Submission to the Australian Government Attorney-General's Department

on Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

September 2017

Family, Youth and Children's Law – Victoria Legal Aid

Contents

About Victoria Legal Aid's family law work

Victoria Legal Aid's Family, Youth and Children's Law Program plays a leading role in the coordination of family law and family violence legal services in Victoria. We provide:

- duty lawyer, legal advice, representation and information services including in child support, parenting disputes, child protection and family violence matters across the state, to children and to parents
- lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court (through FDRS – our Family Dispute Resolution Service)
- independent children's lawyers who promote the interests of children at risk
- the new Family Advocacy and Support Services (FASS) in Melbourne and Dandenong family law registries – providing specialist duty lawyers alongside specialist family violence support workers
- Family Violence to Family Law Continuity of Service Delivery pilots with two community legal centres, offering a continuing legal service from when parents first appear at the Magistrates' Court for family violence intervention orders, through to addressing family law needs[1]
- legal advice and education in the community.

In the year 2016–17, the Family, Youth and Children's Law program provided:

- services to almost 33,000 clients (including 1,659 Aboriginal or Torres Strait Islander clients)
- over 17,000 duty lawyer services and over 15,000 grants for ongoing representation.

Informed by this broad experience and access to data, VLA has, over many years, worked with governments, family law courts and family law professionals to improve the family law system and the outcomes for our clients and most importantly for children. Our most recent work includes:

- two 2015 submissions to the Family Law Council's inquiry into Families with Complex Needs [2]
- our submission to the Victorian Royal Commission into Family Violence (June 2015),[3] and
- our own 2015 Family Law Legal Aid Services Review report, which we are still implementing.[4]

We have ongoing engagement with the Victorian Government, State agencies and other partners in the implementation of the recommendations of the state's Royal Commission into Family Violence.

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[1] See "New pilot to close the gap between family violence and family law help for parents and children" (9 November 2016) on VLA website (www.vla.vic.gov.au/about-us/news/new-pilot-to-close-gap-between-family-violence-and-family-law-help-for-parents-and-children-0).

[2] Available on our website (www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs).

[3] Available on our website (www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-family-violence/royal-commission-into-family-violence).

[4] Available on our website (www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/actions-from-review).

Executive Summary

VLA welcomes the Government's acknowledgement of the trauma family violence survivors experience when forced to directly cross-examine or be cross-examined by an ex-partner who has perpetrated family violence against them. We welcome the Government's commitment to achieving the elimination of direct cross-examination, recognising that existing mechanisms to prevent direct cross-examination are under-utilised so cannot be relied on for protection.

VLA acknowledges that finding a solution is complex. Family law contested hearings are complicated and run over multiple days. Documentation is complex, particularly if prepared by self-litigants. Parties provide complicated instructions and seek detailed orders. Accordingly, some options from other contexts do not translate well to the family law context, and issues with those options could be amplified if adopted in the family law courts.

Our submission details our support for many aspects of the proposed model for protecting family violence survivors from direct cross-examination. We agree that:

- the protection should apply automatically in some cases,
- the Court should exercise its discretion in all other cases involving family violence allegations to determine whether the protection should apply, and
- family violence survivors should have the option of waiving the protection.

We are concerned, however, that the proposed court-appointed person model may create new risks. Further development, and consultation about safeguards, would be important:

- court-appointed persons must be independent of the parties, and could not give legal advice to the parties,
- court-appointed persons would need family violence and legal procedure qualifications,
- court-appointed persons would need good knowledge of the cases in which they acted as intermediaries to ask questions,
- court-appointed persons would need to filter questions, applying awareness of family violence and knowledge of the specific case, to ensure that they were not used as a tool of abuse.

The issues the court-appointed person model presents will be difficult to address within the current processes of family law court proceedings and there are also problems with the transferability of other models to the family law courts. However, we consider that these problems could be addressed by requiring and resourcing earlier findings of fact about family violence in family law cases.

We suggest the *Family Law Act* be amended, together with the ban on direct cross-examination, so that every matter involving family violence allegations is referred promptly to a preliminary hearing, to find fact solely about those allegations, so that subsequent aspects of the proceeding are informed by those findings. This would make it significantly more workable to apply a ban on direct cross-examination in final hearings.

We acknowledge that prompting an early determination about family violence would be a significant change to current court processes. However, this change to procedure would place enquiry about safety at the start and centre of the court's task. Currently safety, although increasingly a court priority, remains the subject of later determination, diminishing the court's impact in managing and responding to family violence risk. Earlier findings of fact about family violence could also be expected to result in fewer and simpler final contested hearings.

Providing full legal representation at a preliminary hearing focused on family violence findings of fact, to prevent direct cross-examination, would also be more workable and more consistent with

legal assistance spending priorities than providing full legal representation at a final contested hearing.

We also support the Family Law Council's recommendation that the Government explore a Counsel Assisting model in relation to preventing direct cross-examination. We suggest the model be piloted for the complex cases that proceed to final contested hearing after a finding of family violence in a preliminary hearing.

Our submission provides more detail about how a system involving preliminary hearings finding fact about family violence might work. We would welcome further discussion about options, and further consultation on a more detailed model.

Threshold for prohibiting direct cross-examination

VLA welcomes the Government's acknowledgement of the trauma family violence survivors experience when forced to directly cross-examine or be cross-examined by an ex-partner who has perpetrated family violence against them.

For example, we have previously published a case study drawn directly from VLA's practice experience that details the potential re-traumatisation posed by the threat of direct cross-examination in family law proceedings, available from our website.[5]

We therefore welcome the commitment to achieving the elimination of direct cross-examination in these circumstances in family law proceedings.

As the consultation paper recognises, legislation to effectively eliminate direct cross-examination in family violence situations needs to first ban it, and then replace it with a less harmful alternative that still allows evidence to be tested and supports the court's ability to make informed decisions.

Amending the *Family Law Act 1975* to prevent direct cross-examination in certain circumstances recognises that existing mechanisms to protect vulnerable parties or witnesses are subject to judicial discretion and do not outright prevent the practice, thus cannot be completely relied on for protection.

To avoid banning direct cross-examination in every family law case, or in every family law case where a party alleges family violence, a threshold for when direct cross-examination will not occur is required. Equally, it is fundamental that the threshold and its operation is, in fact, effective in preventing family violence survivors from having to directly face perpetrators and question or be questioned by them.

The more certainty there is about the circumstances in which direct cross-examination is banned, the more confident family violence survivors can be about the experience of a family law hearing.

We agree it is appropriate that a range of external decisions (for example, a civil court decision to make a family violence intervention order) should automatically trigger the cross-examination ban, and that the judicial decision-maker should also have discretion to impose a ban in other cases.

It is also appropriate that the decision-maker is not required to assess the risk of re-traumatisation, but only to decide about the likelihood that family violence has occurred. Whether the experience of family violence would make direct cross-examination re-traumatising should be a decision for the survivor.

If the threshold is met, the question arises of whether the survivor chooses to waive the protection.

Automatic ban in some cases

Given that it is impossible to craft legislation that perfectly addresses every future individual case, we consider that the legislation should err on the side of mitigating the risk effectively. We therefore suggest that the ban should apply automatically when:

- There is or has been a family violence intervention order (interim or final)

[5] *Case note: when there is family violence in a family law litigation*: available on the VLA website (www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-case-note-when-there-is-family-violence-in-a-family-law-litigation.docx).

