“No straight lines”:

Self-represented litigants in family law proceedings involving allegations about family violence

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AUSTRALIA’S NATIONAL RESEARCH ORGANISATION FOR WOMEN’S SAFETY

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“No straight lines”:
Self-represented litigants in family law proceedings involving allegations about family violence

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ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family and sexual violence who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing. Recommended support services include 1800 RESPECT—1800 737 732 and Lifeline—13 11 14.

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Abbreviations

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ANROWS	Australia's National Research Organisation for Women's Safety
ALS	Aboriginal legal service
AVL	Audio visual link
CALD	Culturally and linguistically diverse
CI	Chief Investigator
CIC	Child Inclusive Conference
CLC	Community legal centre
DIY	Do-it-yourself
DVU	Domestic Violence Unit
EIU	Early Intervention Unit
ESPR	Equal shared parental responsibility
FASS	Family Advocacy and Support Service
FCA	Family Court of Australia
FCCA	Federal Circuit Court of Australia
FCWA	Family Court of Western Australia
FLC	Family Law Council
FLS	Family Law Section of the Law Council of Australia
FMC	Federal Magistrates Court (before 2013 the FCCA was known as the FMC)
ICL	Independent children's lawyer
LAC	Legal aid commission
LIP	Litigant in person
NEC	National Enquiry Centre
NSWLRC	New South Wales Law Reform Commission
SRL	Self-represented litigant
RCFV	Royal Commission into Family Violence (Victoria)
UTS	University of Technology Sydney

Executive summary

Background

Self-represented litigants (SRLs) are a regular feature of the Australian family law system (Australian Law Reform Commission [ALRC], 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017). This is largely due to the high cost of legal representation, limited availability of legal aid, dissatisfaction with lawyers and, in a few cases, choice. The extent of self-representation and the challenges it generates for litigants, as well as for the courts and professionals, have long been concerns (Dewar et al., 2000; Family Law Council [FLC], 2000; Hunter et al., 2002). At the same time, the family law system has been challenged with responding to significant numbers of matters involving allegations of family violence (ALRC & New South Wales Law Reform Commission [NSWLRC], 2010; Chisholm, 2009; FLC, 2009; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

The extent of self-representation and prevalence of family violence allegations in family law matters suggest that these issues frequently occur in the same proceedings. Both alleged victims and alleged perpetrators of family violence may find themselves as SRLs. To date there has been little examination of the intersection of these issues beyond the problems posed by personal cross-examination (Carson et al., 2018; Loughman, 2016).

The research: Aims and methods

This research explored the challenges and intersecting issues raised when family violence and self-representation co-occur in proceedings in the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA). It did so from multiple perspectives: the parties to the proceedings and the legal and other professionals who engage with SRLs.

Aims

The research aimed to:

1. explore how parties in family law proceedings involving allegations of family violence experience court processes when one or both parties represent themselves
2. explore the impact of self-representation on family law proceedings involving violence
3. identify the resources and other measures used by SRLs in family law proceedings, and consider their strengths and weaknesses, including in cases involving family violence
4. formulate appropriate legal and policy responses to better support victims of violence.

Method

The study was a qualitative exploratory study that used a multimethod approach with two key components:

- a general interview sample which comprised semi-structured interviews with:
  - 35 people (24 women and 11 men), most of whom had represented themselves, with a small number of these participants also facing an SRL in family law proceedings[1]
  - 68 professionals who engage with SRLs involved in family law proceedings: 22 judicial officers of the FCA and FCCA, 34 legal professionals and 12 other professionals such as Family Advocacy and Support Service (FASS) workers and court support workers
- an intensive case study which examined individual cases where one or both parties were self-represented (modelled on Dewar et al., 2000 and Trinder et al., 2014). This involved:
  - observation of 512 court events, of which 253 involved SRLs in 243 matters, at eight court sites in three states on the eastern seaboard of Australia
  - 14 interviews with people involved in 12 of the observed cases—SRLs and/or the legal representative representing the other party and/or the independent children's lawyer (ICL)[2]
  - examination of 180 court files related to the 243 matters.

1 There was one interview participant who was not an SRL, nor had she faced an SRL, at the time of the interview. This interview participant became an SRL shortly after the interview was conducted.

2 ICLs can be appointed by the court, under s 68L of the *Family Law Act 1975* (Cth), to represent the interests of a child who is the subject of a family law dispute.

The fieldwork was conducted between December 2018 and January 2020.

Overview of research sample

Who were the self-represented litigants in our study?

The SRLs in the intensive case study were slightly more likely to be male (56.2% were male; 164/292); more likely to be respondents (56.2%; 164/292), with 61 percent of these respondent SRLs being male; and more likely to be involved in parenting proceedings rather than property matters (65% of matters were parenting proceedings; 158/243). Matters involving SRLs were also far more likely to have only one party without legal representation (79.8%; 194/243) rather than both. These profile findings are consistent with previous research.

What motivated self-representation?

