ADDRESSING THE PROBLEM OF DIRECT CROSS-EXAMINATION IN AUSTRALIAN FAMILY LAW PROCEEDINGS

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Difficulties experienced by victims of family violence who are cross-examined by the unrepresented perpetrator of that violence (or vice versa) in family law proceedings are well-documented. Such direct cross-examination can be traumatic and unlikely to generate high quality evidence. In 2019 this problem was addressed in Australia by the Family Violence and Cross-Examination Scheme ('Scheme'). Under this Scheme, direct cross-examination by self-represented litigants is prohibited on a mandatory or discretionary basis in certain family law cases involving allegations of family violence. This article examines the implementation of the Scheme by drawing on data from a large ethnographic project that was concerned with self-representation in family law proceedings involving allegations of family violence and an analysis of recent case law. We highlight issues in the early administration of the Scheme as well as more complex ongoing issues. This article provides an evidence base to guide policy and legislative developments in this area.

I INTRODUCTION

Family law proceedings in Australia are characterised by both high rates of self-representation[1] and high rates of matters involving allegations about family violence (intimate partner violence and child abuse).[2] Given these high rates, it is perhaps unsurprising that many cases involve both of these issues[3] and give rise

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1 For data on self-representation in the Family Court of Australia ('FCA'), see Family Court of Australia, *Annual Report 2019–20* (Report, 2020) 26–7. For data on self-representation in the FCA, Federal Circuit Court of Australia and the Family Court of Western Australia, see Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 98–100 figs 3.9–3.11, 107 [3.102] ('*Family Law for the Future*').

2 Rae Kaspiew et al, *Court Outcomes Project* (Report, Australian Institute of Family Studies, October 2015) 45.

3 Jane Wangmann, Tracey Booth and Miranda Kaye, *'No Straight Lines': Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence* (Report No 24, Australia's National Research Organisation for Women's Safety, December 2020) 47–8 ('*No Straight Lines*').

to a complexity of concerns for the conduct of those proceedings for the litigants themselves, the lawyer representing the other party (if any), the Independent Children's Lawyer ('ICL') (if appointed) and the presiding judicial officer. A key area of concern that has emerged in cases involving self-represented litigants ('SRL') and family violence has been direct cross-examination of the alleged victim of family violence by the alleged perpetrator of that violence where he is without legal representation, or the reverse situation where an alleged victim of family violence is without legal representation and is required to directly cross-examine her alleged perpetrator.[4] Such direct cross-examination raises concerns that the self-represented perpetrator will use cross-examination to further intimidate or harass the alleged victim, or conversely that the self-represented alleged victim may withdraw, settle for less, or conduct less effective cross-examination due to the fear of directly facing her alleged perpetrator. This problem has long been recognised in Australia[5] and in other jurisdictions[6] and has recently been the subject of legislative reform in Australia[7] and the United Kingdom.[8]

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4 We use gendered language in this article, referring to women as victims and perpetrators as men. This recognises that women comprise the vast majority of victims across a wide range of data sources: see, eg, *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 1; New South Wales Domestic Violence Death Review Team, *Report 2017–2019* (Report, Department of Communities and Justice, 2020); Australian Bureau of Statistics, *Personal Safety, Australia* (Catalogue No 4906.0.55, 8 November 2017). The use of gendered language does not mean that we do not recognise that men can also be victims and women perpetrators of violence in heterosexual or same-sex relationships – they can and are. We also recognise the high rates of violence perpetrated against trans women and men and those who do not identify with the gender binary who are particularly vulnerable to gender-based violence. There is also debate about the use of the term victim and/or survivor. In this article, we use the term victim because we focus on people who are still experiencing violence and engaging with the legal system for a response to that violence: see Zoe Rathus et al, '"It's like Standing on a Beach, Holding Your Children's Hands, and Having a Tsunami Just Coming towards You": Intimate Partner Violence and "Expert" Assessments in Australian Family Law' (2019) 14(4) *Victims and Offenders* 408, 435 <https://doi.org/10.1080/15564886.2019.1580646>.

5 See Rachel Carson et al, *Direct Cross-Examination in Family Law Matters: Incidence and Context of Direct Cross-Examination Involving Self-Represented Litigants* (Report, Australian Institute of Family Studies, 2018); Family Court of Australia, *Self-Represented Litigants: A Challenge* (Project Report, 2003); Family Law Council, *Litigants in Person: A Report to the Attorney-General Prepared by the Family Law Council* (Report, August 2000); Miranda Kaye, Jane Wangmann and Tracey Booth, 'Preventing Personal Cross-Examination of Parties in Family Law Proceedings Involving Family Violence' (2017) 31(2) *Australian Journal of Family Law* 94 ('Preventing Personal Cross-Examination'); Janet Loughman, 'Protecting Vulnerable Witnesses in Family Law' (2016) 19 *Law Society Journal* 26.

6 Maddy Coy et al, *Picking up the Pieces: Domestic Violence and Child Contact* (Research Report, Rights of Women and Child and Woman Abuse Studies Unit, October 2012 October 2012); Women's Aid, *Nineteen Child Homicides: What Must Change so Children Are Put First in Child Contact Arrangements and the Family Courts* (Report, 2016); Rosemary Hunter, Mandy Burton and Liz Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (Final Report, Ministry of Justice (UK), June 2020); Natalie Corbett and Amy Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Report, Ministry of Justice (UK), 2017).

7 See *Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018* (Cth) ('*Cross-Examination of Parties Act*').

8 See *Domestic Abuse Act 2021* (UK) which inserted amendments in the *Matrimonial and Family Proceedings Act 1984* (UK), the *Youth Justice and Criminal Evidence Act 1999* (UK) and the *Courts Act 2003* (UK) prohibiting direct cross-examination in a wide range of proceedings that involve domestic

In 2018, the *Family Law Act 1975* (Cth) ('*FLA*') was amended to prohibit direct cross-examination, on a mandatory or discretionary basis, in certain cases involving allegations about family violence.[9] This is commonly referred to as the Family Violence and Cross-Examination Scheme ('Scheme'). It commenced operation in 2019. The mandatory prohibition applies where a party has been convicted of, or charged with, a violence offence relating to the other party, a final state or territory family violence order ('FVO') is in place, or there is an injunction made under the *FLA* for 'personal protection of either party' from the other party.[10] In other cases involving family violence the judge may, in their discretion, prohibit such cross-examination.[11] No legislative guidance is provided for the exercise of that discretion. The Scheme does not prevent cross-examination taking place but ensures that such cross-examination is conducted by a lawyer not by the SRL.[12] Not all cases involving family violence will be subject to a mandatory or discretionary prohibition. In these cases, the judge must consider other protective measures that would assist the alleged victim and alleged perpetrator where such direct cross-examination takes place, such as the use of audio-visual links ('AVL') or screens.[13] The relevant division in the legislation is subject to a review two years after it commences operation.[14]

This protection against direct cross-examination has been welcomed. It is seen as a key measure to prevent legal systems' abuse, and address many of the traumatic impacts that victims of family violence experience as a result of direct cross-examination or the prospect of having to do this work themselves.

A key aim of this article is to provide important information and context to guide the future policy, funding and legislative developments in this critical area. We explore the implementation of the Scheme, highlighting issues that emerged in its early administration as well as some more complex issues that need to be addressed as the Scheme continues in operation. The article draws on data from a large project concerned with the experience and impact of SRLs in family law proceedings involving allegations of family violence.[15] That study explored all aspects of self-representation, including but not limited to, direct cross-examination, and the fieldwork was in progress when the Scheme commenced. The research team observed several matters in which the Scheme was raised before the court and the Scheme was discussed in a number of the interviews with key professionals (judicial officers, lawyers and support workers). Although not

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abuse; and *Children (Scotland) Act 2020* (Scot) which amended the *Vulnerable Witnesses (Scotland) Act 2004* (Scot).

9 *Cross-Examination of Parties Act* (n 7).

10 *Family Law Act 1975* (Cth) ss 102NA(1)(c)(i)–(iii) ('*FLA*').

11 Ibid s 102NA(1)(c)(iv).

12 Ibid s 102NA(2)(b).

13 Ibid s 102NB.

14 Ibid s 102NC. This review has been completed but is not yet publicly available: see 'Review of Direct Cross-Examination Ban: *Family Law Act 1975*', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/families-and-marriage/consultations/review-direct-cross-examination-ban-family-law-act-1975> ('Review of Direct Cross-Examination').

15 Wangmann, Booth and Kaye, *No Straight Lines* (n 3).

designed to evaluate the Scheme, this study was in the unique position of being in place before and after the Scheme commenced. This article reports on our findings during this implementation phase and supplements these findings with an analysis of recent case law on the Scheme. This case analysis provides a detailed picture of the grounds on which judicial officers are exercising their discretion to prohibit cross-examination, as well as the types of matters that have triggered mandatory prohibitions. While some of the issues highlighted might be regarded as 'teething' or implementation issues, others are more substantive and require greater consideration by policy makers.

II BACKGROUND TO THE INTRODUCTION OF PROHIBITIONS ON DIRECT CROSS-EXAMINATION

A The Problem of Direct Cross-Examination in Family Law Proceedings

For many years, research and inquiry reports in Australia and overseas have highlighted problems inherent in allowing alleged perpetrators and victims of family violence to directly cross-examine each other in family law proceedings.[16] Unlike other legal proceedings involving violence against women (for example, civil protection order proceedings, family violence criminal proceedings, and sexual assault proceedings) which had been the subject of law reform to prohibit direct cross-examination in state and territory jurisdictions,[17] until 2019 family law proceedings had allowed such direct cross-examination when the alleged victim or perpetrator was without legal representation.

Research on direct cross-examination in family law proceedings has found that victims of family violence fear being cross-examined by their former partners,[18] that perpetrators can use such direct cross-examination to further harass and intimidate the victim, and that victims find it difficult to give their best evidence when being directly cross-examined by their alleged perpetrator. Research has also found that victims who are without legal representation find it challenging to cross-examine the alleged perpetrator effectively, finding it difficult to 'ask

16 See above nn 5–6.

17 Tracey Booth, Miranda Kaye and Jane Wangmann, 'Family Violence, Cross-Examination and Self-Represented Parties in the Courtroom: The Differences, Gaps and Deficiencies' (2019) 42(3) *University of New South Wales Law Journal* 1106 <https://doi.org/10.53637/BFVQ4347>. New South Wales and the Northern Territory most recently filled this gap in relation to some domestic violence proceedings: see *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW); *Evidence and Other Legislation Amendment Act 2020* (NT).

