

Cross-examination

Note: the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 was introduced to the House of Representatives on 28 June 2018. If passed, a party will be prohibited from directly cross-examining another party in family law proceedings where there are allegations of family violence and any of the following apply:

- > either party has been convicted, or is charged with, an offence involving violence to the other party;
- > a family violence order (other than an interim order) applies to both parties;
- > an injunction for the personal protection of either party is directed against the other party; or
- > the court makes an order that direct cross-examination is prohibited.

Where direct cross-examination is prohibited, the Bill would require that the cross-examination be conducted by a legal representative. For updated information [click here](#).

Cross-examination may present particular difficulties in family disputes where there are allegations of domestic and family violence between the parties to the proceedings, and a **self-represented** perpetrator wishes to cross-examine the victim [Harrison 2007] or a self-represented victim is expected to cross-examine the perpetrator.

Where a party who is a victim of domestic and family violence is self-represented and required to cross examine the perpetrator, their capacity to appropriately and fully question may be diminished or negated by their fear of the perpetrator [Coy et al 2012]. Where the perpetrator is represented, a self-represented victim may feel particular pressure to withdraw or not proceed with an application [Qld Special DFV Taskforce Report 2015], or to consent to orders as a result of fear or intimidation, or to avoid being compromised or intimidated by a hearing or other ongoing proceedings [Kaspiew et al 2009].

In some cases a perpetrator may choose to be self-represented so as to secure the opportunity to directly cross-examine the victim. The victim's capacity to give evidence or the quality of the victim's evidence in these circumstances may be compromised by the victim's fear of the perpetrator and, as a consequence, the probative value of the evidence may be diminished or negated.

Where a perpetrator uses their own or the victim's self-represented status to subject the victim to further abuse [Chisholm 2009] through judicial processes [FLC LIP Report 2000], the victim may experience a form of **secondary abuse**.

These scenarios should be understood in the context of the complex [dynamics of domestic and family violence](#) characterised by a pattern of abusive behaviour involving a perpetrator's exercise of control over the victim, often for an extended period.

Judicial officers have extensive powers in regard to the cross-examination of witnesses. Generally, in the federal jurisdiction, [section 26 Evidence Act 1995 \(Cth\)](#) gives the court power to make orders it considers just regarding the questioning of witnesses; and under [section 41 Evidence Act 1995 \(Cth\)](#) the court must disallow questions that it considers improper on certain grounds. In the family law jurisdiction specifically, Part VII, Division 12A of the [Family Law Act 1975 \(Cth\)](#) and Part 5, Division 11A of the [Family Court Act 1997 \(WA\)](#) contain provisions relating to the conduct of [child-related proceedings](#) (see also the Family Violence Best Practice Principles [[FCA/FCCA FV BPP 2016](#)]). [Section 69ZN FLA](#) and [Section 202B FCA](#) set out the governing principles, including the court's role in actively directing, controlling and managing the conduct of the proceedings, and in safeguarding children and parties against family violence. [Section 69ZT FLA](#) and [Section 202H FCA](#) empower the court to dispense with certain rules of evidence, and [Section 69ZX FLA](#) and [Section 202L FCA](#) give the court considerable flexibility to make orders and directions in relation to evidentiary matters, including to limit or not allow cross examination of a particular witness.

Where a judicial officer is concerned about the safety of a party they may facilitate a safety plan, which may, for example, provide for the party to give evidence by electronic medium and to be attended by a support person in the courtroom and precinct.

A judicial officer must balance the need for procedural fairness in the presentation of both parties' cases, including proper testing of evidence by cross-examination, with the need to ensure the safety of parties.

It is acknowledged in [case law](#) that judicial officers have a high level of discretion in the management of these proceedings, including whether cross-examination will proceed, and its nature and scope [[Fogarty 2009](#)]. A recent survey of judicial officers conducted by the Australian Institute of Family Studies indicated that the Division 12A provisions are used to varying extents by the court to minimise trauma to parties who had experienced domestic and family violence, in relation to evidence being led and the conduct of cross-examination [[Kaspiew et al 2015](#)].