The main reasons SRLs in the general interview sample were self-represented were financial in nature, caused by ineligibility for legal aid and the high cost of legal representation. Some SRLs' decision to self-represent was connected to their dissatisfaction with lawyers in the past, including their assessments that their former lawyers did not have an adequate understanding of family violence. A small number also felt that they were best placed to present their case. Some professionals noted that a very small number of SRLs choose to be without legal representation.

Significantly, women victims of family violence reported that their former partner, with or without legal representation, adopted litigation strategies (e.g. excessive correspondence, multiple applications, failing to attend court and failing to follow court orders) which appeared to be designed to deplete the limited funds they had available for legal representation, leading them to become self-represented.

A small number of professionals interviewed expressed the view that some SRLs who are perpetrators of family violence choose to self-represent to deliberately abuse or intimidate their former partners. A small number of women SRLs we interviewed also saw their former partner's decision to self-represent this way. Regardless of whether this is a perpetrator's motivation for self-representation, the absence of legal representation in family violence cases may still be experienced this way.

Experience of family violence among self-represented litigants in the study

The intensive case study revealed a high rate of family violence in cases involving SRLs: 82.2 percent of SRL matters observed involved allegations of family violence (148/180). While this high rate is partly explained by the purposive sampling strategy employed at some court sites where the research team targeted matters involving SRLs and family violence, the same high rate was found at the three court sites where all matters were observed (82.5%; 47/57).

In our general interview sample, almost all SRL participants alleged being subjected to family violence by their partner prior to and after separation, with a number also making allegations about partners abusing or neglecting children. Almost all of the men (10/11), but only half of the women (12/24), faced allegations that they had used violence against their former partner in the family law proceedings or in protection order proceedings. While there were some similarities in the experiences of violence reported by men and women, there were also clear differences, including that the women tended to report multiple forms of abuse and gendered forms of violence (e.g. strangulation and sexual violence), and that these often intersected with concerns about their children (Laing, 2010).

A number of SRLs across both samples experienced disadvantages in addition to family violence that further impacted their capacity to litigate, including limited literacy and/or English, poor mental health, disability, homelessness, poverty and incarceration.

Key findings

Being a victim of family violence added a complex layer to self-representation. This experience framed and shaped the issues that were the subject of the litigation, and the environment

in which the parties were litigating. A number of victims of violence who represented themselves not only continued to experience violence after separation, but this also took place in the court precinct; it was manifested in the courtroom and the nature of the litigation was often experienced as legal systems abuse. Without the buffer of a lawyer, SRLs faced this violence directly. Victims who were SRLs generally struggled to adequately document their experience of family violence in their affidavits, and experienced considerable pressure to settle for unsafe or unsatisfactory outcomes. When an SRL was an alleged perpetrator, the court system could be used as a tool to continue abuse, for example through numerous applications in multiple jurisdictions, prolonging court proceedings, refusing to settle and bringing proceedings after final orders.

Obtaining legal information and advice

SRLs we interviewed accessed an array of formal and informal sources of information and advice to assist them with their case: lawyers and legal services, court websites, the Commonwealth Courts Portal, court staff (including National Enquiry Centre Staff), dedicated legal information websites (such as AustLII), general internet searches and social media groups. SRLs held mixed and often contradictory views about the resources that they used, reflecting their different circumstances, needs, skills and understanding of the legal system. A key difficulty for SRLs was navigating the distinction between "legal advice" and "legal information". While many services are able to provide procedural advice, with the exception of lawyers there are few avenues for victims of family violence to obtain advice around presenting and articulating their concerns around risk to children, or the impact of violence on property contributions (i.e. substantive advice).

The research found that while there are a wide range of resources available to assist SRLs, there is no centralised authoritative source of information which groups this information together.

Completing documentation

Paperwork is critical in family law proceedings and SRLs in this research varied greatly in their skills and capacities in this area. Some SRLs encountered difficulties as a result of language or literacy issues, access to computers and other technology, limited knowledge of the law and the general complexity of the process. For SRLs who had experienced family violence, completing the documentation was impacted by the emotional and psychological toll of the experience of violence (as well as other intersecting disadvantages) and the requirement to relive that experience in paperwork.

Many SRLs struggled to complete documents that are critical in raising allegations and presenting evidence of family violence to the court: the Notice of Risk (FCCA) or the Notice of Child Abuse, Family Violence or Risk of Family Violence (FCA); affidavits; and subpoenas. Some SRLs failed to appreciate the significance of the Notice of Risk form (or equivalent) or how it functions in the system. Many SRLs had trouble writing affidavits as evidential documents (e.g. failed to mention or were vague about the nature and circumstances of the violence, included irrelevant content or failed to follow court rules about format). Very few SRLs issued subpoenas which can perform a critical role in ensuring that evidence about violence in the form of police and child protection agency records is presented to the court.