- There has been a Police Family Violence Safety Notice (or equivalent)
- Police have charged one party with a family violence offence against the other party (whether or not there was a conviction, and whether or not the charge was of physical violence)
- There is or has been a *Family Law Act* injunction in place.

This is a broader range of circumstances than the exposure draft proposes. We recognise this may include some cases where the allegation of family violence is made by a primary aggressor against a primary victim, or is otherwise ultimately found unproven. However, balancing the need to make this protection accessible, the outcome of the ban being in place, the resources involved in providing the protection, and the resources involved in determining whether the protection is available, we suggest that a lower threshold is appropriate.

Concerns about a lower threshold might also be mitigated by including a provision stating that a ban on direct cross-examination is not to be taken as authentication of family violence allegations.

Discretionary ban in other cases

We agree with the exposure draft Bill's approach that protection against direct cross-examination ought also to be available in any circumstances in which family violence is alleged.

In our experience, many family violence matters proceed to family law courts without any of the proposed criteria for an automatic ban being met. For example, a woman who has fled extreme violence and has not reported it to Police may, once safe in refuge accommodation, not wish to apply for an intervention order, fearing that issuing an application would enrage the perpetrator and would place her at greater risk.

To ensure that the protection is in place whenever it is needed, we support provisions enabling the court's discretion to be exercised not only upon a party's application but also on the court's own motion.

The court's power to exercise the discretion on its own motion will be important, but its effectiveness depends on family violence awareness (by judicial officers and by the professionals informing or representing parties who might provide the evidence to support a ban), as evidenced by the fact that mechanisms to protect family violence survivors already exist but are not consistently used. This highlights the need for all professionals in the family law system to undertake regular training to properly understand the dynamics of family violence.[6]

This also means an own motion power may be insufficient. We suggest that the Government consider a provision which requires the court to consider whether to apply the ban on direct cross-examination in any proceeding in which family violence has been alleged.

The court need not assess the risk of re-traumatisation in Court when considering whether to apply the ban on direct cross-examination. The assessment should be solely of the likelihood that family violence has occurred. The assumption can be made that if there has been any family violence before, there is a risk of re-traumatisation. Consistent with reducing the risk and supporting survivor agency, only the survivor should then be able to determine if they wish to accept the risk (see section on "Waiving the protection" below).

[6] As we set out at pages 27-28 of our May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, available on the VLA website (www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-a-better-family-law-system_-_for_web.docx).

We note that the discussion paper lists "ensuring that the framework does not encourage false allegations of family violence" as a concern to balance in designing the framework.[7] However, undue weight should not be placed on the troubling and persistent misconception that intervention order applications might be made to secure a tactical advantage in the family law courts.

Victoria's Royal Commission into Family Violence addressed this issue, putting the concern in context and collating the evidence to show it is significantly overstated.[8] The Royal Commission cited the "recent Australian Institute of Family Studies evaluation of the effect of the 2012 reforms of family law to give greater weight to family violence in parenting matters, [which] also casts doubt on the allegation of widespread fabrication of family violence claims. The evaluation showed that since the reforms, there has been minimal change in the number of parents who took out orders from state courts to protect themselves against violence".

The Royal Commission report also pointed to the facts in Victoria that almost 70% of family violence intervention order applications are initiated by police where police have responded to a call regarding an incident of violence often involving significant physical evidence, most family violence intervention orders are consented to by the respondent, and family violence is significantly under-reported. This accords with our own experience providing duty lawyer services to clients in family violence intervention order matters across Victoria. We find that many affected family members have experienced violence for significant periods of time before they seek an intervention order or the violence comes to Police attention.

The more significant risk is of perpetrators minimising or falsely denying family violence. It is important that the threshold for preventing direct cross-examination accounts for this by being a relatively low threshold, administered by someone with a thorough understanding of the dynamics of family violence, supported by family law system culture change rooted in family violence education.[9]

1. Should direct cross-examination only be automatically banned in specific circumstances?

There should be a range of legislated circumstances which trigger an automatic ban which the court cannot waive. The court should also have discretion to ban cross-examination in other cases.

2. Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?

Yes, cross-examination should be banned in those circumstances, and in others (see question 3).

3. Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed subsection 102NA(1)?

There should be an automatic ban in additional circumstances, including where:

- *An interim family violence intervention order has been made*
- *Police have charged one party with family violence offending against the other party (whether or not that charge resulted in a conviction). We emphasise that all family violence offending needs to be clearly covered, not only physical violence.*
- *Police have issued a Family Violence Safety Notice or equivalent between the parties*

See section above on an Automatic ban in some cases.

[7] Consultation Paper at page 3.

[8] See pages 200-201 of volume IV, on the Royal Commission's website (www.rcfv.com.au/Report-Recommendations).

[9] See pages 27-28 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

4. Should any ban on direct cross-examination apply to both parties to the proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?

Subject to the victim's consent (see answers to questions 5 and 12-15), the ban should apply to both parties questioning each other. Cross-examining and being cross-examined are both potentially re-traumatising.

5. Should the discretionary power only be exercised on application by the alleged victim, or by the courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?

The power should be able to be exercised on the court's own motion as well as by application. However, a simpler and more effective provision would be to require the court to consider exercising its discretion to ban direct cross-examination in every case in which family violence is alleged.

Waiving the protection

We agree with the proposal that those entitled to protection from direct cross-examination should not be forced to use the protection. Given that the ban's purpose is protection of family violence survivors, it follows that survivors should have the choice of whether to utilise it fully, partially, or not at all, depending on their own assessment of their need for this particular protection from re-traumatisation.

If the survivor consents to conducting direct cross-examination themselves, and/or to being directly cross-examined, that consent should be determinative. The perpetrator's views need not be sought. (Of course, in instances where there are (for example) family violence intervention orders against both parties, both parties' consent would be required to any cross-examination, as both parties will be deemed family violence survivors.)

It is important that any waiver – full or partial – is for the protected person to decide with full information and without pressure to waive the protection. Accordingly, we suggest it be framed as an option to waive the ban, rather than as a request to consent to waiver. A party should not have a mechanism for requesting the consent of the other party to allow direct cross-examination.

12. Should the court only grant leave for direct cross-examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly cross-examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required?

No. The perpetrator's consent should not be required.

13. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will have a harmful impact on the party that is the alleged victim of the family violence?

Under section 70(3)(d) of Victoria's Family Violence Protection Act, the court can only allow direct cross examination with the victim's consent if "the court decides that it would not have a harmful impact on the protected witness for the protected witness to be cross-examined by the [self-represented perpetrator directly]". This provision has worked well in Victoria and we do not observe pressure on family violence survivors to waive the protection.

In the family law courts the court's main concern should similarly be the victim's views. It is important that the question of harmful impact arises only as a protection against pressure (direct pressure from the court, the other party, or any other professional involved, or indirect pressure due to procedural consequences and options) to waive the protection. Procedure should be designed to ensure waiver is a proactive option for a protected person to take, not something the protected person is asked to accede to.

14. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?

See our answer to question 13, it is important that the question of impact on the evidence arises only as a protection against pressure to waive the protection. Procedure should be designed to ensure waiver is a proactive option for a protected person to take, not something the protected person is asked to accede to. A person's options about how they run their case should not be limited because they have experienced family violence, nor extended because they are alleged to have used violence.

15. Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?