18 Adrienne Barnett, 'Family Law without Lawyers: A Systems Theory Perspective' (2017) 39(2) *Journal of Social Welfare and Family Law* 223 <https://doi.org/10.1080/09649069.2017.1306355>; Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009); Family Law Council, *Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, June 2016); House of Commons Justice Committee (UK), *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Report No 8, 4 March 2015); Kaye, Wangmann and Booth, 'Preventing Personal Cross-Examination' (n 5); Loughman (n 5).

sufficiently probing questions or challenge responses'.[19] Whether the direct cross-examination is conducted by a victim or by a perpetrator, the court is likely to receive 'incomplete or poor quality evidence'.[20] In addition a survey conducted by Women's Legal Services Australia ('WLSA') found that 'fear of personal cross-examination … had been a significant factor in [women's] decision to settle' their case.[21] The prospect of direct cross-examination not only creates issues for legal proceedings in terms of the quality of evidence available or whether proceedings continue, it also has considerable personal impacts on victims. WLSA found that many victims who experienced direct cross-examination reported 'feeling unsafe, re-traumatised and intimidated, and suffered physical symptoms of stress leading up to and following the court event "including panic attacks, weight and hair loss, 'being physically sick', sleeplessness and post-traumatic stress disorder"'.[22]

Prior to the recent amendments, judicial officers in the Australian family law system had, and still have, a number of measures available to them that could assist in preventing some of the more egregious direct cross-examination. These might involve judicial officers 'limiting or controlling in-person cross-examination', including relaying the questions or involving a third person, or 'using remote witness facilities' or screens.[23] Legislative provisions also allow a judge to limit or restrict cross-examination. A judge has general powers to limit 'offensive, scandalous, insulting, abusive or humiliating' questions and to 'forbid an examination of a witness that it regards as oppressive, repetitive or hectoring' unless the court is satisfied that it is 'essential in the interests of justice'.[24] In child-related proceedings, judicial officers have the general power to limit or not allow the cross-examination of any witness.[25] Despite these powers, the intervention of judges in direct cross-examination is constrained by the nature of adversarial proceedings in which the judge assumes a 'traditional, passive role' and notions of what makes a 'fair trial' in terms of testing evidence.[26] In addition, research has shown that the use of such measures by judicial officers in Australia and overseas has been 'inadequate and inconsistent'.[27]

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19 Coy et al (n 6) 40.

20 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence: Recommendations for an Accessible, Equitable and Responsive Family Law System Which Better Prioritises Safety of Those Affected by Family Violence* (Report, December 2017) 135 [4.178] ('*A Better Family Law System*').

21 Loughman (n 5) 26.

22 Booth, Kaye and Wangmann (n 17) 1114, quoting Women's Legal Services Australia, Submission to Attorney-General's Department, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017: Public Consultation on Cross-Examination Amendment* (2017).

23 See *A Better Family Law System* (n 20) 135 [4.179] (citations omitted).

24 *FLA* (n 10) s 101. See also *Evidence Act 1995* (Cth) s 41.

25 *FLA* (n 10) s 69ZX(2)(i).

26 Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 115. See also Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16(3) *Social and Legal Studies* 405 <https://doi.org/10.1177/0964663907079766>.

27 In the United Kingdom, see Corbett and Summerfield (n 6) 2, 15–25. In Australia, see Carson et al (n 5) 2–3; *A Better Family Law System* (n 20) 135 [4.180].

B The Family Violence and Cross-Examination of Parties Scheme

The new prohibition on cross-examination in family law proceedings was introduced following an extensive consultation process which included exposure bills and a parliamentary inquiry.[28] It commenced operation on 10 September 2019 for any hearing (interim or final) listed after that date, whether or not the matter commenced before that date. The Scheme does not apply in all cases involving family violence. In certain cases the prohibition is mandatory, in other cases the court may make a discretionary order imposing a prohibition. Other cases may fall outside the Scheme and in these cases the court must consider other protective measures.

1 The Mandatory Prohibition

Prohibition on direct cross-examination is mandatory in cases in which:

- 'either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party';[29]
- a final FVO applies to the parties;[30] or
- 'an injunction under section 68B or 114 [of the *FLA*] for the personal protection of either party is directed against the other party'.[31]

This means that in any case (parenting or property) involving an SRL in which one of the above triggering circumstances exists, then that unrepresented party will automatically be prohibited from directly cross-examining the other party. If cross-examination does take place it 'must be conducted by a legal practitioner acting on behalf' of the SRL.[32]

2 The Discretionary Prohibition

If a case involving an SRL and allegations about family violence does not satisfy one of the above mandatory circumstances the court may, in its discretion, order that direct cross-examination is prohibited.[33] A judge can make this order on their own initiative, or following a request from the self-represented party, the

28 See Exposure Draft, Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017 (Cth); Attorney-General's Department (Cth), *Proposed Amendments to the Family Law Act 1975 (Cth) to Address Direct Cross-Examination of Parties in Family Law Proceedings Involving Family Violence* (Public Consultation Paper, July 2017); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Report, August 2018).

29 *FLA* (n 10) s 102 NA(1)(c)(i).

30 A Family Violence Order ('FVO') is a civil protection order available under state and territory legislation. In each jurisdiction these orders are known by various terms; for example, in New South Wales they are known as 'Apprehended Domestic Violence Orders': see *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In Victoria they are known as 'Family Violence Intervention Orders': see *Family Violence Protection Act 2008* (Vic). While in Western Australia they are known as 'Family Violence Restraining Orders': see *Restraining Orders Act 1997* (WA). We use the term FVO as a generic term to cover all these orders. It is also the term used in the *FLA* (n 10): at s 4 (definition of 'family violence order').

31 *FLA* (n 10) s 102NA(1)(c)(iii).

32 Ibid s 102NA(2)(b).

33 Ibid s 102NA(1)(c)(iv).

lawyer for the other party, or an ICL (if one has been appointed). The legislation, however, does not provide any guidance about what factors might be relevant in weighing that discretion.[34]

3 Cases in which the Mandatory and Discretionary Prohibitions Do Not Apply

Where the mandatory conditions do not apply and the court decides not to make a discretionary order, section 102NB of the *FLA* provides that the court 'must ensure that during the cross-examination there are appropriate protections for the party who is the alleged victim of family violence'. Such 'appropriate protections' include the use of AVL or screens. This legislative directive is useful given that research has indicated that these types of protective measures have been little used in family law proceedings in Australia.[35]

4 Operation of the Scheme

The mandatory and discretionary prohibition on direct cross-examination means that the SRL to whom this ban applies is prevented from personally conducting cross-examination of the other party and if such cross-examination takes place, it can only be conducted by a lawyer. In these circumstances the SRL may apply to the relevant state or territory legal aid commission ('LAC') for representation under the Scheme, engage their own private lawyer to conduct the cross-examination, or choose not to engage a lawyer at all in which case the cross-examination of the other party cannot occur.

In order to facilitate and administer this Scheme, the federal government has provided funding to the various state and territory LACs. Once a prohibition order is made (whether mandatory or discretionary) the self-represented party may apply to the appropriate LAC to secure representation under the Scheme. Provision of a lawyer under the Scheme is not means or merit tested as is the case for other legal aid grants; indeed, this is not a 'grant' of aid, but rather funding 'administered' by the LACs for the purposes of the Scheme.[36]

III THE OPERATION OF THE CROSS-EXAMINATION SCHEME IN PRACTICE: FINDINGS FROM TWO STUDIES

To explore the operation of the Scheme we draw on findings from two studies:

34 See *Owen v Owen* (2020) 60 Fam LR 334, 337 [21] (Gill J) ('*Owen*').

35 Miranda Kaye, 'Accommodating Violence in the Family Courts' (2019) 33(2) *Australian Journal of Family Law* 100, 115–19; Carson et al (n 5) 45. The impact of COVID-19 has meant that many family law matters are now conducted online and the embrace of these alternative means for conducting hearings may lead to the greater use of such measures after the pandemic restrictions ease: Bruce Smyth et al, 'COVID-19 in Australia: Impacts on Separated Families, Family Law Professionals, and Family Courts' (2020) 58(4) *Family Court Review* 1022, 1034 <https://doi.org/10.1111/fcre.12533>.

36 See *Legal Aid ACT v Westwell* (2021) 62 Fam LR 546 ('*Westwell*'), which confirmed that funding under the Scheme was not a grant of legal aid and, as a result, costs could be ordered against the party who has representation under the Scheme.

1. A large study on self-representation in family law proceedings involving family violence (the 'SRL study') funded by Australia's National Research Organisation for Women's Safety ('ANROWS').[37] This study was designed to explore all of the issues that arise when parties are without legal representation, including direct cross-examination. The study commenced in 2018 with field work continuing until the end of 2020. This timing meant that the research team was in the unique position of conducting field work before and after the implementation of the Scheme. While the study was not designed to evaluate the Scheme, we gathered useful data about its early implementation.
2. An analysis of recent cases that involved the making of, or a discussion about, a mandatory or discretionary order (the 'case analysis study').

A The SRL Study

1 Methodology

This large empirical study had two key components:[38]

1. *A general interview sample* which involved semi-structured in-depth interviews with 35 people (24 women and 11 men) who represented themselves at some stage in their family law proceedings and/or faced an SRL, and 68 professionals (22 judicial officers, 34 lawyers and 12 other professionals) who engaged with SRLs in family law proceedings.[39] SRL interview participants were recruited via information and flyers distributed or displayed at some court registries, through women's legal services, LACs and on social media. Judicial officers were recruited via the Chief Justice of the Family Court of Australia ('FCA') and the Federal Circuit Court of Australia ('FCCA')[40] informing them about the research and advising them that they were able to participate if they wanted to do so. A research flyer was also made available at the annual judicial plenary. Other professionals were recruited as a result of contact at court sites visited as part of the intensive case study (described below) and via other methods of purposive sampling to ensure a range of legal and other professionals were interviewed.
2. *An intensive case study sample* which involved visiting eight court sites (FCA and FCCA) across three eastern seaboard states to observe court

37 Wangmann, Booth and Kaye, *No Straight Lines* (n 3).

38 For detailed information about the methodology, see ibid ch 3.

39 All self-represented litigant ('SRL') interview participants have been given a pseudonym, and professional interview participants a code number that indicates their professional grouping (ie, judges – J, legal professionals – L, other professionals – O, and registrars – R). In this article we refer to interviews that were quoted in the published report for this study: Wangmann, Booth and Kaye, *No Straight Lines* (n 3). We also refer to or quote passages from those interviews that were not included in the published report.

40 This study was conducted prior to the amalgamation of these courts into the Federal Circuit and Family Court of Australia effective from 1 September 2021. See the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

proceedings, interview parties involved in those observed matters and to examine related court files. A mix of metropolitan and regional circuit courts were selected. This component of the study involved the observation of 512 court events[41] of which 253 involved at least one SRL (with 243 being unique matters); the examination of 180 court files related to those 243 matters; and interviews with 14 people (SRLs and lawyers) who were involved in 12 of the observed matters.