Services available to assist self-represented litigants at court

Many SRLs interviewed relied on duty lawyer services and the majority were positive about them. Professionals, particularly judicial officers, also spoke very highly about duty lawyer services. Duty lawyers provide SRLs with legal advice on the day at court and, subject to resourcing, may appear in court, assist with documentation, assist negotiations and explain proposed consent orders. While duty lawyers are available at most registries, the number available varies, as does the workload of the court, which places constraints on the extent of assistance provided. Some SRLs were unable to be assisted due to conflicts of interest,[3] a particular concern in rural and regional areas where there may be a limited number of practitioners.

FASS represents the most significant innovation in this space. FASS targets SRLs in matters involving family violence and

3 A conflict of interest is where a person seeks assistance from a legal service, but that legal service has already provided legal advice to the other party and is therefore unable to provide assistance to the person now seeking advice.

provides an enhanced duty lawyer service together with support services for men and women. Given the recency of FASS, few SRLs we interviewed had accessed this service (or were aware that they had, often referring to a duty lawyer but not whether that duty lawyer was part of FASS). The professionals we interviewed highlighted significant strengths of FASS: it addresses the needs of families experiencing violence beyond their legal needs, the duty lawyers provide an expanded service, and male support workers are provided. FASS coverage is, however, limited and many courts outside metropolitan centres do not have access to this service.

Both FASS and duty lawyer services, more generally, are focused on the front end of litigation and more discrete events; there is an absence of services that are targeted at matters that continue to litigate to a final hearing. As matters progress, particularly those involving family violence, the complexity and costs increase.

Many SRLs also relied on family and friends for support at court and some accessed professional support groups and, very rarely, McKenzie Friends.[4] Some SRL victims of violence chose to come to court alone because of fear for the safety of others, embarrassment/shame, social isolation or the length of time their matters would take.

Safety in the court precinct

While the potential for abuse and intimidation within the court precinct is a concern for all victims of family violence attending family law courts, this research found that opportunities for violence increased when an alleged perpetrator and/or alleged victim represented themselves. Several women SRLs interviewed reported experiencing violence and abuse at court, such as being verbally abused and/or intimidated, cornered in common spaces or the lift, and being followed home after court.

Safety measures offered by the federal family courts, such as safe rooms, separate entry and exit points, security and alternative means of participating in court events, are important safeguards against violence and abuse by perpetrators of family violence. These measures are, however, not available at all family law courts, and this research noted the varied availability of safety measures across the court facilities, particularly between newer metropolitan courts and the regional circuit courts. Some SRLs drew attention to the difference between the safety measures they were able to access in state magistrates courts compared to the federal Family Court that they attended. In many cases, because they did not have a lawyer, SRLs were simply unaware of what is available at the family law courts. Legal professionals, particularly from FASS, explained that one of their key roles is to assist victims who are SRLs to access safety plans for attending court. A key area where SRLs could be made aware that safety measures are available is on the respective forms that notify the FCCA and the FCA about risk of family violence and child abuse.[5]

We observed a number of safety measures being utilised at the courts we visited, such as security guards escorting victims to and from the courtroom, security presence in the courtroom, use of safe rooms, and staggered entry to and from the courtroom. However, we also observed cases that demonstrated a distinct lack of attention to safety: security staff were unavailable or unwilling to escort victims to and from safe rooms, and there was a failure on the part of some court staff and lawyers to consider how victims and perpetrators will enter or exit a courtroom or precinct.

Self-represented litigants in the courtroom

Family law proceedings assume a model of legal representation in which each party has a lawyer who is equipped with legal knowledge and skills and presents their client's case according to legal rules and court procedure. While some SRLs we observed presented their cases well, most lacked the requisite knowledge and skills to do so and struggled to present their case within this model. Three issues underpinned these difficulties: misalignment of expectations, inadequate preparation for court events and the negative impact of ongoing trauma caused by family violence.

4 "McKenzie Friend" is a term derived from *McKenzie v McKenzie* [1971] P 33 and is used to describe a person who provides non-legal support to an SRL, for example, sitting at the bar table and taking notes, but not speaking during proceedings.

5 We understand that the FCA and FCCA, in their current work on revising these forms, is addressing this gap.

We found general agreement between SRLs, professionals and judicial officers that SRLs' expectations of court events and process do not align with reality. SRLs do not understand how the process works, what can be realistically achieved or how long it will take. They expect to tell their story to the court and for a decision to be made promptly. SRLs who are victims of family violence also expect to have the space to talk about the violence they have experienced and perhaps its ongoing nature.

SRLs' preparations for and performances in the courtroom were mixed. Most SRLs fared better in shorter, more procedural matters than more complex defended hearings. Most of the SRLs we observed struggled and required assistance from judicial officers. For judicial officers, however, this can challenge their role as passive and impartial decision-makers, and we found judicial responses to SRLs varied. Perhaps to avoid some of these difficulties, we found it was common for judges to encourage SRLs to obtain legal advice, which is not necessarily a realistic option and may serve to make SRLs feel that they are unwelcome in the courtroom.