Whether direct cross-examination occurs should be a matter for the person protected by the ban to decide. The court should, however, satisfy itself that the person entitled to the protection is fully informed about the consequences and is under no pressure to waive the protection.

Alternatives to direct cross-examination

Once the ban has been triggered, and direct cross-examination is not to occur, the question then of course arises of what alternative to direct cross-examination will be employed.

VLA recognises that designing and implementing an effective mechanism for replacing direct cross-examination in family law courts is a challenge. Family law contested hearings are complicated and run over multiple days. Documentation is complex, particularly if prepared by self-litigants. Parties provide complicated instructions and seek detailed orders. Accordingly, some options from other contexts do not translate well to the family law context.

The exposure draft Bill proposes a court-appointed person model to replace direct cross-examination where it has been banned.

We are concerned, however, that the court-appointed person model may create new risks that will be difficult to address within the current processes of family law court proceedings.

In this section we discuss concerns with the proposed provisions and suggest safeguards that will be necessary if this model is implemented. We also consider various alternatives:

- More funding for legal aid commissions to legally represent more parties
- Lawyers appointed for cross-examination only or for representation at the whole hearing
- A pilot of a Counsel Assisting model

We acknowledge that funding full legal representation for all parties in all family law matters involving family violence is costly and unlikely to occur, and our experience of the Victorian scheme to eliminate direct cross-examination in family violence intervention order matters suggests that its transfer to full family law contested hearings, which are significantly longer and more complex, may not be workable.

We endorse the Family Law Council's suggestion of further consideration of the Counsel Assisting model.

Court-appointed person model

VLA has serious reservations about the model in the draft Bill. Many safeguards would be required to minimise the risks associated with the model. We suggest that if this model is to be implemented there should be further consultation once a more developed model is available for consideration.

For a mechanism replacing direct cross-examination to be effective and itself safe, it self-evidently needs to prevent family violence survivors from being required to directly face perpetrators and question or be questioned by them.[10] However, it also needs to ensure that the questions themselves are filtered to prevent abusive questioning. That filtering – and the questioning – needs to be done by a person with a solid understanding of the dynamics of family violence, and of the background to the particular case (given that a superficially benign question can be highly distressing in the context of a particular history of family violence). The mechanism also needs to meet the courts' need for high quality evidence, and any role within the mechanism filled by a lawyer must be consistent with lawyers' professional obligations.

In the court-appointed person model proposed in the draft Bill, the perpetrator still frames the questions to be asked. It is also difficult for the court-appointed person to determine whether the questions are necessary for the proceeding or are asked as a form of abuse.

The court-appointed person must also be independent of the parties. Allowing a party to nominate their own person to put questions presents an unacceptable risk that the cross examination would re-traumatise family violence survivors. The possibility of a party nominating their own person to ask questions also raises the issue of respectful treatment of highly sensitive and personal proceedings. The more members of a party's family are involved in the proceedings, the more targeted and exposed a family violence survivor is likely to feel, and the harder the non-publication rules are to protect, particularly on social media. We caution against parties nominating persons.

The court-appointed person model also raises questions about legal advice. The model does not provide for advice to the parties about how to draft cross-examination questions, exacerbating the risk that the court-appointed person will give (whether intentionally or not) unregulated legal advice.

If the court-appointed person model is to proceed, we recommend that minimum requirements and qualifications be set out for court-appointed persons. We recommend a prohibition on the appointment of an examining party's nominees. We also recommend that court-appointed persons be required to hold family violence knowledge and legal procedural knowledge. Qualified professionals, relevantly educated in the dynamics of family violence, would reduce the risk of re-traumatisation through cross-examination.

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[10] The Productivity Commission cited the Australian Law Reform Commission and NSW Law Reform Commission 2010 recognition that direct cross-examination "provides an opportunity for a person to misuse legal proceedings and exert power and control over the victim of his or her family violence", at page 865 of the Productivity Commission's 2014 Access to Justice Arrangements Inquiry Report volume 2 (www.pc.gov.au/inquiries/completed/access-justice/report). The Family Law Council also discussed the need for an alternative to direct cross-examination, including noting "the research evidence that cases involving unrepresented litigants are less likely to contain the kind of evidence needed to determine matters involving child safety concerns than cases where the parties are represented", at page 5 of its summary, and again at page 133, in its Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5 (2016) (www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx).

The court-appointed person would also need the power and obligation to filter questions, or they would risk perpetrating abuse by being unable to identify and eliminate abusive questions.

6. Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.

It would not be appropriate for a lay person to be appointed, particularly not a lay person with any association with the party wishing to put the questions. Anyone appointed would need to be independent of the parties, and appropriately qualified to understand family violence, as described in response to question 7 below.

They would also need a thorough understanding of the background to the particular case, in order to be able to apply their knowledge of family violence to the particular case and to avoid being used as a mouthpiece for abusive questions.

7. What qualifications, if any, should the court-appointed person have?

A court-appointed person would need qualifications in family violence and legal procedure.

A solid understanding of the dynamics of family violence is vital, as the person needs to be able to ensure they are not used as a tool of abuse. They need to understand the risks of intimate terrorism or emotional abuse, when a superficially benign question can be highly distressing in the context of a particular history of family violence. Accordingly, they also need to understand the facts of the case so that they can apply their knowledge.

8. Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?

Yes. Minimum requirements should be legislated, to prohibit the appointment of an examining party's nominees and to require family violence knowledge and legal procedural knowledge. More detailed requirements can be provided in regulations referenced in the legislation.

9. Should any further information about the scope of the role of the court-appointed person be included in the Family Law Act?

Yes, there should be legislated detail about the role of a court-appointed person. The detail should include:

- *a prohibition on legal advice from the court-appointed person to parties*
- *the requirement that the court-appointed person filter questions to avoid re-traumatising family violence survivors*
- *the prominence of the judicial officer's role, allowing the judicial officer to deny the court-appointed person from asking a particular question, but not allowing the judicial officer to require the person to ask a particular question*
- *a requirement that the court-appointed person familiarise themselves with the details of the case.*

10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?

No. This option would present an unacceptable risk that the cross examination would re-traumatise family violence survivors. There could be no expectation that especially traumatising questions would be avoided, and the personal relationship between the appointed person and the survivor may also cause the survivor additional distress and trauma when discussing past traumatic events.

11. Do you have any concerns about the court-appointed person model?

Yes. We are concerned that it requires significant additional development and safeguards in order to avoid introducing new risks.

Other models to replace direct-cross examination

Greater legal aid representation

Increasing the amount of legal aid funding available in family law disputes would allow Legal Aid Commissions to broaden their means tests to allow more people to be eligible for legal assistance.

An increase in family law legal aid funding would be welcome and would reduce the number of people impacted by direct cross examination. This would also be consistent with the recommendations of the Productivity Commission in its 2014 Access to Justice Arrangements Inquiry.[11]

However, we accept that there will always be a number of people who do not qualify for legal aid. Legal aid funding also does not address when a party chooses not to have a lawyer so that they can run their family law case on their own. Unfortunately, in a small number of cases this choice is made by an abusive party in order to use the legal process to intimidate or harass a victim of family violence.

Lawyers appointed to represent parties for cross-examination

VLA administers the funding and allocation of court-ordered representation for the purposes of cross-examination in Victorian family violence intervention order contested proceedings.

Based on this experience we have several reservations about applying this model directly to longer and more complex family law proceedings. There are some features of the scheme that would need to be changed for it to be effective in family law proceedings, and some issues with the scheme which would be amplified in the context of family law proceedings.