Ten SRLs we interviewed had cross-examined their former partner, and four had experienced direct cross-examination. All of these cases took place prior to the Scheme and they confirmed that the experience was traumatic and difficult.[42] For example, Marie stated:

> I found it really, really hard [cross-examining my former partner]. I found it really traumatising just even to look at him. Right? Because I am really scared of my ex. Like, being in the same room with him … I am literally shaking all over because I know how much he hates me.[43]

Marie was also cross-examined by her former partner and explained that she 'couldn't answer him. I was just so afraid of making him angry'.[44]

We observed 10 matters in which the application of section 102NA was raised: four cases attracted the mandatory prohibition, in two cases a discretionary order was made, in two cases the court held that the provision was inapplicable, in one case the court had not yet determined this issue, and in the final case it was unclear whether the prohibition was mandatory or discretionary. Many of the professionals we interviewed also made comments about the Scheme, particularly those interviewed just before or just after the Scheme commenced.

B The Case Analysis Study

1 Methodology

In January and July 2021, a search was conducted in Lexis Advance Pacific for all cases that mentioned section 102NA using the legislation and provision number search fields. This search retrieved 167 results. A number of cases were removed from this initial retrieval because they were determined before the Scheme became operative, or because the mention of section 102NA was confined to a notation on the court orders about the applicability of section 102NA if one of the parties was to become self-represented in the future. Matters involving multiple proceedings were also grouped together and counted as a single case. This resulted in a final sample of 121 cases.

41 The term court 'event' encompasses a variety of steps in the legal process requiring attendance at court, for example, mentions in a duty list, directions hearings, interim hearings and final hearings.

42 Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 113–14.

43 Marie, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 113.

44 Ibid.

(a) Overview of the Case Analysis Sample

The 121 cases in the case analysis sample comprised:

1. 54 cases that involved a mandatory prohibition;[45]
2. 29 cases which considered a discretionary order;[46] and
3. 38 cases where it was unclear what type of order had been made or was under consideration.

The majority of matters in dispute were parenting (71.07%), followed by parenting and financial matters (16.53%), and then financial matters (property and/or maintenance) (12.40%).[47] See Figure 1. Some of these proceedings involved a contravention of parenting orders, or a vexatious application in a parenting matter, or other procedural issues, and these proceedings have been characterised in terms of the overarching nature of the matter.

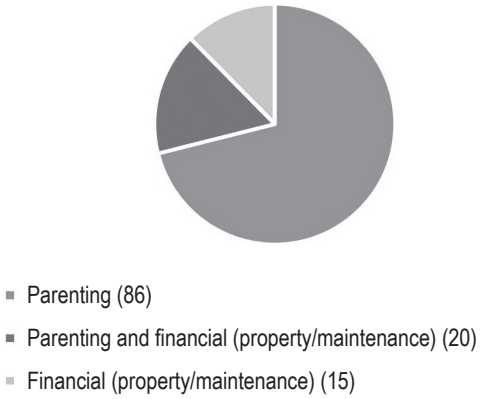

Figure 1: Type of matter

Most of the 121 cases were heard in the FCA (82), followed by the FCCA (37), and the remaining two cases were heard in the Family Court of Western Australia ('FCWA').[48] There were a number of cases in the case analysis sample where the

45 There was an additional case, *Perras v Perras* [2020] FCCA 3109, in which Hughes J had mistakenly thought that it was a mandatory case: at [37].

46 There was an additional case in which the parties 'did not seek for the court to exercise its discretion' and it proceeded with cross-examination allowed: Order of Bennett J in *Waverley v Labelle* (Family Court of Australia, MLC1021/2017, 26 September 2019).

47 This fits the general profile of SRLs in family law proceedings: Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 45–7; *Family Law for the Future* (n 1) 98–9; Rosemary Hunter et al, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Report, August 2002) 61–3. This also fits the profile of SRLs in a specific study on direct cross-examination: Carson et al (n 5) 17.

48 This refers to where the case was initially heard. Some cases also involved appeals to the Full Court on a range of different matters, including the making of, or refusal to make, a section 102NA discretionary order, or in relation to whether costs can be awarded where someone has legal representation under the Scheme: see *Balmer v Balmer* [2020] FamCAFC 281; *Neil v Zang* (2021) 62 Fam LR 432 ('*Neil*'); *Pitman v Hynes [No 2]* [2020] FamCAFC 310; *Westwell* (n 36).

SRL did not avail themselves of the legal representation under the Scheme and the matter proceeded on an undefended basis,[49] or without cross-examination taking place on behalf of the SRL.[50]

In two cases, it was unclear which party had been without legal representation prior to the section 102NA order. Of the remaining 119 cases, most involved only one party who was without legal representation (102/119) with most of these SRLs being male (75/102), with slightly more as respondents (42/75). Seventeen (17) cases involved both parties being SRLs. See Table 1. This fits the general profile of SRLs in previous research on family law and self-representation,[51] and research focused on direct cross-examination in family law proceedings.[52]

Table 1: Who Was the SRL Party in the Case Analysis Sample? (N = 121)*

	Applicant	**Respondent**	**Total**
One party is SRL (102 cases)			
Male	33	42	75
Female	8	19	27
Both parties are SRLs (17 cases)			
Male	12	5	17
Female	5	12	17
Cases in which it was unclear who had been the SRL			2

* This table does not include second and third applicants/respondents who may have also been without legal representation.

The allegations about family violence in most cases concerned the actions and behaviours of the male party (79/121; 65.29%), in 17 cases the direction of the violence was unclear (17/121; 14.05%), in 14 cases there were allegations both parties had used violence (14/121; 11.58%),[53] in 10 cases it was the female party

49 *Norris v Denis [No 3]* [2020] FCCA 1374; *Tariq v Tariq* [2020] FamCA 1004; *Thanos v Salsbury* [2020] FCCA 3353; *Mercer v Hatfield* [2021] FCCA 593; *Valcour v Alardin* [2020] FCCA 2233. In *Cardus v Lavrick* [2020] FamCA 579, the father's explanation that he did not want to cross-examine the mother as he did not want to '"escalate the dispute"' was dismissed by the court as 'plainly disingenuous. The father has escalated the dispute at every turn': at [229] (McEvoy J).

50 See *Northam v Lowrey [No 2]* [2020] FCCA 374, where the respondent father did not arrange for legal representation under the Scheme, instead attending court with a law student. Young J refused to allow this person to conduct the cross-examination. As a result, the matter proceeded without any cross-examination of the mother by the father. The mother was however cross-examined by the Independent Children's Lawyer: at [26]. See also *Seifert v Kominsky* [2021] FCCA 318 ('*Seifert*'); *Powell v Christensen* [2020] FamCA 944.

51 Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 45–6; Hunter et al (n 47) 41.

52 Carson et al (n 5) 20–2.

53 This is an underestimate of the extent of allegations that were made against both parties as this number only refers to whether the mandatory trigger(s) involved both parties.

who was alleged to have used family violence against the male party (10/121; 8.26%), and in the remaining case the court stated that the case did not involve violence.[54] By and large it was the person without legal representation who was also the party who was alleged to have been violent.

IV DISCUSSION OF FINDINGS

A The Mandatory Prohibition Threshold

The triggering circumstances for the mandatory application of the Scheme are set out above. Mixed views on this threshold emerged in the SRL study with some considering that the mandatory threshold 'is quite high' and will be difficult to satisfy,[55] whilst others felt that the triggering circumstances were in fact very common in the cases that appear in the family law courts.[56] One judge was of the view that most orders under the Scheme would be discretionary rather than mandatory:

> [T]here's so many people that will never, for a number of reasons, make it to a police station or to the [family violence] service … Because they're too frightened, because they're trying to not make a big fuss about it, because they don't want the embarrassment, because they're frightened of the ramifications, because they're hoping it'll all go away. You know, some of the worst victims that I've seen have not had a [FVO]. So, I think the government, if they understood that, could expect a lot [of discretionary orders] to be made.[57]

In the case analysis sample, the trigger for the mandatory prohibition in almost half of the 54 cases was the existence of a final FVO in force at the time of the hearing (25), followed by a charge/conviction (17), and a combination of a charge/conviction and a current FVO (11). There were no cases clearly relying on a *FLA* injunction,[58] and in two cases, the nature of the trigger was unclear. In all but two cases, the trigger circumstance identified one party as the perpetrator. The exceptions[59] involved mutual final FVOs with each party named as the victim in one FVO and as the respondent in the other. In one of these cases, the applicant father had also been convicted of charges in relation to the mother and 'placed on [a] … diversion program'.[60] For the vast bulk of cases (42), the male party was the perpetrator of the violence in the trigger for the mandatory prohibition. See Table 2.

54 *McQueen v Daube [No 2]* [2019] FCCA 2983, [3] (Harland J) ('*McQueen*').
55 L26, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 118.
56 See L19, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 118.
57 J3, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 118.
58 In *Nazer v Musa* [2020] FamCA 618 it appeared that the mother may also have had a *FLA* injunction, however, this was unclear: at [9] (Berman J referring to the interim orders made by Kelly J on 17 July 2018). There was a clear trigger in the form of a final FVO protecting the father: at [38].
59 *Fisher v Fisher* [2021] FamCA 236; *Zackary v Rabassa* [2019] FCCA 2901 ('*Zackary*').
60 *Zackary* (n 59) [35] (Harland J).

Table 2: Trigger for the Mandatory Prohibition and the Gender of the Perpetrator of That Violence (N = 54*)**

	Trigger for the mandatory prohibition				
	Conviction or charge	**Conviction/ charge plus current final FVO***	**Final FVO**	***FLA* injunction**	**Unclear**
Male	15	11	16	--	--
Female	2	--	5	--	--
Both	--	--	2**	--	--
Unclear	--	--	2	--	2
Total***	17	11	25	0	2

* This is likely to represent an undercount of those cases that involved both of these triggers. In some cases there was reference to an FVO and a charge/conviction but it was not explicit that the FVO was a current final order. Only those cases in which it was explicit that the case involved both are counted here.

** Mutual FVO in two cases: *Fisher v Fisher* [2021] FamCA 236; *Zackary v Rabassa* [2019] FCCA 2901.

*** This adds to 55 (instead of 54) because in one case, *Zackary v Rabassa* [2019] FCCA 2901, the father had been convicted of a violence offence against the mother, as well as there being mutual FVOs in force. This case is therefore counted under Conviction or charge/Male *and* Final FVO/Both.

Men were far more likely to be both the subject of the mandatory order and the recipient of the legal representation provided under the Scheme. Of course, the women victims of the perpetrator's violence also benefited from not having their former partner directly cross-examine them. This 'benefit', however, was tempered in some cases by the ensuing delays created by successive adjournments to enable the SRL to access the Scheme or arrange legal representation.[61] The problem of adjournments and the intersection with legal tactics and legal systems abuse is discussed in more detail below.