Our research also revealed that family violence and resulting trauma impacted negatively on the capacity of SRLs who are victims of family violence to present their case in the courtroom. These SRLs told us that it was difficult to control their emotions and that their fear and anxiety were exacerbated by the proximity of the alleged perpetrator. We also found that SRLs were subjected to violence and abuse by the alleged perpetrator in the courtroom such as being shouted at, glared at, intimidated and threatened. Again, judicial attempts to acknowledge or deal with this violence varied from stopping the abuse in the courtroom to allowing it to continue. Although a range of safety measures can be invoked, it is concerning that some SRLs are subjected to violence and abuse in the courtroom that is not often recognised or acted upon by the court. It is perhaps not surprising that some SRLs feel that the courts minimise family violence or do not understand the dynamics of violence.

Personal cross-examination

Ten of the SRLs in the general interview sample (10/35) had personally cross-examined their former partner and four were personally cross-examined by their former partner (4/35). Their discussion of this experience confirms earlier research that personal cross-examination by SRLs in family law matters involving violence is traumatic (Carson et al., 2018; Loughman, 2016). All of these instances of personal cross-examination took place before the introduction of the Family Violence and Cross-Examination Scheme (the Scheme) on 10 September 2019. For these SRLs, and those cases we observed prior to the introduction of the Scheme, we found that some judges did support alleged victims during cross-examination by providing alternative means of giving evidence; physically separating parties in the courtroom; having someone else, such as the ICL or the judge themselves, direct the questions; and shutting down abusive or threatening questions. However, we also found that the use of such measures was highly variable and did not happen in every case.

The Scheme prohibits SRLs in matters involving family violence from conducting personal cross-examination in certain mandatory and discretionary circumstances; instead, cross-examination must be conducted by a legal practitioner. Where the Scheme does not apply, the courts must ensure that appropriate protections are in place to assist SRLs who have experienced family violence when giving evidence. Many judges and professionals interviewed considered that the Scheme will greatly benefit victims of family violence not only in relation to cross-examination, but with reaching settlements.

While this research project was not designed to assess the efficacy of this new Scheme, it was in the unique position of conducting fieldwork before and after the introduction of the Scheme. This revealed some difficulties or challenges in the early implementation of the Scheme, including:

- the underestimation of the numbers of people who would be eligible for the Scheme and in turn the adequacy of funding allocated to legal aid commissions to administer the Scheme
- confusion about the process of making an order and whether that is required in cases in which the prohibition is a mandatory one
- lack of clarity about the factors that should be considered when making a discretionary order
- lack of information available to SRLs about the Scheme, for

example, how to make an application for a discretionary prohibition and what an SRL needs to do once a prohibition has been made
- confusion about the extent of legal representatives' responsibilities under the Scheme
- the risks of misuse of the Scheme which is not asset- or means-tested.

Outside the courtroom: Negotiations

The family law system encourages settlement by the parties. There is surprisingly little information about this negotiation process and its centrality at court and many SRLs come to court not expecting to negotiate and not knowing how to do it. Negotiations are especially problematic for SRLs who are victims of family violence; they have to deal directly with the other party's legal team or directly with their former partner if they are also an SRL.

Some SRLs reported being pressured by the judge and lawyers to participate in negotiations. In particular, SRLs complained about aggressive, bullying and rude behaviour of lawyers for the opposing party. Duty lawyers and ICLs were seen to have an important role in buffering negotiations, although in a small number of cases ICLs were seen as part of the "bullying" culture.

Outcomes and impact

Overwhelmingly, participants in our study (SRLs and professionals) felt that SRLs were disadvantaged in a system premised on a model of legal representation. SRLs whose matter was finalised at the time of the interview were dissatisfied with the outcomes in terms of safety and fairness of property division. In many cases, outcomes were achieved via consent orders that SRLs described as being the product of institutional pressures or encouragement to settle, bullying, fear or the need to placate the alleged perpetrator. At the same time, a number of lawyers interviewed, and observed, actively adjusted their practices when a matter involved an SRL, including in cases involving family violence, in order to avoid being part of this pressured environment. Examples of best practice included giving SRLs time to consider proposals and obtain legal advice, providing explanations and keeping terms simple.

A clear dissonance emerged in our research between what judicial officers described as their practice when scrutinising consent orders and what SRLs (particularly women victims of violence) expressed about the consent orders reached in their matters. This may be a product of the non-representative sampling strategy for both judicial officers and SRLs. It may also reflect the lack of evidence available or presented on the documentation at the time that a consent order is proposed, where the extent to which "scrutiny" can take place is compromised when evidence establishing family violence or risk is wanting or limited. Our findings confirm the Family Law Council's call for further research into consent orders in matters involving family violence, including the "effectiveness" of the court rules around oral and/or written submissions in these matters (2016, pp. 11, 156–157).

SRLs also reported extensive personal, negative impacts on them and their children. Additionally, for victims of family violence this experience had profoundly negative consequences. For some victims of family violence who represented themselves, attaining safe orders was achieved over a lengthy process of continuing litigation.