How Victoria's court-ordered representation works in intervention order hearings

When the *Family Violence Protection Act 2008 (Vic)* ban on direct cross-examination applies, the Magistrates Court orders VLA to assign a lawyer to the applicant and/or the respondent. The order is faxed or emailed to VLA.[12]

VLA then writes to the parties, asking them to complete a financial position statement that will determine whether they will be required to contribute to the cost of representation.

When parties return their financial statements, VLA then writes to the parties allocating them a lawyer and letting them know what contribution (if any, up to a current maximum of $713) they will be required to make.

Respondents can choose to actively refuse representation, but will then be unable to cross-examine. If a respondent does not return a financial statement, they effectively refuse representation. They will not be allocated a lawyer.[13] They will be unable to cross-examine unless they instruct a lawyer privately.

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[11] Recommendations 21.4, 21.5 and 24.2.

[12] The grant of aid is covered by VLA's State Civil Law Guidelines, Guideline 6 – family violence protection order cases. Available on VLA's website (http://handbook.vla.vic.gov.au/handbook/7-state-civil-law-guidelines/guideline-6-family-violence-protection-order-cases).

[13] The legislation requires only that VLA "offer" a lawyer to the respondent (Family Violence Protection Act 2008 s71).

VLA cannot refuse to grant legal assistance to applicants, as the legislation requires VLA to provide (rather than just offer) representation. Therefore, if an applicant does not return their financial statement, legal assistance will be provided and a full contribution will be imposed. Applicants can decline VLA's assistance, but only if they decline proactively (not simply by failing to return their financial statement).

If the financial information shows that the party is required to contribute to the cost of their representation, the grant they will receive will cover cross-examination only. It allows for some preparation by a solicitor, and for a barrister to appear on any day there is cross-examination. (Cross-examination typically happens at a one-day contested hearing.)

Financially eligible parties on court-ordered grants will be represented for the full contested hearing instead of just for the cross-examination portion of the hearing. The grant they will be given pays slightly more for preparation by the solicitor (and pays appearance fees for a barrister for every day of the contested hearing – though hearings typically last no more than one day).

Usually, the only difference between the payments made on the two court-ordered grants (the cross-examination-only grant for financially ineligible parties, and the contested hearing grant for financially eligible parties) is a small increase in the preparation payment to the solicitor. If the hearing ran to more than one day, a barrister would be paid for every day of that hearing under the contested hearing grant, and only for cross-examination days under the cross-examination only grant.

The barrister receives the same daily appearance fee whether the grant is for cross-examination only or is the grant for representation for the full duration of the contested hearing.

On a close reading, the legislation providing for court-ordered representation for applicants for the purposes of cross-examination is drafted only to protect the applicant from unreasonable cross-examination by the respondent's representative. The wording is "for purpose of cross-examination by the respondent's legal representative".[14]

Some barristers go beyond the brief and represent the party for the whole day, even if only assigned for cross-examination, and assist the matter by helping the parties to settle, which means the contested hearing need not proceed. If the matter proceeds, the barrister may seek leave to withdraw after cross-examination is complete, and that leave is granted at the court's discretion.

Other barristers do only the cross-examination, and are concerned by the consequences for the client when the cross-examination fails to raise all the issues the party has with the evidence of the other person, and the party's evidence is consequently restricted following the rule in Browne v Dunn.[15]

Frequently, the solicitors assigned these matters also conduct preparation for the full hearing even on a cross-examination only grant, and attempt to settle the matter.

[14] Family Violence Protection Act 2008 s72.

[15] The rule in *Browne v Dunn* (1893) 6 R 67 means that if a party can lead evidence that contradicts another witness's evidence only if the evidence is put to that other witness in cross-examination.

Data on family violence intervention order contested hearing grants

There are three types of grants for representation at intervention order contested hearings. Two of these are the court-ordered grants we have explained:

- court-ordered grants for cross-examination only (for financially ineligible parties)

- court-ordered grants for cross-examination and hearing representation (for financially eligible parties)

The third grant is a full family violence intervention order grant. If the representation is *not* court-ordered, but is instead the result of a proactive application for legal aid, through a lawyer who does legally-aided work,[16] the application is subjected to a means test *and* is assessed to see whether it meets VLA funding guidelines.[17] The grant covers not just preparation and appearance at the contested hearing, but also associated fees like fees for directions hearings and mentions, and disbursements like subpoena costs.

It is difficult to hypothesise what grants VLA would make for family violence intervention order contested hearings if there was no court-ordered representation, and to therefore determine how the court-ordered grants affect VLA spending on family violence intervention order hearing representation.

In the last four financial years VLA has made a total of around 1400 grants each year for representation in family violence intervention order contested hearings in the Magistrates' Court.

Each year only around 300 of those grants have been made after applications by the parties through lawyers (about half and half by respondents and applicants). These parties meet the means and guidelines tests and would be granted aid without any court-ordered representation provisions.

Each year, a further 200-250 applicants, 60-80 cross-applicants, and 200-300 respondents are granted legal representation for the full day of their hearing, because the court orders representation and they return financial statements that show they meet the means test.

And every year more than 300 applicants and about 150-200 respondents are granted court-ordered cross-examination only grants, and will be liable for a contribution. This is sometimes because they have returned their financial statement and are not eligible under the means test, and sometimes (in the case of applicants) because no assessment can be made because they haven't returned their financial statement. (As mentioned earlier, respondents who do not return financial statements will be refused aid.)

So, in general terms, we can say that, each year, of the 1400 grants made, at least 300 are to people who are eligible without a court order. Another 500 or more are to people who are eligible in terms of means, but might not meet other aspects of the usual guidelines. Around 500 are court-ordered cross-examination-only grants to parties who have not passed VLA's means test – these are the grants that most clearly result from the court order provisions.

[16] The lawyer may be a VLA lawyer, a Community Legal Centre lawyer, or a private practitioner.

[17] The relevant guideline is VLA's State Civil Law Guidelines, Guideline 6 – family violence protection order cases. Available on VLA's website (http://handbook.vla.vic.gov.au/handbook/7-state-civil-law-guidelines/guideline-6-family-violence-protection-order-cases). The guideline includes assessment of the merits of the party's case.

We note also that, in Victoria, Police apply for around two thirds of intervention orders,[18] and relatively few intervention order matters proceed to contested hearings,[19] so these numbers represent a small portion of intervention order matters.

VLA also makes numerous grants for representation (court-ordered and not court-ordered) in County Court family violence intervention order appeals and Children's Court family violence intervention order matters. We also grant representation for children protected by family violence intervention orders in both the Magistrates' Court and Children's Court.[20] These grants not included in the above figures have totalled around 250-400 annually over the past four years.

How the ban on direct cross-examination works in Victorian criminal matters

Direct cross-examination by the accused is also banned in family violence criminal proceedings in Victoria. As in family violence proceedings, the court can order VLA to provide representation.[21]

(In criminal proceedings, family violence survivors are not represented by lawyers, so the question of aid for the family violence survivor does not arise.)

When court-ordered representation is for cross-examination only, VLA only funds a barrister to appear on the days when cross-examination is taking place. Some barristers decline this work. Others take the work on and then represent the accused for the entire hearing, even though they have been paid only for the days when cross-examination of a family violence survivor takes place. Other make applications under standard criminal law guidelines for funding for full representation, in cases that meet the VLA funding guidelines.

