permitted.
- Overall, direct cross-examination took place in more than two-thirds of in-scope cases (72%).
- 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 cases where there were allegations of family violence, 83% were against the father and 39% against the mother.

Sample characteristics

Among the 97 cases examined which involved one or more self-represented litigants, and allegations or substantiated instances of family violence and where the matter proceeded to a final hearing, direct cross-examination took place 72% of the time. It was more likely to occur when multiple matters were in dispute.

Of the cases heard:

- The majority (76%) were heard in the Federal Circuit Court, and 24% in the Family Court.
- All but one case involved a dispute about children/parenting matters.
- Around one-fifth of cases involved property/financial matters.
- Around two-thirds of cases proceeded to full judicial determination.

In terms of self-representation:

- The father only was self-represented in 52% of cases.
- The mother only was self-represented in 29% of cases (in 2% of these cases, the father's representation status was unclear).
- Both the mother and father were self-represented in 20% of cases.

This pattern was consistent for applicants and respondents (in that male parties were more likely to be self-represented than female parties).

Cases involving direct cross-examination

The majority of cases (72%) with self-represented litigants and allegations of family violence involved direct cross-examination. In those cases:

- The father alone cross-examined the mother in 33% of cases.
- The mother alone cross-examined the father in 28% of cases.
- Both parents cross-examined each other in 11% of cases.
- There was no cross-examination in 28% of cases.

Of the cases that did not involve cross-examination, 10 were settled prior to cross-examination, while in another five cases the opposing party did not appear in court. In the remaining cases, the reason why the cross-examination did not take place was unclear.

There were higher rates of allegations of violence against both parties where there was direct cross-examination.

The majority of self-represented parents conducted direct cross-examination, with self-represented mothers more likely than self-represented fathers to conduct direct cross-examination (81% vs 62%).

When a father was self-represented, the likelihood that he would directly cross-examine the mother was associated with the mother having legal representation, and with allegations of family violence towards children.

Handling of allegations of family violence

In almost 60% of files there was evidence that a family violence/safety risk assessment had been undertaken by a family consultant, with this being more likely in the Family Court (74%) compared with the Federal Circuit Court (54%).

Where there were allegations of family violence against a cross-examining parent, the allegations were upheld in 45% of cases involving a cross-examining mother, and 31% of cases involving a cross-examining father.

In cases with self-represented litigants and allegations of family violence, it was common for multiple forms of evidence to be used to support allegations. In 63% of cases, at least two forms of evidence were used, the most frequent being family violence orders (57% of cases) and a family report or other evidence from a family consultant (42%).

Notably, however, cases that involved direct cross-examination had fewer forms of evidence than cases without direct cross-examination.

Specific safeguards

The majority of cases (58%) involving direct cross-examination did not include specific safeguards for either witness or cross-examiner. Safeguards could include: remote witness facilities or screens, judicial intervention (such as relaying or rephrasing questions, or reprimanding the parties), monitoring of the direct cross-examination process, or permitting assistance by a McKenzie friend.¹

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%). As witnesses, 23% of mothers had safeguards in place, and 24% of fathers. These safeguards were most likely to involve judicial intervention, primarily to assist with the formulation of, and/or the relaying of, questions.

Final parenting and property orders

When looking at the relationship between direct cross-examination and children's final care-time arrangements, 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.

Judgments regarding general parenting and property-related matters were similar across all 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, while supervised contact orders were more common in cases without direct cross-examination or where the father directly cross-examined the mother.

Suggested reading

Carson, R., Qu, L., De Maio, J., & Roopani, D. (2018). *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*. Melbourne: Australian Institute of Family Studies.

¹ 'A McKenzie friend is a legally unqualified person who may, with the permission of the Court, support and assist a litigant in Court.' (Dewar, J., Smith, B.W., Banks, C. (2000). *Litigants in Person in the Family Court of Australia*. Family Court of Australia: Canberra.)

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