Lack of finality of orders

For a number of SRLs in this study, obtaining a final order did not end their engagement with the family courts. Fourteen (14/35) of the SRLs interviewed were involved in ongoing proceedings, with six of these involved in multiple types of ongoing proceedings. For most SRLs the ongoing litigation concerned contravention of parenting orders, with nine of the SRLs facing or bringing contravention proceedings. However, they were also involved in enforcement of property orders (two SRLs), applications to change parenting orders (five SRLs) and appeals (six SRLs). For some SRLs it was only in these subsequent legal proceedings that they started to represent themselves, often because they were dissatisfied with the performance of their lawyers in the original proceedings.

Almost all the SRLs who were involved in these ongoing proceedings were women. Half of the women we interviewed (12/24) and less than one fifth of the men (2/11) were involved in ongoing proceedings. A number of women who faced ongoing proceedings characterised these continuing actions as a continuation of the abuse and harassment that they had

experienced in the relationship. Those women who brought additional proceedings often did so because they did not think that the original parenting order adequately addressed risk, or because there were continuing problems with neglect of children and instances of abuse.

Of the 243 matters that we observed as part of the intensive case study sample, 17 involved contravention proceedings. Significantly, the research found that the vast majority of these contravention proceedings had a background of family violence (14/17).

There are multiple reasons or motivations for ongoing litigation; some reasons are inextricably linked to the challenges faced by SRLs generally in terms of understanding the terms of the order made and the obligations imposed. Other reasons are closely connected to allegations about family violence and how well they were documented in the original proceedings, and whether the original order addressed risk. While some SRLs might be viewed as vexatious, the presence of family violence in these matters suggests that the lack of finality may be more complex than simple "vexatiousness".

Key thematic findings

The key findings of this research are underpinned by four themes that flow through the report and inform the proposed ways forward:

- *Variability*: variability existed at every level of this study. Not only were the SRLs we interviewed and observed markedly different in their capacities to self-represent, they also encountered a highly variable environment in which the professionals they encountered varied, as did each court, registry and jurisdiction, in terms of facilities and cultural practice. The discretionary nature of family law decision-making adds to this variability.
- *Complexity:* SRLs encountered complexity on multiple levels, in terms of the family law system itself: that is, the division of the two federal courts, the forms and documents to be completed, the procedural requirements and the "complexity of the legislation" (ALRC, 2018a, para 115). The fragmentation of legal responses to family violence adds to this complexity. The SRLs involved in our research frequently needed to navigate family law while engaging with other areas of law in response to family violence—sometimes simultaneously and sometimes also without legal representation.
- *Misalignments:* we found misalignments between SRLs' expectations of family law litigation and the way proceedings were conducted in family courts. SRLs expected their matters to be dealt with quickly, and that they would have an opportunity to speak freely, and they frequently encountered a mismatch between these expectations and the practice of the law.
- *Skilled lawyering:* there is a definite need to increase access to legal aid, duty lawyers and ongoing affordable legal representation, and at the same time there is a need to improve the quality of lawyering. Good-quality lawyering is critical to the course of the litigation, particularly in terms of marshalling and presenting evidence about family violence. A clear finding in our research is that a number of lawyers perform the tasks of family law litigation poorly. A number of the SRLs in our study had instructed lawyers at some stage, and for some SRLs one of the reasons that led them to self-represent was dissatisfaction with their lawyers' performance, particularly in the context of understanding and representing family violence.

Ways forward

The high number of family law cases involving family violence allegations and self-representation in our data indicates a pressing need to attend to safety issues and bring a "family violence lens" to the conduct of family law proceedings. Legislative and policy responses need to contend with SRLs' diversity and their complex needs, with the safety for victims of violence being paramount.

The extent of heterogeneity on multiple levels means that there are no simple solutions; rather, a complex and multi-faceted response is required. We present this in terms of "ways forward" to acknowledge the need to be flexible and adaptive to a changing environment. The family law landscape is one that is subject to regular review and is ever changing. We note forthcoming innovations by the FCA and FCCA, such as the Lighthouse Project (FCA, 2020), which may address some of the gaps in safety currently experienced by victims of family violence, whether represented or not. The

focus on risk assessment, triage and a dedicated list in the Lighthouse Project is very promising for victims of family violence. Many of the ways forward identified below repeat, or build on, recommendations made in past reports. In order to better address the needs and experiences of SRLs in family law proceedings involving family violence there are clear ways forward, namely:

- improving the resourcing of the family law system at all levels and in all aspects
- increasing access to lawyers and legal advice for SRLs, in particular through the expansion of FASS. In this area consideration needs to be given to how such services can better assist SRLs who continue to litigate
- increasing access to lawyers and legal services that can assist with preparation and drafting of documentation (a key need here is to ensure that such services have a good understanding of family violence and its relevance to parenting and property proceedings)
- providing enhanced, up-to-date and better information for SRLs in multiple formats (including face-to-face). There is a need for a centralised, authoritative website for SRLs on the family law system, perhaps maintained by National Legal Aid or the federal Attorney-General's Department
- delivering training and education for professionals on dealing with SRLs and family violence (particularly legal professionals, judicial officers and family consultants)
- reducing the complexity of family law matters, in terms of both legislation and process
- addressing possible system change, particularly the fragmentation of areas of law that respond to family violence, and including the need to consider more innovative, low-cost models of legal service provision
- providing holistic case management and referral pathways.