Anecdotally, few hearings take place where representation is funded for cross-examination only and the accused is unrepresented on some additional hearing days when no cross-examination takes place. There are various reasons for this.

One reason in summary matters is that many hearings conclude within the same day as cross-examination takes place, so the issue of barristers' fees for the days without cross-examination would not arise, even if the accused were not eligible for legal aid. Another reason is that the accused may be eligible for a grant for representation for the entire proceedings under the standard criminal law guidelines. In indictable jury trial matters, the accused is usually eligible for legal aid, and even if VLA were to refuse aid, the court then has the power to over-ride that refusal and order VLA to grant aid, to assist with the conduct of a fair hearing.[22]

As we have described above, our experience in practice is that lawyers are reluctant to represent a party only to cross-examine. Joining a proceeding at contested hearing stage is a very difficult task for a lawyer. In the considerably less-involved Victorian family violence intervention order

[18] Page 119 of volume III of the report of Victoria's Royal Commission into Family Violence, available on the Royal Commission's website (www.rcfv.com.au/Report-Recommendations).

[19] As observed for example on page 135 of volume III of the report of Victoria's Royal Commission into Family Violence, available on the Royal Commission's website (www.rcfv.com.au/Report-Recommendations).

[20] Under section 62 of the Family Violence Protection Act 2008.

[21] Criminal Procedure Act 2009 s357.

[22] In jury trials, this power arises under s197 of the Criminal Procedure Act 2009.

jurisdiction, lawyers, allocated to a self-represented party for the purposes of cross-examination only, often conduct the entire contested hearing as it is difficult to prepare for and conduct only the cross-examination portion in a legally competent manner.

This would, however, be a much larger task in family law proceedings, or alternatively lawyers would risk conducting a significantly under-prepared cross-examination or even full conduct of a trial, if they are not well across all the materials filed in the proceedings at interim stages. Advocating at trial on the basis of documents filed by self-represented litigants also tends to be significantly more difficult than doing so on the basis of documents prepared by solicitors.

It is foreseeable that private practitioners would not view a cross-examination-only grant in family law proceedings as a viable option financially and professionally, and may be reluctant to do this work, in an environment where many legal aid commissions already have difficulty attracting private lawyers to do family law legal aid work.

Instructions taken from a party in a family law matter are typically complex, and family law documentation requires significant preparation time to review – often more so if the documentation is filed by a litigant in person. Much more preparation time would need to be funded than is funded for contested hearing representation in family violence intervention order matters.

The burden of proof in family law matters is different from the criminal burden of proof, and the outcome sought in cross-examination can be more nuanced – as the parties are seeking detailed orders from the court, not a binary finding as in a criminal law matter or the establishment of the two limbs of the family violence intervention order test. Issues in family law cases are typically less confined than in family violence intervention order matters.

Issues are often protracted and entrenched in the complex family law matters that proceed to hearing. As noted earlier, lawyers assigned family violence intervention order cross-examination-only grants often prepare as if it is a full grant, and attempt to settle the matter. Our view is that settlement, while still possible, is less likely in family law matters because earlier opportunities for settlement have arisen before a matter proceeds to hearing.

Accordingly, drawing from our considerable experience both as a funder and arranger of court-appointed legal representation and as a provider of family law legal representation, we expect that it would be very difficult to find lawyers prepared and able to be appointed in family law hearings for cross examination only.

This model could also be costly. As detailed above, in the Victorian family violence intervention order context a significant proportion of legal aid grants are now for court-ordered direct cross-examination matters, and many of these matters would not necessarily be otherwise funded under legal aid grant guidelines, due to the party's means or the merits of their legal case.

We note that the current National Partnership Agreement on Legal Assistance Services prioritises early intervention and dispute resolution in family law, as was the case in the previous National Partnership Agreement. An approach that prioritised the allocation of legal aid funding for final family law trial representation would potentially be inconsistent with several years' appropriate focus on legal assistance services that support timely intervention and resolution of matters. Additional funding would be required to prioritise legal representation in these circumstances and ensure other National Partnership Agreement priorities were not diminished.

Counsel Assisting model

We continue to support the Family Law Council's recommendation in their recent report on *Families with Complex Needs* that the government explore implementation of a Counsel Assisting model in cases where one or both parties is self-represented and issues of family violence or other safety concerns for a child have been identified.

We recommend the government invest in a pilot of the Counsel Assisting model in several family law court locations with a view to expanding the pilot if it proves effective.

This section of our submission draws on our May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, where we also cited the Family Law Council's observations that the Counsel Assisting model could be expected to have a range of benefits:[23]

> *'The use of this model in such cases would assist the court's determination of the child's best interests by ensuring that all relevant evidence is identified and collated and that all relevant issues are ventilated before the court in a coherent and efficient way.*
>
> *Council also notes the potential benefits of a Counsel Assisting model for an unrepresented party who has experienced family violence, including by assisting them to narrow the issues in dispute. Council further notes the potential for this approach to help maintain a focus on the best interests of the child throughout the hearing, which may be otherwise compromised in the context of adversarial proceedings.'*[24]

Counsel Assisting in a traditionally adversarial system

There is a question as to how preventing direct cross-examination or using a Counsel Assisting role might operate in the family law courts, which traditionally operate on an adversarial model adjudicating private disputes.

Discussions on the benefits of establishing increased inquisitorial or investigative powers, including a Counsel Assisting role, in the family law jurisdiction reflect the wider tension in adjudicating private law disputes between two parties where decision-making requires paramount consideration of the best interests of a third party (the child). This reflects the reality of the hybrid nature of the family law jurisdiction in practice.

There are indeed already investigative functions in the jurisdiction, including:

- independent children's lawyers (ICLs)
- section 11F (family consultant) reports, and
- own motion subpoena powers of judicial officers.

[23] See pages 20-22 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

[24] Page 134 of Family Law Council Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5 (2016) (www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx).

ICLs assist judicial officers in family law court proceedings to make decisions based on the best available evidence and in the child's best interests where a child is at risk of harm due to the conduct of one or both parents.

Effectively, ICLs inquire into the child's best interests for the court, with the power to seek out relevant evidence. In addition to seeking information from the state or territory child protection authority and the police, for example, an ICL can also request and provide information to the court on the non-legal support services a parent is accessing outside the family law system (for example, drug and alcohol counselling or a men's behaviour change program). In fulfilling these obligations, ICLs already provide a service to the court that is akin to an investigatory role.

Additionally, under rule 15.17 of the Family Law Rules 2004, the court may, on its own initiative, issue subpoenas requiring production of evidence or requiring a witness to attend court to give evidence. We understand that this power is rarely used, yet it is available to judicial officers in situations where decision-making may benefit from information not provided by the parties.

The increased complexity of the matters before the court, including an increasing number of matters involving allegations of violence, and the increasing interaction between state local and children's courts and federal family law courts represents the reality of an evolving jurisdiction. The family law courts in 2017 do not operate as a purely adversarial jurisdiction, merely adjudicating private disputes.

Given the already hybrid nature of the family law jurisdiction, it is VLA's view that the Counsel Assisting model would also be a reflection of the evolving nature of the family law courts from a private law jurisdiction to an intersection between private and public law, and the model merits a pilot.