Possible limitations of the scope of the mandatory threshold were revealed in the examination of the discretionary cases where judges pointed to a range of factors outside the mandatory parameters of the Scheme including:

61 See *Adel v Banes [No 3]* [2019] FamCA 725; *Bamberg v Cardell* [2019] FCCA 2984 ('*Bamberg*'); *Beckert v Beckert* [2019] FamCA 768; *Firmin v Curtin [No 3]* [2019] FamCA 726 ('*Firmin*'); *Golena v Golena* [2020] FCCA 860; *Keskin v Keskin* [2020] FamCA 323; *Killen v Spriggs* [2019] FamCA 701; *Lou v Wong* [2021] FamCA 410; *Norris v Denis* [2019] FCCA 2653 ('*Norris*'); *Safford v Kelso* [2021] FamCA 349; *Seifert* (n 50); *Zaccardi v Zaccardi* [2020] FamCA 964; *Zong v Lim [No 4]* [2021] FCCA 319 ('*Zong*').

- The fact that section 102NA(1)(c)(i) of the *FLA* refers to an 'offence involving violence' or an offence involving a 'threat of violence' and does not refer to family violence offences or offences perpetrated in the context of family violence, meant that some judicial officers have drawn distinctions about what type of offences fall within this mandatory scope.[62] For example, this reference to 'violence' has meant that a case involving a conviction for property damage,[63] and another case involving a breach of a FVO that concerned multiple text messages that were not threatening,[64] were deemed to fall outside the mandatory prohibition;
- Because the provision refers to a charge or conviction, people who are found guilty of a violence offence, but no conviction is recorded,[65] which is not uncommon for more minor offences and for first-time offenders, fall outside the mandatory provisions;
- Expired final FVOs,[66] or interim orders that were on foot at the time of the family law proceeding; and
- Where the offences were not perpetrated against one of the parties, but rather against another family member such as a child of the relationship.[67]

This does not mean that these factors were not subsequently referred to when the judge was determining whether to make a discretionary order, but rather to raise for consideration whether the line for mandatory orders is correctly drawn given the purpose of the legislation is to protect victims from re-traumatisation and to assist the court in receiving the best evidence.

Other issues with the operation of the Scheme were revealed in FCWA cases and are part of the unique nature of that court. Unlike other jurisdictions, Western Australia ('WA') did not refer its powers in relation to de facto relationships to the federal government and established its own court. The first issue concerned the coverage of de facto relationships; the Scheme initially only applied to marital relationships. This disparity was dealt with in September 2021.[68] The other issue was whether the protections afforded under the Scheme in WA extend to cover proceedings that can be joined to the family law proceedings in that jurisdiction. This issue was raised in *Monaco v Daniels*.[69] This case concerned whether the Scheme, which protected the mother from direct cross-examination in the parenting and property proceedings, extended to cover her in civil proceedings for damages for injuries inflicted on her by the father which had been transferred from the Supreme Court of Western Australia

62 See discussion in *Middleton v Redmond* [2021] FCCA 316, [56]–[61] (O'Shannessy J) ('*Middleton*').
63 *Scritton v Javins* [2020] FamCA 316 ('*Scritton*').
64 *Middleton* (n 62).
65 Ibid; *Santer v Santer* [2020] FamCA 444 ('*Santer*').
66 *Chard v Yong [No 2]* [2019] FamCA 948 ('*Chard*'); *Donne v Scully* [2019] FamCA 785 ('*Donne*'); *Ferreira v Ferreira* (2019) 60 Fam LR 19 ('*Ferreira*'); *Muratov v Muratov* [2019] FamCA 1014 ('*Muratov*'); *Santer* (n 65); *Zang v Neil* [2019] FamCA 760 ('*Zang*').
67 *Owen* (n 34).
68 *Family Court Amendment Act 2021* (WA).
69 (2020) 60 Fam LR 395 ('*Monaco*').

to the FCWA.[70] The court held that these civil proceedings were not covered by the Scheme as they were not proceedings under the *FLA*.[71]

B Discretionary Orders

There is no legislative guidance to assist judges, or indeed those seeking a discretionary prohibition, as to what factors might be considered when making a decision. A small number of judges in the case analysis sample commented on this silence[72] and the absence of Full Court authority on the exercise of discretion in this area.[73]

One judge in the SRL study who had not yet been asked to make a discretionary order stated that they 'would err on the side of caution … if there's any suggestion that it would be appropriate'.[74] A small number of the legal professionals interviewed confirmed that they thought judges would adopt a 'wide' approach to this provision.[75]

In the case analysis sample, it was unclear in a number of cases who had sought the making of the discretionary order (11/29). Where it was clear who raised the issue, in seven cases it was the SRL (or one of the SRLs),[76] in six cases it was the represented party, in two cases the judge initiated it, in one case it was raised by the ICL, in one case the judge noted that '[t]he parties have raised with me the application of s 102NA',[77] and in another case the judge noted that both the mother (who was represented) and the ICL raised the matter.[78] Interestingly, in the two cases where the judge raised the applicability of section 102NA, both parties were without representation.[79]

The discretionary order to prohibit direct cross-examination was made in the vast bulk of cases where section 102NA was raised (20/29). For some cases, while they were subject to a discretionary order, they would have later satisfied

70 Pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA).

71 *Monaco* (n 69) [21]–[26] (O'Brien J). In the end, the Department of the Attorney General (WA) 'made funding available … for the purpose of the transferred proceedings, bearing in mind that those proceedings are entirely about her allegations of family violence and the alleged impact of that violence on her': at [14].

72 See *Owen* (n 34) [21] (Gill J); *Delancy v Theobald* [2019] FCCA 3852, [7]–[8], [11] (Altobelli J) ('*Delancy*'); *Hurley v Melton [No 2]* (2020) 61 Fam LR 405, [24] (Hogan J) ('*Hurley*').

73 *Hurley* (n 72) [26] (Hogan J). Since this decision, *Neil* (n 48) was determined. *Neil* clarified that in determining whether to make a discretionary order, the court needs to consider not only the impact on a person of being cross-examined, but also the impact on them in terms of having to conduct their own cross examination: at [38]–[40]. This Full Court decision, however, does not provide wider guidance about the factors that might be relevant to the exercise of discretion.

74 J10, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.

75 See L19 and L27, cited in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.

76 This includes *Barber v Khatri* [2021] FamCA 296 ('*Barber*') where the respondent mother's legal team raised it with Williams J when they indicated that they were withdrawing their representation: at [19]–[21].

77 *Chard* (n 66) [1] (Gill J).

78 *Vader v Dantes* [2020] FamCA 775.

79 *Ferreira* (n 66); *Middleton* (n 62).

the triggers for a mandatory order for events that took place while the family law proceedings were on foot.[80]

1 Making a Discretionary Order

A number of the judges in the SRL study discussed factors that had influenced their discretion to make an order. These included: an expired final FVO,[81] 'if there [was] a history of family violence',[82] a 'level of disparity in the relationship',[83] where the presentation of the parties indicated that the quality of evidence might be impeded if direct cross-examination were permitted,[84] and if they 'believe[d] that some of the litigation might be motivated as another form of family violence'.[85] Sometimes a combination of factors meant a discretionary order was appropriate. For example, one judge explained:

> I had a Family Report where both parties were interviewed and the report writer had observed the controlling and coercive violence … and said that if the court accepted versions of it, it happened all through the marriage … [There had also been] … two lots of notices of discontinuances filed on the same day, filled out by the husband … for both parties, [and] … he had taken the children from her for five months [and the father] … had been already found to have made false allegations about [the mother]. So, I thought, yes, I think I've got everything here [to make a discretionary order].[86]

The case analysis sample provides more information about what issues influence the making of discretionary orders. While in some cases the basis for the discretionary order was not clear, in those where it was clear the order was generally a product of multiple factors. The following factors were cited in the judgments as the reason, or part of the reason, for making a discretionary order:

- The nature of the allegations made by the victim including the severity of the allegations, the extent to which they were particularised in any documentation such as affidavit material, other supporting evidence, and whether the SRL was likely to want to cross-examine on those matters whether as the alleged victim or perpetrator;[87]
- The existence of a current interim FVO;[88]

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80 See *Holt v Stiller* (2020) 62 Fam LR 464 ('*Holt*'). The prospect of this was also noted in *Donne* (n 66) in which there was a current FVO listed for final determination shortly before the hearing in the family law matter. Tree J noted that if a final order was made at that time, then the case would fall within the mandatory circumstances: at [1]–[2].

81 See J12, cited in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.

82 Interview with J15 (2019) conducted as part of the SRL study.

83 J16, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.

84 Interviews with J5 (2019) and J16 (2019) conducted as part of the SRL study.

85 Interview with J15 (2019) conducted as part of the SRL study.

86 J13, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.

87 *Ademis v Beauman* [2020] FCCA 1661 ('*Ademis*'); *Balmer v Balmer* [2020] FamCAFC 281, [7] (Kent J); *Chard* (n 66); *Ferreira* (n 66); *Parisi v Zein* [2020] FamCA 587 ('*Parisi*'); *Sayid v Alam* [2020] FamCA 400; *Scritton* (n 63); *Thompsett v Keen* [2019] FamCA 673; *Velderman v Velderman* [2021] FamCA 207 ('*Velderman*').

88 *Abercrombie v Damon [No 3]* [2021] FCCA 682; *Barber* (n 76).

- An expired final FVO,[89] or multiple earlier interim FVOs that had not been made into final orders;[90]
- Both parties were SRLs;[91]
- One party had been found guilty of a prior offence in relation to the other party, but no conviction had been recorded against them;[92]
- Conviction for a non-violent offence that does not strictly fall within the mandatory provisions;[93] and
- Previous findings made in earlier family law proceedings together with family law consent orders that restrained the father from approaching the mother.[94]

In addition, a small number of judges pointed to the possible traumatic impact on the victim if direct cross-examination was allowed and that if it took place, the best evidence would not be available to the court. For example, Henderson J in *Velderman v Velderman* noted that she was 'concerned that the wife would … be impeded in her capacity to give cogent evidence'[95] if direct cross-examination were permitted and that this could 'jeopardise the Court receiving the best possible evidence'.[96]

There were also cases where these factors were not evident, yet a discretionary order was made. For example, in *Delancy v Theobald* ('*Delancy*') the applicant mother was self-represented and had raised allegations about family violence, but these were 'poorly particularised and … historical'.[97] The case also involved allegations about the mother's drug misuse and its impact on the child. Altobelli J posed a series of questions about the discretion to prohibit direct cross-examination in this case which indicated that in many ways, family violence, while alleged, was not the central issue, rather the focus was on

> the risk of harm presented to a child as a result of the mother's drug abuse or alleged drug abuse? It could be said by some, for example, that this is not a family violence case, it is a drug case. Why, then, should the Mother receive the benefit of a series of protections that were enacted as a result of concerns over family violence?
>
> The legislation is unclear about these issues and is relatively untested.[98]

The father was 'represented by both Solicitor and Counsel'.[99] This disparity in legal representation led Altobelli J to note that

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89 *Chard* (n 66). In *Donne* (n 66), another FVO application was in process and Tree J noted the prospect of this being made shortly before the family law hearing: at [1]. *Ferreira* (n 66) in addition to the previous FVO, there were new allegations including sexual assault. This was noted to be a 'serious allegation … which will require resolution at the proceedings': at [4] (Gill J); *Muratov* (n 66); *Santer* (n 65) (plus charges proven no conviction).