We identify the need for further research in the following areas:

- whether people from Aboriginal and Torres Strait Islander or culturally and linguistically diverse (CALD) backgrounds who represent themselves in matters involving family violence face additional hurdles
- the nature of self-representation in appellate matters
- SRL engagement with court staff
- whether consent orders reached when one or both parties are self-represented are less resilient or satisfactory (leading to subsequent proceedings such as contravention and enforcement)[6]
- the nature of judicial scrutiny of consent orders when both parties are SRLs and so may not make submissions to the court on matters such as risk in parenting matters and "just and equitable" outcomes in property matters
- the use of technology and design innovations to assist SRLs in completing documentation and to identify the legal issues in their matter.

6 We note that this may be considered within a current ANROWS research project: see https://www.anrows.org.au/project/compliance-with-and-enforcement-of-family-law-parenting-orders/ (accessed 29 September 2020)

CHAPTER 1

Introduction

Background

The extent of self-representation in family law proceedings and the challenges that self-represented litigants (SRLs) face in a system premised on a model of legal representation have long been a concern in Australia (e.g. Dewar et al., 2000; Family Court of Australia [FCA], 2003; Family Law Council [FLC], 2000; Hunter et al., 2002). These concerns have been shared in a number of overseas jurisdictions: the United States (Knowlton, 2016), Canada (Birnbaum et al., 2018; see also Macfarlane, 2013) and the United Kingdom (Trinder et al., 2014). The Australian family law system has also been increasingly challenged to respond to matters involving allegations of family violence (Australian Law Reform Commission [ALRC] & New South Wales Law Reform Commission [NSWLRC], 2010; Chisholm, 2009; FLC, 2009; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Kaspiew, Carson, Dunstan, Qu, et al., 2015; Laing, 2017; Moloney et al., 2007). The extent of self-representation and the prevalence of family violence allegations in family law matters suggest that both these issues are likely to occur in the same proceedings. Yet surprisingly, there has been little in-depth investigation to date into what happens for litigants or the court when these issues intersect. Our research investigates this intersection to inform improvements to policy and legal responses.

Existing research on this intersection has tended to concentrate on direct cross-examination of victims by perpetrators of family violence (and vice versa; Carson et al., 2018; Corbett & Summerfield, 2017; Kaye et al., 2017; Loughman, 2016). To some extent, this problem has been addressed by the passing of the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018* (Cth), which came into force on 10 September 2019.

Outside of cross-examination, we know little about the nature and impact of self-representation in family law matters that also involve family violence allegations. This is despite research indicating that being a victim of violence is one of the "most frequently occurring" indicators of "vulnerability" for SRLs (Trinder et al., 2014, pp. 26–27; see also Moorhead & Sefton, 2005). The nature of the harm, the relationship between parties and the imbalance of power inherent in a relationship characterised by violence all influence how effectively a victim of violence is able to self-represent. Research indicates that a perpetrator without legal representation can have additional opportunities to continue their abuse of the victim through the legal system, known as "legal systems abuse" (Dewar et al., 2000, pp. 18, 34; see also Douglas, 2018; Fitch & Easteal, 2017; Kaspiew et al., 2017).

Overview of the research

Our research addresses the knowledge gap around the nature and impact of self-representation in family law matters which also involve family violence allegations. It provides practice and policy direction to better support victims of family violence who represent themselves in family law matters, or who face a self-represented perpetrator. Drawing from interviews, court observations and examination of court files, we have analysed matters from the perspective of SRLs or those who face SRLs, as well as from the perspective of legal and other professionals involved, including judicial officers. This is the first Australian study to explore the issue in this multi-layered way.

Aims

Our research aims to:

- explore how parties in family law proceedings involving allegations of family violence experience court processes when one or both parties represent themselves
- explore the impact of self-representation on family law proceedings involving violence
- identify the resources and other measures used by SRLs in family law proceedings, and considers their strengths and weaknesses, including in cases involving family violence
- formulate appropriate legal and policy responses to better support victims of violence.

Context for the research

The impetuses for this research have been the large numbers of people representing themselves in Australian family law matters, ongoing concerns for the safety of victims of family

violence engaged in court proceedings, and increasing pressure in the environment in which litigation occurs. The presence of SRLs, in a family law system that assumes a model of legal representation, exposes and exacerbates existing systemic issues in the courts, such as delays, staff shortages and a lack of technological innovation (Feldstein, 2016).