The role of Counsel Assisting and Independent Children's Lawyers

In piloting the Counsel Assisting model, we note the significant overlap between the role of the independent children's lawyer and Counsel Assisting. On that basis, VLA also supports the review and codification of the law in *Re K* (1994) 17 FLR 537 (relating to the role of independent children's lawyers), as we detailed in our submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence.[25]

Were *Re K* and a role for Counsel Assisting both codified, the relationship between the independent children's lawyer and Counsel Assisting roles should also be codified, including clear delineation as to when independent children's lawyer and/or Counsel Assisting would be appointed. A pilot could be expected to reveal the extent to which the two roles are complementary or overlapping.

The Family Law Council did not describe in any detail the expected operation of a Counsel Assisting scheme. We would suggest that the role of Counsel Assisting in a coronial inquest would be a useful base model to start from. The Magistrates Court of Tasmania's website provides a useful public description of that role.[26] We would anticipate that key elements would include:

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[25] At page 22 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

[26] See "Counsel assisting the coroner" on the Magistrates Court of Tasmania's website (www.magistratescourt.tas.gov.au/about_us/coroners/coronial_practice_handbook/key_players_in_the_process/counsel_assisting_the_coroner).

- Counsel Assisting is independent of all parties, and assists the court, including by gathering evidence relevant to assist the Court to make determinations of fact and orders that are in the best interests of the child/ren
- only one Counsel Assisting need be appointed for each proceeding
- Counsel Assisting would familiarise themselves with the documents filed in the case and the issues identified
- Counsel Assisting would liaise with any parties' legal representative and with any Independent Children's Lawyer appointed in the matter
- Counsel Assisting would ask all cross-examination questions between the perpetrator and victim (unless the victim consented to any direct cross-examination), and ask any questions of their own where they deemed it useful to assist the court to determine facts.

A pilot

There are clearly questions still to be worked through. One key question is how the Counsel Assisting would gather and test information from a self-represented litigant about the questions they wanted to have asked of the other party, and how the Counsel Assisting would avoid giving legal advice to parties – and what legal information the Counsel Assisting could give, including about the procedural rules.

We are keen to be involved in further work to determine how a Counsel Assisting model might be piloted in order to properly and efficiently resolve the issues associated with direct cross-examination.

Earlier findings of fact on family violence

VLA recognises that banning direct cross-examination and substituting a workable alternative is a complex challenge in the current family law system.

As detailed above, we are concerned that the proposed court-appointed person model needs much more development before it could be determined to be effective and safe, while there are significant issues with the transferability of other models to the family law courts. However, we also consider that many of these issues could be addressed by requiring and resourcing earlier findings of fact about family violence in family law proceedings.

In the following section we suggest for discussion a possible model that incorporates earlier findings about allegations of family violence.

We suggest that if every matter involving family violence allegations were referred promptly to a preliminary hearing, to find fact solely about family violence allegations, subsequent aspects of the proceeding would benefit from being informed by those findings of fact.

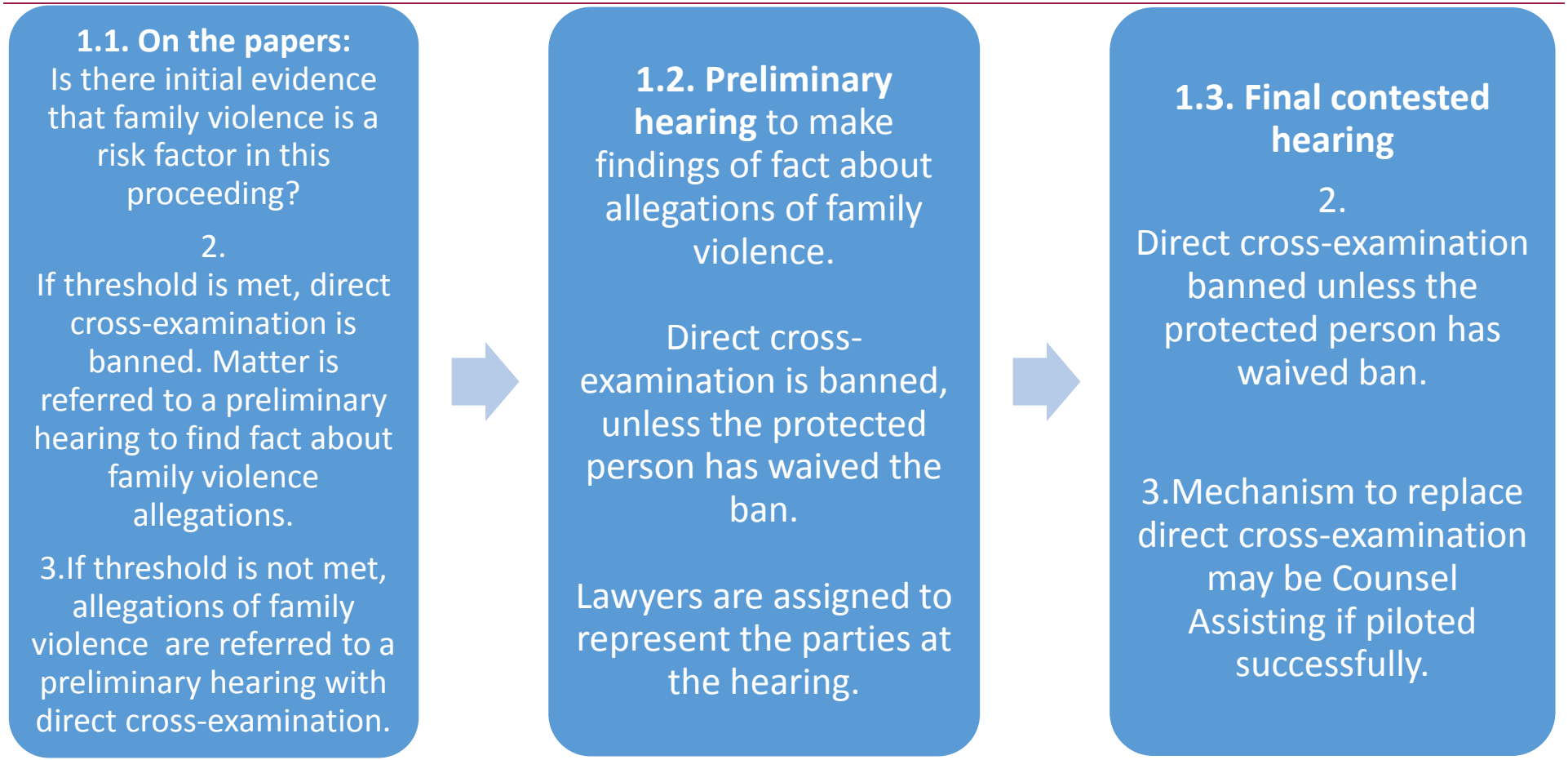
As we submitted to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, earlier findings about family violence could be expected to flow through to broader benefits for the family law system, including earlier resolutions that are better informed by findings about family violence.[27] At the moment, a three-year family law process can conclude with a contested hearing where facts about family violence are still in dispute. If these matters had been determined earlier in the proceedings, decisions about the children's care in the intervening years could have been informed by those findings.

We suggest consideration of a procedure which brings forward decisions on allegations of family violence. This would make the application of a ban on direct cross-examination significantly easier to apply (in addition to the general benefits noted above).