90 *Scritton* (n 63).

91 *Parisi* (n 87) [32] (Wilson J).

92 *Santer* (n 65).

93 *Scritton* (n 63).

94 *Hurley* (n 72) [40], [42], [45] (Hogan J).

95 *Velderman* (n 87) [37].

96 Ibid [41]. See also *Scritton* (n 63) [10] (Gill J); *Ferreira* (n 66) [4]–[5] (Gill J).

97 *Delancy* (n 72) [7].

98 Ibid [7]–[8].

99 Ibid [6].

> the reality of this case is that if I do not grant the Mother's application and make the order, the Mother would not be able to cross-examine the Father, but the Father would be able to cross-examine the Mother. That is significant particularly in a case where there are issues about drug abuse, the risk of relapse and the potential impact on the child in question.[100]

During his extended discussion, Altobelli J refers to the purpose of the legislation to '[avoid] and/or minimis[e] the risk of retraumatisation … and to seek to mitigate the power imbalances potentially created' where an alleged victim is required to conduct their own cross-examination.[101] In his view, this means that a case does not necessarily have to be a 'family violence case' for the provisions to come into play, it is about whether the existence of allegations of family violence would impact on the nature of cross-examination.[102]

2 Reasons for Refusal

The reasons for refusing to grant a discretionary order in the case analysis sample were frequently the absence of the factors relied upon in the cases in which an order was made. Judges made reference to the following matters, often in combination, as pointing away from the making of a discretionary order:

- The age of the allegations about family violence;[103]
- The vague or sparse nature of the allegations about family violence,[104] including where only a single allegation about family violence had been made;[105]
- Allegations in relation to violence or abuse of a child and not the party;[106]
- That the proposed cross-examination would be limited in scope;[107]
- Limited funding available under the Scheme;[108]
- Not a case that involves violence 'such that an unrepresented party should be prohibited from personal cross-examination';[109]
- While there was a charge or conviction for an offence concerning behaviours between the parties, it was not a 'violence' offence;[110]
- No conviction recorded;[111] and
- Parties did not want the matter adjourned.[112]

There appeared to be greater variability between judicial officers in the factors relied upon to support their refusal to grant a discretionary order compared to

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100 Ibid.
101 Ibid [9].
102 Ibid [12]–[13].
103 *Hills v Caldwell* [2020] FamCA 574 ('*Hills*'). In this case the allegations were five years old: at [23] (Rees J).
104 Ibid; *Owen* (n 34).
105 *Upton v Everett* [2020] FamCA 805.
106 *Owen* (n 34) [43] (Gill J).
107 *Hills* (n 103) [22] (Rees J).
108 *McQueen* (n 54); *Owen* (n 34).
109 *McQueen* (n 54) [3] (Harland J).
110 *Middleton* (n 62) [58] (O'Shannessy J).
111 Ibid [63].
112 Ibid [29].

making such an order. In the SRL study, some judges pointed to practical issues such as whether there was sufficient time to enable appointment of legal representation under the Scheme without necessitating an adjournment; this was particularly important where the victim did not want further delays.[113] In a directions hearing observed in the SRL study, the judge declined to make a discretionary order. In this case, the ICL informed the judge that section 102NA was not applicable. However, later in the proceedings the SRL mother asked the judge whether she had to cross-examine the father, noting that she had made allegations of family violence against him. The judge responded that it was 'at the discretion of the court. You choose to be unrepresented even though you've been told endlessly to be represented. You will question each other'.[114] Subsequent examination of the court file by the research team revealed that the mother's affidavit and Notice of Risk form alleged that her former husband had sexually assaulted her, monitored her, 'set traps', controlled the finances, and denigrated her in front of the children.[115] This potential inconsistency and variability in matters weighed in the refusal to exercise discretion warrant further investigation.

In the case analysis sample, it was evident that judicial officers took different approaches to similar factors. For example, in terms of the age of allegations, while Altobelli J in *Delancy* (discussed above) noted that the legislation was silent on this issue, his honour acknowledged that older allegations may still impact on the victim in ways that satisfy the rationale of the Scheme.[116] However, in stark contrast, Rees J in *Hills v Caldwell*[117] commented that it was 'difficult to foresee how it can be asserted that anything that occurred almost five years ago, before the parties separated, is relevant to the present issues'.[118] In this latter case, the applicant SRL father stated that he was not 'interested in probing that time' and would confine his questions to matters relevant to the best interests of the children[119] and Rees J indicated that he was satisfied that '[t]he scope of cross-examination will be limited'.[120] Here, Rees J appears to see the possibility of difficulties arising from direct cross-examination to be confined to whether the party is intending to ask questions about the alleged family violence, and not the prospect of direct cross-examination by an alleged perpetrator more generally.

Another factor relevant to refusing to make a discretionary order, was the view of the opposing party. In *Abadi v Sokulsky*,[121] while the judge acknowledged that a number of matters 'point[ed] towards an order being made'[122] to prohibit the SRL applicant father from directly cross-examining the mother, the judge declined to

113 Interview with J8 (2019) conducted as part of the SRL study.
114 Court observation, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.
115 Notice of Risk examined as part of court file examination, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.
116 *Delancy* (n 72) [11].
117 *Hills* (n 103).
118 Ibid [23].
119 Ibid [21].
120 Ibid [22].
121 [2020] FamCA 64 ('*Abadi*').
122 Ibid [7] (Gill J).

make the order largely because it was opposed by the mother and her legal team.[123] The mother had made a number of allegations that the father had perpetrated violence against her, and while the mother, through her legal representative, agreed that she will be the subject of 'some pressure' and that direct cross-examination will be 'uncomfortable', the prospect of further delays in the case meant that she opposed the making of the order.[124] Gill J concluded:

> On that basis, and bearing in mind the largely protective concerns addressed by s 102NA on the basis of that representation made by counsel, and on the basis that in the ordinary course the Court is in a position to sufficiently control the questioning, particularly where a party is legally represented, so as to combat the undermining of the integrity of the evidence, I decline to make an order under s 102NA.[125]

Gill J did not make any orders under section 102NB which requires the court to consider other protective measures that may assist the alleged victim of family violence (such as cross-examination being conducted via audio or visual link) because these were not sought by counsel for the mother. However, the court noted that this may be 'revisited' later in the proceedings.[126]

In *Scott v Scott [No 3]*[127] the prospect of further delays to facilitate access to the Scheme was key to the SRL wife's position that she did not want an order made.[128] This meant that in the final hearing, while the wife did manage cross-examination of the husband about a range of issues, she was reluctant to cross-examine him about her claim that 'her execution of the [binding financial] agreement [was carried out] under duress due to the alleged history of family violence'.[129] Interestingly, while Austin J acknowledges that he could still have made an order, 'there was no apparent reason for the Court to act voluntarily'[130] even though in the end '[t]he failure to test the evidence about family violence was mutual'.[131] As a result, the court had inadequate evidence on this issue of duress, and

> [b]ut for concessions made by the husband's counsel in final submissions, the failure by each party to cross-examine the other at all about the disputed allegations of family violence would have hampered any factual findings. The husband's counsel conceded it was properly open, in the circumstances, to find the wife was treated by the husband in the manner she alleged on those occasions, and further, to infer such adverse experiences would be remembered by her and such memories might shape her behaviour in dealings with the husband.[132]

In another case, the trial judge refused to grant a discretionary order given that the SRL would not be subject to direct cross-examination as the other party was legally represented.[133] Here, it was the respondent father who was without legal representation and there were mutual allegations of violence (although the

123 Ibid [10].
124 Ibid.
125 Ibid [12].
126 Ibid [14].
127 [2019] FamCA 936.
128 Ibid [69] (Austin J).
129 Ibid [67].
130 Ibid [68].
131 Ibid [70].
132 Ibid [71].
133 *Zang* (n 66) [255] (Rees J).

Full Court, in agreement with the trial judge, stated that 'the father truly was the principal aggressor'[134]). On appeal, the Full Court agreed that the trial judge had erred because they had only considered the impact of direct cross-examination on the father, and had not considered 'how the father might be adversely affected by having to personally ask questions of the woman who assaulted him'.[135] While the Full Court agreed with the father on this point, they found that he had 'suffered no disadvantage'[136] because 'no aspect of his subsequent conduct of … cross-examination [of the mother] demonstrated his performance was inhibited by his reticence'.[137] The Full Court also noted that the father had shown a 'willingness to regularly challenge and lodge formal complaints' about a range of different people and agencies including the police officer who had charged him, the lawyers who had represented him in his criminal proceedings, the lawyer representing the mother, the child contact services, the ICL and the expert witness appointed in the case, and that 'such determination powerfully implies the father was not overborne by the experience of having to personally cross-examine the mother'.[138] This holistic approach evidences a more nuanced approach to the consideration of family violence and how it might manifest in legal proceedings and legal systems abuse.

C Administrative Issues

1 The Model of Legal Representation under the Scheme

Across the three jurisdictions visited in the SRL study, a 'full representation' model had been adopted by the respective LACs administering the Scheme as opposed to a 'mouthpiece model' where a lawyer only conducts the cross-examination component of the trial and asks the questions devised by the SRL. 'Full representation' means that the lawyers appointed under the Scheme are not confined to cross-examination but take on the full carriage of the matter around three months prior to the hearing dates. This means that the legal representative will draft trial affidavits, issue subpoenas and all matters 'associated with' conducting a full hearing.[139]

In the early implementation phase when the field work for the SRL study was conducted, it was far from clear to legal practitioners and judicial officers what model of legal representation was provided under the Scheme.[140] For example, in one matter we observed, the barrister representing the father under the Scheme at the final hearing of the matter still appeared confused about the extent of his retainer, believing it was limited to cross-examination only.[141]

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134 *Neil* (n 48) [47].
135 Ibid [38].
136 Ibid [41].
137 Ibid [42].
138 Ibid [43].
139 L6, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119–20.
140 See discussion in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 120.
141 Court observation: ibid.