Australian family law system and the courts

The division of legislative powers between the Commonwealth and state parliaments resulting from s 51 of the *Australian Constitution* means that many issues that might be thought of as family law are outside the domain of the Commonwealth Parliament and are covered by state and territory legislation. Marriage is central to the Commonwealth Parliament's powers in family law. Apart from Western Australia, the states and territories have referred to the Commonwealth some of their legislative powers over parenting disputes about children and financial disputes on de facto partner relationship breakdown. This means that divorce, and parenting and property disputes following relationship breakdown (regardless of the status of the relationship), are dealt with at the federal (national) level (except in Western Australia). Meanwhile, child protection, family violence protection orders, status of children and adoption are dealt with at the state or territory level. Western Australia chose to have its own Family Court and did not refer its powers to the Commonwealth regarding children and de facto financial disputes.

Three main courts are responsible for family law proceedings in Australia:

- Family Court of Australia (FCA): the FCA generally deals with "more complex matters" than the Federal Circuit Court of Australia , including case management of parenting cases involving serious allegations of physical abuse and/or child sexual abuse (Magellan matters), cases involving complex questions of law and international child abduction, parenting and financial cases involving multiple parties, and cases involving complex superannuation issues (FCA, 2019a, p. 10).
- Federal Circuit Court of Australia (FCCA): the FCCA has almost the same jurisdiction in family law as the FCA with the exception of adoption and applications for nullity (FCCA, 2019a). It deals with the vast bulk of family law matters and all divorce applications.[1] Until 2013, the FCCA was known as the Federal Magistrates Court.
- Family Court of Western Australia (FCWA): the FCWA operates in Western Australia only and "exercises jurisdiction in respect of all family law matters in that state, whether federal or state" (Parkinson, 2019, p. 204). Our research does not include the FCWA (see discussion of scope below), however, our findings may be relevant to proceedings and the experience of SRLs in that state. We generally use "family courts" in this report to refer to the FCA and the FCCA.[2]

While the various state and territory magistrates courts have some jurisdiction in family law matters (Parkinson, 2019), we do not focus on family law matters in these lower courts. Although the FCA and FCCA both handle matters arising from family breakdown, each operates under different rules and procedures, adding another layer of complexity. A working group of FCA and FCCA members is currently working to harmonise rules and procedures across both courts (FCA, 2019a).

A fragmented system

Australia's constitutional arrangements have created a complex network of courts and processes to be navigated by parties dealing with family violence and family law issues, including child protection (ALRC & NSWLRC, 2010; Hunter, 2011). The pursuit of legal responses to family breakdown in circumstances of violence requires navigating "an array of judicial settings (magistrates courts, district and county courts, supreme courts, tribunals, family courts, children's courts), as well as a variety of non-judicial dispute resolution processes" (Stubbs & Wangmann, 2015, p. 113). Kaspiew and colleagues (2017, p. 186) have noted that this fragmented system of service delivery is "open to exploitation by perpetrators of family violence".

1 In its most recent annual report, the FCCA noted that it handles 89 percent of all family law work filed at the federal level (FCCA, 2019a, p. 30). Just over half of this workload (52%) is made up of divorce applications.

2 Only two SRLs and one professional interviewed were from Western Australia. This is too small a sample to be able to generalise regarding the experience in that state.

Additionally, it has been observed that "legal problems tend to occur in clusters" and that dealing with problems, such as family violence, housing, children, money/debt and relationship breakdown, without considering their interdependency can exacerbate the problems (Hunter, 2011, p. 354; see also Coumarelos, 2019). Accordingly, SRLs may find themselves dealing simultaneously and sequentially with more than one court, in different jurisdictions with different rules and procedures, and with a critically different focus (Laing, 2013). This can be overwhelming and can prevent victims of violence from seeking help (Law Council of Australia, 2018).

A complex discretionary system

Much of the jurisdiction of family courts is discretionary. This makes it very difficult or impossible to predict outcomes, particularly for SRLs who do not have the benefit of legal training, practice and local knowledge. These difficulties are compounded by the complexity of the legislation in which judicial discretion is exercised. The law on parenting after separation has long been criticised as being overly complex and "practically impenetrable" (Riethmuller, 2015, p. 39; see also Rhoades et al., 2014), while the property division principles have been criticised as being overly discretionary and the principles on which discretion is exercised as unclear (Parkinson, 2016; Productivity Commission, 2014). The complexity of the *Family Law Act 1975* (Cth) is a "barrier to access to justice for unrepresented litigants" (ALRC, 2019, para 14.1).

Resourcing

The Australian Law Reform Commission (ALRC) report into the family law system, *Family Law for the Future*, noted that the system "has been deprived of resources to such an extent that it cannot deliver the quality of justice expected" (2019, para 1.8). The ALRC (2019) also noted that this lack of resources has been a matter of concern for at least 30 years. The Acting Chief Justice of the FCA was explicit about resource constraints in his submission to the ALRC review:

> The Family Court can only provide the service that it is set up to provide if it is adequately funded, and always has the requisite number of judges, registrars, family consultants and staff to enable it to carry out its core function. The Family Court has been chronically under-funded and under-resourced for many years. (19 November 2018, para 10)

Delays in the Australian family law system can be substantial (FCA, 2019a). The House of Representatives Standing Committee on Social Policy and Legal Affairs, in their Better Family Law Inquiry, reported that "delays of nine to 24 months between filing an application and commencement of trial" are occurring in some FCA and FCCA registries and delays can be even longer, particularly in regional and remote registries (2017, p. 56). A lack of resources for family courts and delays in cases can especially disadvantage people representing themselves, who may require additional court resources and assistance to help them to litigate their matters.