A possible process might be:

1. A decision on the papers about whether there is initial evidence that there has been family violence
2. A preliminary hearing (without direct cross-examination, and potentially with lawyers appointed, unless the protection is waived) with the limited purpose of making findings of fact about allegations of family violence
3. Further steps as occur currently, including for example interim hearings, with a final hearing if required, at which direct cross-examination is banned should family violence have been found proven at the early preliminary hearing (unless the protection is waived).

[27] See pages 9-10 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

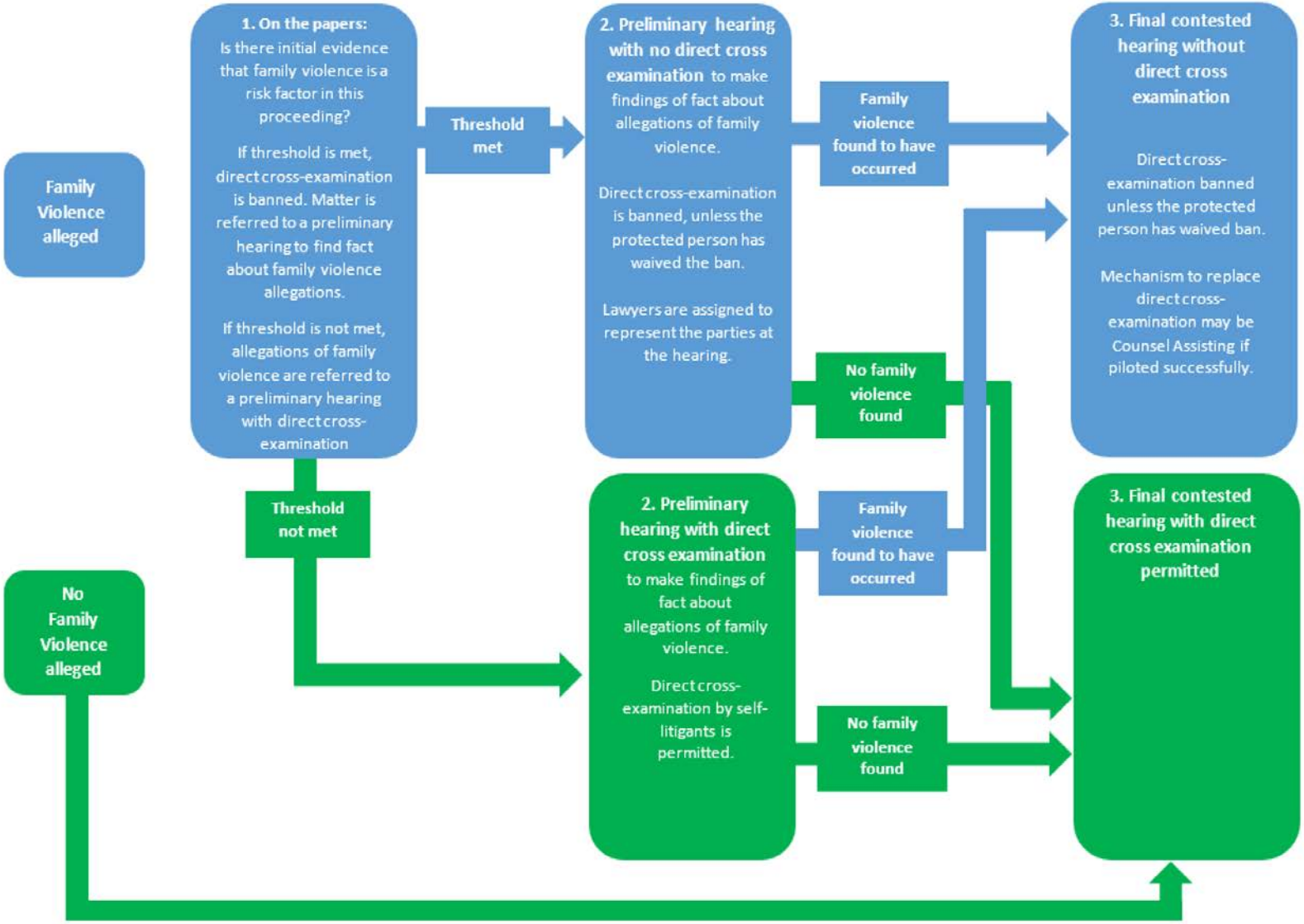


This flow diagram sets out how our suggested process could operate in instances where allegations of family violence are substantiated.

If, at step 1, the decision on the papers was that the initial evidence of family violence did not warrant a ban on direct cross-examination, the matter would still proceed to a preliminary hearing to find fact about the allegations of family violence, but direct cross-examination would be permitted.

In either case, family violence allegations are addressed in a preliminary hearing before interim orders are made and in order to inform any procedural directions that may be required before the final contested hearing. The finding of fact informs those next steps. The only allegations of family violence that may remain in issue at the final contested hearing are any new allegations that have arisen since the preliminary hearing.

This more detailed diagram illustrates how the described process could operate if no family violence was alleged, if evidence on the papers of family violence risk was deemed inadequate to meet the threshold for a ban, or if the preliminary hearing found no family violence.
It does not illustrate appeal pathways. Those appeal pathways are described in the text of the following sections.



We understand that considering and potentially implementing the procedural changes suggested above would require further examination and consultation. Below we set out some further initial suggestions about how such a process could operate.

A process for preliminary hearings finding fact about family violence

First: An assessment on the papers of initial evidence of family violence

In the above process, a preliminary hearing would be conducted early in family law proceedings focused on making findings of fact about family violence in those proceedings, to inform the remainder of the proceedings.

While a preliminary hearing has the benefit of being a more focused and issue-limited hearing than a final hearing (see further below), consideration of whether a ban on direct cross-examination should be applied in the hearing would still be required.

We therefore suggest that, as an initial step, when family violence is alleged, a decision should be made on the papers as to whether there is sufficient evidence capable of satisfying a court that family violence between the parties is a risk factor in the proceedings. Along the same lines as we described in our section above about the Threshold for prohibiting direct cross-examination, we suggest that the decision on the papers will be not a full risk assessment or determination of family violence fact, but instead merely identification of the presence of family violence risk factors.

This decision on the papers would then determine whether a ban on cross-examination is imposed at the preliminary hearing.

A preliminary assessment of the evidence of family violence risk could perhaps be made by a Registrar. The decision-maker could refer to current or past intervention orders, child protection authority and Police records, and any other evidence from the parties.[28]

If the decision-maker were satisfied, on the balance of probabilities, that family violence is a risk factor and an interim ban on direct cross-examination is necessary until a final decision about family violence:

- direct cross-examination would be banned (unless the victim waived that ban, fully or partially – see section above about waiving the protection); and
- the matter would be referred to a preliminary hearing to make findings of fact solely about whether the allegations of family violence are substantiated (as described in section on preliminary hearings below).

If it were decided the initial evidence did not suggest that family violence is a risk factor, the allegations would still be referred to a preliminary hearing, but direct cross-examination would be permitted at that hearing.

[28] The court might take advantage of enhanced information gathering powers and changed processes in order to gather this basic information early. The Victorian Royal Commission into Family Violence and the Family Law Council's report into families with complex needs both recommended the court have enhanced access to information that would support this decision-making, and COAG has committed to developing a database from which courts would access this information: see the Family Law Council's Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5 (2016) at 7.2; and see for example the discussion at page 152 in volume III of the report of Victoria's Royal Commission into Family Violence.