While a full representation model appears to avoid a number of the limitations and problems inherent in a mouthpiece model, professionals we interviewed in the SRL study emphasised that a full representation model does not necessarily address all imbalances that might still be in play. Under the Scheme, a lawyer is appointed close to the date of the hearing and as a result will not necessarily have deep knowledge of the matter, not having been involved in earlier court events and the drafting of paperwork as would be the case for a lawyer engaged from the very beginning.[142]

Some SRLs who want to manage and conduct their litigation prefer the lawyer appointed under the Scheme to be confined to cross-examination. In the SRL study, we observed one case in which the SRL respondent father expressed this preference. When he learned that the lawyer would conduct the whole matter, the father refused the Scheme because he wanted to be able to direct the proceedings. He accepted that this meant he would forgo cross-examining his former partner. There is also the possibility that some victims of family violence may want to conduct their own cross-examination but are prohibited by the mandatory nature of the Scheme. One judge recounted an example where the alleged victim became angry because she wanted to be able to cross-examine her former partner.[143] Another judge described an SRL alleged victim who, despite appearing distressed in the witness box, when offered a discretionary ban protested: 'No, no. I don't want a lawyer. Only I can cross-examine my husband, I have to ask him'.[144]

2 Adequacy of Funding

It became apparent shortly after commencement that the funding allocated to the Scheme was inadequate. The field work for the SRL study was conducted prior to the increases in funding in 2020 and 2021[145] and the legal practitioners and judicial officers we interviewed during the early period of operation were concerned that the funding was inadequate, and that the estimate of numbers on which the Scheme was based was inaccurate.[146] One judge colourfully described the number of applications being made in their jurisdiction as a 'tsunami' approaching the relevant LAC.[147] In this context a small number of the legal practitioners and judicial officers we interviewed expressed concern that the funding in their jurisdiction had already been exhausted.[148] This environment led one judge to warn that they needed

142 L30 and O11, discussed in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 120.
143 J13, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 122–3.
144 J1, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 122.
145 See discussion in Law Council of Australia, 'Legal Funding Welcome but Underscores Crisis' (Media Release, 28 February 2020) ('Legal Funding Welcome'); Law Council of Australia, 'Significant Funding for Federal Courts Applauded' (Media Release, 12 May 2021).
146 See discussion in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 121, citing interviews with J3, J5, J12, J15, J17, L13, L18, L19 and L20.
147 J3, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3).
148 J12, J17 and L18, cited in Wangmann, Booth and Kaye, *No Straight Lines* (n 3).

'to be quite careful about not making too many [discretionary] orders … because I think the funding for that [Scheme] or the estimate [of numbers] is ridiculous'.[149]

In the case analysis sample, some judges referred to the availability of funding as one of the factors they weighed in determining whether to grant a discretionary order. This was a key issue in *Owen v Owen* where the ICL reported to the court that availability of funding under the Scheme was uncertain.[150] In that matter, Gill J concluded that '[e]ven if the other factors had sufficiently pointed to the making of an order, the uncertainty as to funding would have been sufficient to decline to make the order'.[151] Similarly in *McQueen v Daube [No 2],* Harland J noted that '[t]here is going to be a real issue about whether or not that Scheme can continue if too many orders are made under their discretionary provisions'.[152]

Lack of funding may also lead to adjournments (an issue that is already a concern) and matters delayed until funding is available. One legal practitioner in the SRL study commented on this problem,[153] and it is also evident in the case analysis sample.[154] For example, in *Seares v Seares*[155] (a mandatory case) there was a discussion that funding for the Scheme had been exhausted and the LAC could not afford to fund any more legal representation under the Scheme at that time.[156] Forrest J stated that he had no option but to adjourn the case until the father could obtain legal representation.[157] This case had already been in the system for three and a half years.[158] Forrest J also noted that other judges in Brisbane had taken similar steps. His Honour had been informed that in the Brisbane registry 'more than five listed trials in the Family Court and more than thirty listed trials in the Federal Circuit Court have been directly impacted in this way by notice from Legal Aid Queensland that funding under the Scheme is not available'.[159] This case was decided shortly before the federal government made significant funding increases to the Scheme in February 2020.[160]

In *Bradbury v Lander [No 4]*,[161] a case decided in 2021, the inadequacy of funding, and what it covered, were issues. It is not clear whether this was a mandatory or discretionary order case, but when the matter came before the court the solicitor acting for the mother under the Scheme 'indicated that the grant was insufficient to enable him to prepare the material for the trial, as well as conduct

149 Interview with J7 (2019) as part of the SRL study. Part of this quote appears in the published report: Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 119.
150 *Owen* (n 34) [36] (Gill J).
151 Ibid [46].
152 *McQueen* (n 54) [4]. In this case the discretionary order was refused on the basis that it did not raise issues about violence such that a section 102NA order should be made: at [3].
153 See L19, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 121.
154 In addition to the cases discussed in the main text, see *Chafer v Quigley* [2021] FamCAFC 43 and *Fraser v Layfayette* [2020] FCWA 43.
155 [2020] FamCA 216.
156 Ibid [8]–[9], [11] (Forrest J).
157 Ibid [14].
158 Ibid.
159 Ibid [15].
160 See 'Legal Funding Welcome' (n 145).
161 [2021] FamCA 379.

the trial'.[162] As a result the mother was 'advised by the Court that she should continue her preparation of her affidavit material'.[163] It is unclear how adequate representation could be provided where the lawyers do not have some role in the preparation of the affidavit material.

3 Knowledge about the Scheme

A discretionary order may be sought by one of the parties (with or without representation), by the ICL if there is one, or the judge can make this order on their own initiative.[164] For people without legal representation, there may be issues about whether they have adequate knowledge and information about the Scheme, or about what kinds of submissions they need to make to satisfy the court that this is an appropriate case in which to make an order. In the SRL study which covered the early operation of the Scheme, we observed cases, and professionals revealed in their interviews, that delays were caused by the failure to identify cases early in the trajectory of the litigation. The family law courts and the various LACs sought to address this through the provision of fact sheets and notations on orders that alerted parties to the existence of the Scheme if they became unrepresented. Reference to section 102NA in a number of cases in the case analysis sample was limited to this type of notation.[165] However, the Law Council of Australia's submission to the current review of the Scheme suggested that some SRLs 'may fail to read' these notations.[166]

Five discretionary order cases in the case analysis sample involved both parties being without legal representation. In three cases it is not clear who raised the issue of the applicability of section 102NA,[167] in one case it was clear that the court had raised the issue,[168] and in the remaining case the applicant mother raised the issue.[169] *Middleton v Redmond*[170] is an example where the application of section 102NA was raised by the judge. In this case, O'Shannessy J noted that he was making this determination 'without the benefit of a contradictor and without the benefit of the parties or counsel retained by them making any submissions to the court'.[171] O'Shannessy J declined to make the order because both parties wanted the matter to proceed without further delay, and the criminal matters either had not attracted a conviction or were not deemed by O'Shannessy J to be a 'violence offence' (involving non-threatening breaches of an FVO by text message).[172] Further,

162 Ibid [9] (Gill J).
163 Ibid.
164 *FLA* (n 10) s 102NA(3).
165 See, eg, *Aggarwal v Aggarwal* [2020] FCCA 2659; *Fielder v Fielder* [2019] FCCA 3902.
166 Law Council of Australia, Submission to Robert Cornall and Kerrie-Anne Luscombe, *Review of Direct Cross-Examination Ban* (4 June 2021) [12] ('Law Council Direct Cross-Examination Ban Submission').
167 *Ferreira* (n 66); *Holt* (n 80); *Parisi* (n 87).
168 *Middleton* (n 62) [28] (O'Shannessy J). See also *Waverley v Labelle* [2019] FamCA 1028 in which both parties were without legal representation and did not fall within the mandatory criteria, and Bennett J noted that the parties 'did not seek for the Court to exercise its discretion': at [6].
169 Hurley (n 72) [1] (Hogan J).
170 *Middleton* (n 62).
171 Ibid [28].
172 Ibid [57].

O'Shannessy J noted that the trial was to be conducted via Microsoft Teams, and that the court still had a range of measures available to limit and intervene in cross-examination if required.[173]

If no one else raises the discretionary application of section 102NA with the court, the onus is on an SRL to raise it, but additionally, once an order is made – discretionary or mandatory – the onus remains on the SRL to complete the form and lodge it with the relevant LAC if they are not intending to instruct private legal representation. It was unclear in the SRL study whether all SRLs appreciated the consequences of not doing so. One judge explained:

> It's not enough that we make the order, … the applicant still has to apply, you see? And often they don't get that either. And that's what we're finding is we'll say, yes, let's [make the order, but the relevant LAC] would rightly tell us … 'That's not enough, we need the applicant themselves to apply'. And of course, they don't speak English or they're illiterate or both.[174]

The application form that SRLs need to complete in order to gain representation under the Scheme was described in the SRL study as 'not difficult'.[175] However, given the diversity of SRLs with some facing difficulties completing court forms because English is a second language, or they have low levels of literacy, or other compounding disadvantages, this ease may not be experienced by all SRLs.[176] While there are services, such as the Family Advocacy and Support Service[177] and duty lawyers, that can assist SRLs to complete the form,[178] these services are not necessarily available at all courts.[179] In the SRL study, we observed three matters where SRLs lacked information about the Scheme. This lack of knowledge about whether an order had been made and what steps the SRL had to then take led to adjournments in two of these cases. In the remaining case, the lawyer acting for the other party told the court that they would assist; this obviously was also in the interests of the lawyer's client to avoid further delays.

D More Complex Issues

The administrative issues discussed above are relatively easy to address. However, other matters that emerged in the SRL study and the case analysis study point to more complex issues with the nature and operation of the Scheme.

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173 Ibid [68].

174 J10, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 122.

175 L19, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 122.

176 Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 72–3.

177 'Family Advocacy and Support Service', *Family Violence Law Help* (Web Page) <https://familyviolencelaw.gov.au/fass/>.

178 L11 and L27, cited in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 122. See also Legal Aid NSW, 'Commonwealth Family Violence and Cross-Examination of Parties Scheme' (Information Sheet, 21 August 2021) <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0014/32342/Cross-examination-information-sheet-for-parties-12-November-2019-Updated-31-8-21.pdf>.

179 Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 85, 87.

1 Potential Misuse of the Scheme

As a Scheme that is not means or merits tested, some professionals interviewed in the SRL study expressed concern that some SRLs may seek to take advantage of the Scheme to obtain free legal representation.[180] One judge explained: '[I]t's probably going to be inevitable that there will be some people who go, "well right, I'm going to become self-represented now so that I can get the benefit of this Scheme, and I can delay the trial as well"'.[181]

Another judge provided an example in which the reliance on section 102NA was seen as part of the SRL's constant attempts to delay the process, and was counter to the intent of the legislation:

> There's this property case … one of the few that will actually go to hearing, where the husband has sought to delay the final hearing of this matter from day one. He has sought to duck and weave and not provide disclosure, and, you know, seek adjournments. And all of these sorts of things … 102NA comes along and, guess what, husband comes along and relists the matter and says, 'oh, Your Honour, the matter needs to be adjourned because section 102NA applies, and I need to have the benefit of representation, so we need to vacate the hearing, and get a fresh hearing date'.
>
> So, is that what 102NA was designed to do? I don't think so. But can I tell you that two of us actually looked at this case because we were wondering whether, in fact, we were compelled by 102NA to adjourn the matter, and we both independently came to the conclusion that we did have to adjourn the case. Even though it's the perpetrator of violence … who uses 102NA … to his advantage. Now that's an unintended consequence of the legislation. And hopefully, you know, we'll learn from these lessons, and there can be some fine-tuning about the legislation in the future.[182]

One SRL interviewed, who was an alleged perpetrator, was more upfront about possible misuse. When asked '[w]hat advice would you give someone who was representing themselves?' he responded: 'I would tell my friends … just accuse them of domestic violence and you'll get free legal representation'.[183] It also remains to be seen what impacts, if any, this provision has on litigants' decisions in relation to FVOs – for example, whether to consent to a final FVO on a 'without admissions' basis in order to attract the mandatory application of the Scheme.[184]

While the respective LACs can ask an SRL to contribute under the Scheme,[185] at the time of the SRL study, which was very early in the life of the Scheme, none

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180 J7, J8, J9 and L27, cited in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 123. See also Law Council Direct Cross-Examination Ban Submission (n 166) [32].