If the person alleging family violence wanted to challenge the decision, they would have to provide new evidence or wait until the preliminary hearing, with direct cross-examination allowed.

The person alleged to have been violent could not challenge the cross-examination ban, but could refute the allegations of family violence at the preliminary hearing.

Provisions addressing the same considerations discussed earlier, around the threshold for an automatic ban, the power of the court to apply a ban in further circumstances, and a party's ability to waive the protection against direct cross-examination, should be enacted, however, they would be significantly easier to apply at this early stage for the limited purpose of a preliminary hearing.

Second: A preliminary hearing to find fact about family violence

As we detailed in our submission to the 'Parliamentary inquiry into a better family law system to support and protect those affected by family violence', we support earlier findings about family violence, including to inform decisions about cross-examination in final contested hearings.[29]

Current legislation requires courts to take prompt action in relation to allegations of child abuse or family violence under section 67ZBB of the *Family Law Act*. However, in our experience, this is not by itself resulting in early findings in matters involving family violence allegations. No process is currently prescribed to give effect to this provision. Resourcing constraints, in particular a lack of judges to hear these preliminary matters, and an unavailability of the information required to make the decision at this early stage, contribute to there being few matters where findings are made at an early stage.

In our view an effective way to prompt earlier findings of fact relating to family violence would be a stronger and more specific legislative requirement that family violence allegations be determined early, alongside increased resourcing of courts to enable this earlier decision-making.

Prompting an early determination about family violence would be a significant change to court processes. This procedural restructuring would place enquiry about safety at the start and centre of the court's task. Currently safety, although increasingly a court priority, remains the subject of later determination, diminishing the court's impact in managing and responding to family violence risk.

Earlier findings about family violence would inform the rest of the proceeding (including whether cross-examination should be banned at the final contested hearing) and could be expected to lead many matters to resolve before final hearing, leading to significant court efficiency and cost saving.

We also note that appointing lawyers to represent the parties would be substantially more feasible at a preliminary hearing confined to the issue of whether family violence has occurred than at a full final hearing years into a family law proceeding.

A preliminary hearing finding fact about family violence would be (relative to a full contested family law hearing) similar in nature to a contested hearing about a family violence intervention order, so lawyers could be assigned for the one or two days required for the whole hearing. Preparation time would be required, but much less than is required for a full contested family law hearing. Further, the use of government-funded legal assistance resources to represent parties at early hearings to determine whether family violence occurred, with a view to earlier resolution and safety-focused

[29] See particularly pages 9-10 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

orders, is more in line with legal assistance funding priorities than the funding of representation at full contested final hearings without any assessment of the merits of the case being pursued.

We emphasise that the appointment would need to be for the full hearing, not just for cross-examination. We would not support appointment of lawyers for cross-examination only in these preliminary hearings, given the challenges those cross-examination-only orders create in the relatively less complex Victorian family violence intervention order jurisdiction, described earlier. We also note that additional legal assistance funding would still be required to enable this option to be implemented, however, it is likely to be significantly less costly than providing for full legal representation at final hearings.

After a preliminary hearing finding fact about family violence, the matter would proceed to standard pre-hearing steps, and then to a full contested hearing (if required). Direct cross-examination would be banned at the final contested hearing if family violence had been found at the preliminary hearing and the survivor of that violence had not waived the protection from cross-examination.

Third: A final contested hearing, without direct cross-examination

We anticipate that earlier findings of fact about family violence would bring many matters to resolve earlier, and would usefully change the nature (as well as decreasing the number) of final contested family law hearings.

If preliminary hearings were implemented, standard interim procedural steps – including appointment of Independent Children's Lawyers, referrals for family reports and/or family dispute resolution, and use of the courts' own motion powers of subpoena – could be usefully informed by early findings of fact about family violence.

For example, in our submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, we described the difficulty of family reports by report writers who are unable to draw conclusions that make findings about family violence.[30] In some matters involving family violence, the views expressed by the family report writer are caveated by an uncertainty about whether allegations of family violence are accurate. It is therefore not uncommon for these reports to express alternate proposals which are contingent on the finding by the court about the family violence allegations.

> *Extract from a family report's recommendations in a VLA case file:*
>
> *'On the material at hand it is respectfully recommended that: … the child spend time with the father by agreement and failing agreement as follows [unsupervised contact including regular overnight contact with the father] … If the father is found to have breached the conditions of a current Intervention Order protecting [the mother], [as alleged,] the time with the child revert to [orders for supervised time].'*

Family reports provide valuable psychological insights regarding the parties and the various issues and dynamics experienced by the family. The utility of these family reports, however, and the consent orders that are reached on the basis of the views expressed in them, would likely be greatly improved if there were findings about the allegations of family violence by the court prior to their preparation.

[30] At page 16 of VLA's May 2017 submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (above, footnote 6).

Final contested hearings themselves would be similarly better-informed about the best interests of the child/ren (and about property matters when *Re Kennon* is relevant).

As noted above, we would anticipate that the ban on direct cross-examination would automatically apply at final contested hearings when a preliminary hearing has found that family violence has occurred, and the survivor of that violence has not waived (or partially waived) the protection from cross-examination.

We also suggest that the court should retain its ability to ban cross-examination at any stage if new evidence of family violence arose or the cross-examination itself proved abusive.

In terms of the appropriate model for replacing direct cross-examination at a final contested hearing, we refer to our earlier comments and suggest that, in the hierarchy of alternatives to direct cross-examination, a Counsel Assisting model remains a sensible compromise that is worth piloting.

17. **Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**
18. **Should any changes be made to the proposed amendments to ensure that the courts can be satisfied that any cross-examination of the parties that occurs through a court-appointed person will enable the judicial officer to accord procedural fairness to the parties?**
19. **Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?**
20. **Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?**
21. **Any general comments.**

Throughout our submission we suggest that the proposed amendments do not adequately protect against re-traumatisation by direct cross-examination. We suggest more effective protection should be implemented.

Our submission suggests integrating the cross-examination ban with a change to family law court procedure to require preliminary hearings to find fact on family violence (without direct cross-examination where there is family violence risk) at an early stage in family law proceedings.

Further consultation before commencement

We note our submission above that a Counsel Assisting model should be piloted. This pilot would of course necessitate changes taking place at the pilot site/s only.

If no pilot takes place, we suggest that the amendments banning cross-examination could take effect in all proceedings at once, including those already on foot, to avoid confusion. Whether the amendments affect existing proceedings or not, however, clarity about what rules apply is the most important factor and this will allow legal services, including duty lawyers and VLA's Legal Help phoneline staff, to give clear information to parties.

We would welcome further consultation before any proposal is finalised. We would be keen to provide views about an appropriate commencement date and the necessary funding required to provide legal aid services to support the changes.

For any legislation implemented, we support the two-year review period suggested in the consultation draft.[31] While we have detailed above our concerns with the court-appointed person model proposed in the exposure draft Bill, we believe that the complex and important problem of direct cross-examination between family violence perpetrators and survivors can be solved by developing, implementing, evaluating and further developing innovative solutions, and we support the Government's commitment to this work.

16. Should the amendments apply to proceedings started before the law comes into effect, or should they only apply to proceedings started after the law comes into effect?

While clarity either way is the most important consideration, on balance we suggest the former: the amendments should apply to all proceedings as soon as they come into effect. This will avoid confusion over which rules apply and more easily allow for clear and accurate information and advice to be provided to parties.

[31] Proposed section 102NC.