181 Interview with J7 (2019) conducted as part of the SRL study.

182 Interview with J8 (2019) conducted as part of the SRL study. This quote appears in part in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 123.

183 ICS-B, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 123.

184 Juliet Behrens and Belinda Fehlberg, *Australian Family Law: The Contemporary Context – An Update* (Oxford University Press, South Melbourne, 2020) 19.

185 See, eg, 'Commonwealth Family Violence and Cross-Examination of Parties Scheme', *Legal Aid Queensland* (Web Page, 22 November 2021) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Family-law/Commonwealth-Family-Violence-and-Cross-Examination-of-Parties-Scheme#toc-scheme-funding-2>. See also 'Commonwealth Family Violence and Cross-Examination of Parties Scheme', *Victoria Legal Aid* (Web Page, 12 April 2022) <https://www.legalaid.vic.gov.au/find-legal-answers/commonwealth-family-violence-and-cross-examination-of-parties-scheme>.

of the professionals interviewed were aware of any such requests being made. This is of significance given that funding under this Scheme is not subject to the regular LAC means and merit tests. The capacity of an SRL to fund their own litigation, or at the very least make a contribution, was highlighted by one of the SRLs interviewed:

> [Unlike] normal legal aid it is not needs-tested and even though the application form said that they might ask for something back … they never asked for any financial statement so how would they know who they can ask back money from …? In the case of my ex, he's earning over $130,000 a year so I honestly hope the government was to recover some funds, but I don't see how they would do it … it's not well thought through.[186]

In the case analysis sample, one judge noted the irony that a person whose legal aid had been withdrawn was now, by virtue of the Court's discretionary order, able to access free legal representation via the Scheme: 'It seems unusual to me that less than three months ago Legal Aid would withdraw aid for the father only now to be required, perhaps, through a different pocket of money, to represent him again. Nonetheless, that is, in my view, what is required of me applying the law at this stage'.[187]

Recently the Full Court clarified that because funding made available under the Scheme is not a grant of 'legal aid',[188] costs can be sought from the party with representation under the Scheme.[189] The Full Court noted that it would be a 'bizarre outcome' if a perpetrator of violence who was granted representation under the Scheme could avoid a costs order, but the victim who had legal representation had to pay such costs.[190]

2 Adjournments and Intersections with Legal Systems Abuse

A common theme in the case analysis sample was the need to adjourn matters as a result of the making of a section 102NA order. The Family Law Council in its submission on the Bill to the Senate Committee on Legal and Constitutional Affairs also raised the likelihood of such adjournments causing further delays in an already overwhelmed family law system.[191] In discretionary cases, it was sometimes the prospect of further adjournments and further delays that meant some parties made submissions against the making of a discretionary order.[192] These adjournments were simply unavoidable in many cases given the point in time when the court was made aware of the applicability of section 102NA

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186 ICS-B, quoted in Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 123.

187 *Muratov* (n 66) [10] (Baumann J). This 'irony' was also noted by professionals in the SRL study: see interview with J8 (2019) conducted as part of the SRL study.

188 *Westwell* (n 36) [18]–[20], [31]–[33].

189 Ibid [41]–[42].

190 Ibid [41]. See also *Balsom v Hagerman [No 2]* [2021] FCCA 1281 where Young J noted the costs that had been incurred by the wife had been increased by the behaviour of the husband in the litigation, yet the husband had legal representation under the Scheme: at [28].

191 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (16 July 2018) [16].

192 See discussion of *Abadi* (n 121) above in Part IV(B)(2).

particularly for mandatory cases.[193] When ordering adjournments, a number of judges cited concerns about procedural fairness for the person now prohibited from conducting cross-examination. In some cases, the SRL elected not to conduct cross-examination in order to avoid any further delay in the proceedings.[194] Such cases raise concerns about the nature of the evidence put before the court and the extent to which it is tested. Whether this impacts on the outcomes of these cases requires further investigation.

In *Bamberg v Cardell*[195] the matter was adjourned shortly before the trial even though the respondent mother had become self-represented some several weeks earlier.[196] Here, Harland J made a useful suggestion to prevent such delays that might otherwise take place if the applicability of section 102NA is raised close to, or on the date of, the hearing: amend the form which a lawyer completes when they are withdrawing their representation to indicate whether section 102NA may now be applicable.[197] While this is a useful suggestion, one would have thought that the filing of this form alone would give rise to the court considering whether section 102NA might be applicable on either a discretionary or mandatory basis and relisting the matter for that determination.

Concerns were raised in a number of other cases that section 102NA was being used by the alleged perpetrator of the violence to further delay and subvert the family law proceedings.[198] One of the clearest examples of this was *Sachar v Kalita [No 2]*[199] (a mandatory case). In this case, the applicant father had engaged in multiple delaying tactics which included: not approaching the LAC in a timely fashion to arrange legal representation under the Scheme; refusing to give instructions, or withdrawing instructions, to the legal representatives appointed under the Scheme; and not filing submissions when ordered by the court to do so. The mother's legal representatives made strong submissions to the court that the legal proceedings had been used to 'continue [the] cycle of violence'.[200] Reflecting on the father's approach to the litigation, Neville J commented:

> [T]he Mother remains quite traumatised about the Father's past conduct, and this litigation which seems to be never-ending, particularly as a result of the Father's regular attempts to delay the proceeding. On one view, the delay and obfuscation that has characterised much of the litigation could be viewed as another form of control of the Mother and the children by the Father.[201]

193 See *Bamberg* (n 61) [4] (Harland J).
194 *Leacroft v Darell* [2019] FamCA 940, [19] (Cleary J).
195 *Bamberg* (n 61).
196 Ibid [3].
197 Ibid.
198 For a discussion about legal systems abuse, see Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84 <https://doi.org/10.1177/1748895817728380>; Vivienne Elizabeth, Nicola Gavey and Julia Tolmie, '"... He's Just Swapped His Fists for the System": The Governance of Gender through Custody Law' (2012) 26(2) *Gender and Society* 239 <https://doi.org/10.1177/0891243211434765>.
199 [2021] FCCA 1468 ('*Sachar [No 2]*').
200 Kalita, 'Submissions on Behalf of the Respondent Mother', Submission in *Sachar v Kalita [No 2]*, MLC5428/2018, 21 April 2021, [17]–[18], [21]–[22].
201 *Sachar [No 2]* (n 199) [11].

The court proceeded to make orders in accordance with the submissions made by the mother and the ICL as these 'are in the children's best interests'.[202] Sadly, this is not the end of the mother's litigation journey as the father successfully sought the transfer of the property matters to the FCA.[203]

In *Cavelli v Selden*,[204] the request to rely on section 102NA to adjourn proceedings in a matter that had started in 2019 was refused. This was a mandatory case (a final FVO protected the mother and the father had been convicted of multiple breaches of that order) and the father had become unrepresented just before the trial date. Although this was a mandatory order case, Riethmuller J refused the father's application for adjournment highlighting the number of times the matter had been before the court, the fact that past orders included notations about the Scheme, and that the mother had already expended 'considerable sums to be ready for trial today'.[205] Riethmuller J concluded:

> To allow the father's application to adjourn the proceedings would allow him to use the very provisions that were enacted for the mother's protection in the processes of the Court to disadvantage the mother, in this case both financially and emotional, as the litigation will be delayed. It is not appropriate to allow the operation of s 102NA to result in such a disadvantage to the very person it is intended to protect.[206]

Other cases also evidenced how some perpetrators of violence rely on almost every avenue to challenge proceedings, and section 102NA sits as another tool within this process. This was evident in *Norris v Denis*[207] where the husband sought an adjournment of the property hearing in order to obtain representation under section 102NA. This was after he had contested the FVO application against him and had unsuccessfully appealed the making of that final order. The wife's legal representatives opposed the adjournment arguing that it was 'a tactic to delay the inevitable hearing of the matter'[208] and drew attention to how section 102NA and the resultant prospect of a further delay in proceedings was impacting on the wife:

> That the relevant section was a protective provision not intended to punish persons who have asserted that they have been the subject of family violence …
>
> That the wife had complied with all directions and would be prejudiced by an adjournment of the hearing in terms of delay and costs. The husband, however, had not filed a response, a trial affidavit nor a financial statement. [The wife's legal representative] submitted that, given that the wife had so complied, the matter should proceed absent her cross-examination.[209]

However, it was a mandatory application case, and given the final FVO was made after the family law matter had been listed for a final hearing, the court could not refuse the request for an adjournment (the issue of section 102NA being heard the morning of the first day of the family law hearing). Kemp J noted that he was

202 Ibid [14].
203 Ibid [3]. See *Sachar v Kalita* [2021] FamCA 264.
204 [2021] FCCA 605.
205 Ibid [21].
206 Ibid [23].
207 *Norris* (n 61).
208 Ibid [18] (Kemp J).
209 Ibid.

not in a position to determine whether this was a tactic.[210] The case was adjourned to the Wollongong registry. Ultimately, the husband did not make an application under the Scheme and did not attend the final hearing, which proceeded undefended. When making a costs order following the final hearing Altobelli J remarked that

> the distinct impression formed from the totality of the evidence including the litigation history is that the Respondent always intended to conduct this matter himself, and the section 102NA application that he made was simply intended to delay the Hearing.[211]

Another example is provided in the *Beckert* litigation.[212] There the respondent father was the subject of a mandatory section 102NA prohibition, and while he had obtained a lawyer under the Scheme, they ceased to act for him less than a month before the trial and he did not obtain further representation.[213] At trial, he challenged the making of the section 102NA order and also sought the disqualification of the judge on the basis that he was prohibited from undertaking direct cross-examination.[214] The father had previously attended court intoxicated[215] and had demonstrated difficulty using Microsoft Teams, and other technology to assist participation in the trial. The range of difficulties noted in the judgment, in conjunction with the father's behaviour, were noted to be a 'deliberate frustrating of the trial itself'.[216]

Some judges have sought to facilitate the timely completion of a matter by imposing a time limit for the SRL to lodge an application with the respective LAC. If the SRL does not comply, judges have indicated that the matter will 'run regardless' on the newly allocated hearing date and the SRL will be unable to cross-examine the other party if they are not legally represented.[217] Orders of this kind have been made in the context of concern expressed by the represented party and/or the ICL about the 'bona fides' of the SRL.[218]

3 Implications for Lawyers Appointed under the Scheme

As noted above, the Scheme has adopted a full representation model, albeit limited to the late stages of litigation. While the full representation model was greatly preferred to the 'mouthpiece' model, it does not address all the legal and professional ethical issues that might arise for lawyers appointed under the Scheme.

In the case analysis sample, a number of SRLs were appointed representation under the Scheme only to have the SRL withdraw their instructions or the legal

210 Ibid [20].
211 *Norris v Denis [No 4]* [2020] FCCA 2192, [16].
212 *Beckert v Beckert* [2019] FamCA 768; *Beckert v Beckert* [2020] FamCA 627.
213 *Beckert v Beckert* [2020] FamCA 627 [17] (Harnett J).
214 Ibid [13], [40].
215 Ibid [42], [61].
216 Ibid [60].
217 See *Bamberg* (n 61) [5] (Harland J), where a seven-day limit was placed on the respondent mother to lodge an application with Victoria Legal Aid. See also *Firmin* (n 61) [17] (Bennett J); *Melonas v Dietz* [2020] FamCA 492, [21] (Bennett J).
218 *Bamberg* (n 61) [6] (Harland J).

representative withdraw their appearance before the hearing.[219] For some SRLs that happened on multiple occasions. It appeared in some cases that this inability to retain legal representation might have links to legal systems abuse.[220] In other cases it appeared to be linked to their inability to give instructions[221] or accept advice, and in other cases there appeared to be an intersection with possible mental health issues of the SRL that made giving instructions and accepting advice more difficult.

In terms of intersections with legal systems abuse, there were a number of cases in which the inability to retain lawyers also emerged in situations where that SRL had been involved in multiple other proceedings and challenges to legal personnel involved in the litigation. For instance, in the *Newett* litigation[222] the respondent wife SRL was the respondent in a five-year FVO made to protect her former partner, an order she had also unsuccessfully appealed. She had engaged three different sets of lawyers under the Scheme, all of whom had withdrawn. This led Baumann J to note that

> the wife has been unable to retain lawyers appointed under [the Scheme] … because all three different lawyers appointed gave her advice she was not prepared to follow. It is now the position that the scheme cannot offer her further representation – with the clear effect that as an unrepresented litigant she is not entitled to cross-examine the husband/father.[223]

The mother had also unsuccessfully sought to have the ICL and the judge removed from the case.

Some SRLs in the case analysis sample complained that lawyers appointed for them did not act on their instructions,[224] or were incompetent. In the *Balmer* litigation for instance,[225] the applicant father complained that the solicitors 'imposed' on him by the court were 'negligent, failed to act in accordance with my instructions and failed to properly advise me at all times subsequent to their appointment'.[226] On appeal, the Full Court said that '[c]ompetent lawyers would give significant weight to such a recommendation [contained in the Family Report] … It is difficult to see that there is any basis or substance to the allegations of negligence or misconduct here, much less that it led to appealable error'.[227]

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219 In *Beckert v Beckert* [2019] FamCA 768, the legal representatives withdrew 24 days prior to the trial date. See also *Hawley v Wiggins* [2019] FamCA 477.

220 See *Beckert v Beckert* [2019] FamCA 768; *Beckert v Beckert* [2020] FamCA 627, discussed above in Part IV(D)(2).

221 *Doan v Lock [No 3]* [2021] FamCA 190.

222 *Newett v Newett* [2020] FamCA 470; *Newett v Newett [No 2]* [2020] FamCA 745; *Newett v Newett [No 3]* [2020] FamCA 822; *Newett v Newett [No 5]* [2020] FamCA 1023; *Newett v Newett* [2021] FamCA 82; *Newett v Newett [No 2]* [2021] FamCA 186; *Newett v Newett [No 3]* [2021] FamCA 187; *Newett v Newett [No 4]* [2021] FamCA 318.

223 *Newett v Newett [No 4]* [2021] FamCA 318, [8].

224 See, eg, *Zong* (n 61), where the respondent had had two lots of solicitors appointed under the Scheme and had withdrawn his instructions from both, the first because they were not acting on his instructions, and the second because he did not trust them: at [18]–[20] (Coates J). In *Morales v Lopez* [2020] FamCA 979 the applicant father dismissed the lawyers appointed under the Scheme 'apparently because she declined to accept his instructions to act beyond the limits of this grant': at [6] (Stevenson J).

225 *Balmer v Balmer* [2020] FamCAFC 199; *Balmer v Balmer* [2020] FamCAFC 281.

226 *Balmer v Balmer* [2020] FamCAFC 281, [16] (Tree J).

227 Ibid [43].

As mentioned above, some of these cases in which the SRL has been through multiple legal teams reveal the difficult intersection between violence and mental health concerns. For example in *Cornett v Hext [No 4]*,[228] there had clearly been concerns about the mother's capacity to instruct during the litigation, however an assessment determined that she 'did have the requisite capacity'.[229] The applicant mother who was the respondent in an FVO protecting the father and the children had instructed five different solicitors over the course of the litigation, only retaining the lawyers appointed under the Scheme for three days before she withdrew her instructions.[230]

While most SRL studies indicate that only a small proportion of SRLs actively choose to be without legal representation, some do.[231] This was the case for one SRL in the case analysis sample who made it clear that he only wanted the lawyers appointed under the scheme to conduct cross-examination, whilst he would remain in control of the remainder of the proceedings, including negotiations.[232] Perhaps this was also evident in *Tabano v Yabon [No 4]*[233] where shortly after the legal representative for the father had finished the cross-examination of the mother, the lawyers withdrew, informing the court that they had

> 'lost the confidence' of their client. The father confirmed this and confirmed that he withdrew his instructions and would conduct the balance of the trial himself. He sought and obtained my leave to proceed with the assistance of his current wife acting in the capacity as a McKenzie friend.[234]

V CONCLUDING DISCUSSION

The Scheme to prohibit direct cross-examination in Australian family law proceedings represents a significant measure to improve the experience of victims of family violence engaging in those proceedings whether as an SRL, or when facing an SRL who is alleged to have perpetrated violence against them. The Scheme clearly seeks to address the well-documented problems of legal systems abuse and the poor quality of evidence that can result from direct cross-examination. In 2021 the Federal government conducted an independent review of the Scheme.[235] Unfortunately the results of this review have not been publicly released. This article, which examines the early operation of the Scheme through two studies, seeks to contribute to the assessment of the Scheme and to raise issues and concerns that need to be addressed in its continuing operation.

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228 [2021] FamCA 289.
229 Ibid [94] (Williams J).
230 Ibid [92].
231 See discussion of findings from various research studies about the reasons why people self-represent: Wangmann, Booth and Kaye, *No Straight Lines* (n 3) 25–6.
232 *Hawley v Wiggins [No 2]* [2019] FamCA 777, [6] (Bennett J).
233 [2020] FamCA 1001.
234 Ibid [24] (Forrest J).
235 See 'Review of Direct Cross-Examination' (n 14).

This article reveals a range of administrative or implementation issues concerning clarity around the model of representation provided under the Scheme, the adequacy of funding, and the need to ensure that SRLs have adequate knowledge about the Scheme and the steps they need to take in order to access it. These have been identified as administrative or teething issues that are open to correction; however, if not remedied, these concerns necessarily become structural issues that are likely to undermine the viability and operation of the Scheme. In particular it is important that the Scheme has adequate and secure funding to continue the full representation model. In this context, we suggest that the LACs explore a broader approach to cost recovery under the Scheme and in particular in cases where legal systems abuse is evident.

The division between the mandatory and discretionary operation of the Scheme reveals areas that require some adjustment. The examination of the case law revealed that the mandatory category emphasises physical violence between former intimate partners through the use of the term 'violence offence'. Depending on how judicial officers interpret this provision, it may leave out offences perpetrated in a family violence context, such as property damage[236] and breach of a FVO.[237] Given the broad and encompassing definition of family violence in the FLA, such a restrictive interpretation appears counter to the intention of the amendment. In addition, the limitation to violence between the parties[238] also ignores the extent to which child abuse is present on its own or in combination with family violence in family law proceedings where the vulnerability of parties to direct cross-examination may remain a central concern.

It is useful to have a discretionary provision to capture cases that fall outside the mandatory prohibition. The absence of guidance here meant that great variability was found between judicial officers' approaches to this provision. This was particularly evident in cases in which the judicial officer refused to make the discretionary order. Here it may be useful to include within the legislation itself a reminder of the purpose of the amendment. The United Kingdom cross-examination provisions provide a useful model.[239] In those provisions, the discretionary prohibition directs the court to prohibit cross-examination in cases that fall outside various mandatory categories, where 'significant distress' may be caused, or the 'quality' of the evidence diminished if direct cross-examination were allowed, and it is 'not contrary to the interests of justice' to make the order.[240] This provision directs the judicial officer to consider the underlying purpose of the prohibitions, and while this is technically the task of statutory interpretation, having it on the face of the legislation provides a useful reminder to judicial officers about how the discretion is to be exercised. However, without adequate training and understanding about family violence judicial officers may still not make orders in appropriate cases; discussion about the time since the last 'incident' of violence,

236 See *Scritton* (n 63).
237 See *Middleton* (n 62).
238 See *Owen* (n 34).
239 See above n 8 and accompanying text.
240 *Domestic Abuse Act 2021* (UK) s 31U.

or that separation has now occurred are suggestive of a lack of understanding about the nature of family violence and the continuing impact of trauma.

As with any amendment to the law, attention needs to be paid to potential unintended consequences. This is particularly important in an area, substantive or procedural, designed to address family violence and legal systems abuse. Given the potential for legal systems abuse and the funding consequences, this Scheme should be constantly monitored/evaluated. What was gratifying in this study was the extent to which lawyers and judges appear to be increasingly attuned to the nature of legal systems abuse, drawing to the court's attention the misuse of the Scheme by some perpetrators in order to further delay and frustrate proceedings.

Further research needs to be undertaken in the context of those cases in which cross-examination does not take place, either because the person fails to engage legal representation, or rejects any legal representation. How does this lack of legal representation and the testing of evidence impact on the outcomes in any case, particularly those in which the court is determining the best interests of any children?

Finally, a key limitation of this research is the absence of family violence survivors' lived experience under the operation of this Scheme. Our early field work and the case law study were unable to capture how the Scheme is experienced by the very people it was designed to assist – whether as people getting access to the Scheme, or facing a party who has access to the Scheme. This is the critical next step in evaluating the Scheme.