Extent of self-representation in family law proceedings

Self-representation has been relatively common in family law proceedings for many years (Dewar et al., 2000; FLC, 2000; Hunter et al., 2002). In 2017, the FCA noted that the percentage of SRLs at trial has "been steadily increasing" (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, p. 130).

The FCA annual report for the 2018–19 financial year states that one or both parties were self-represented at some point during the proceedings in 29 percent of finalised matters (whether by consent or trial; FCA, 2019a, p. 25). The extent of self-representation was much higher for those matters that were judicially determined: of matters that went to trial, 41 percent involved at least one SRL and in 22 percent, both parties represented themselves—a significant increase from 8 percent of cases in the previous year in which both parties represented themselves. In terms of appeals, the FCA reported that people were self-represented in 43 percent of appeal matters in 2018–19 (FCA, 2019a, p. 35). For the calendar year 2019, the FCWA reports that, at the point of filing, SRLs are involved in 48 percent of matters seeking a final parenting order, 27 percent of financial matters and 32 percent of matters involving both parenting and financial matters (FCWA, n.d., p. 4). The FCCA does not report on the

extent of self-representation in its annual reports. However, the ALRC report, relying on figures it received in 2019, showed similar rates of self-representation to those in the FCA (2019, p. 100).

In all three courts, self-representation is more likely to be a feature of parenting-only matters. The ALRC, relying on FCA private correspondence, reported that in the FCA for the year 2017–18, for finalised matters, SRLs were involved in 33 percent of parenting matters, 14 percent of the financial-only matters and only 8 percent of parenting and financial matters (2019, p. 98). In the FCCA in 2017–18, SRLs were involved in 37 percent of parenting matters only, 21 percent of financial matters only and 11 percent of financial and parenting matters (2019, p. 100). These figures increase substantially when the matters that went to trial are isolated. For the FCA, 41 percent of parenting trials, 32 percent of financial and parenting trials and 20 percent of trials concerned with financial matters only involved an SRL (2019, p. 99).

Access to legal aid and the cost of private representation

The increasing number of SRLs in family law cases is exacerbated by limited access to legal aid and the high cost of private representation. The federal government provides funding to state and territory legal aid commissions (LACs) to help people with limited financial resources access representation in federal matters, and the majority is allocated to family law matters (Productivity Commission, 2014). Australia's funding for legal assistance services, per capita, makes it "one of the lower funding nations" (Productivity Commission, 2014, p. 734). Access to legal aid for family matters "has become increasingly limited" and the areas of family violence and separation "have emerged as two areas of growing unmet legal need" (Mutha-Merennege, 2017, pp. 255–256; see also Productivity Commission, 2014, p. 855).

People unable to reach an agreement outside the court system and who do not qualify for legal aid may choose to hire a private lawyer. However, costs can be substantial. The fee for a private lawyer varies according to the location of the matter and its complexity. For many people, private legal representation is simply unaffordable. The remaining options for those who do not qualify for legal aid and cannot afford private representation are to discontinue, settle or represent themselves at court.

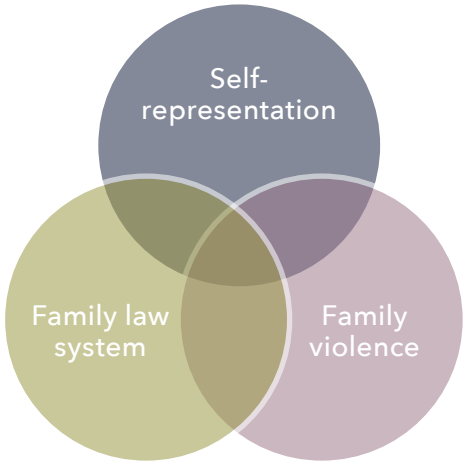
Extent of family violence in family law proceedings

Previous studies have established that the "core client base" of the family law system is people affected by family violence (ALRC, 2019; FLC, 2009; Moloney et al., 2007; State of Victoria, 2016). For example, the Australian Institute of Family Studies (AIFS) found that of judicially determined parenting matters, 65 percent raised allegations about family violence, and that in matters resulting in consent orders after proceedings commenced, 53 percent involved allegations of family violence (Kaspiew, Carson, Qu, et al., 2015, p. 45). Parents who used the court system to resolve parenting issues reported the presence of pre-separation emotional abuse in 85 percent of cases and pre-separation physical violence in 54 percent of cases (Kaspiew, Carson, Dunstan, Qu, et al., 2015, p. 16). In 2017, a parliamentary report suggested that 50 percent of matters before the FCA and 70 percent of matters before the FCCA involved allegations of family violence (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, p. 102). A sitting FCCA judge found that 76 percent of cases in his docket during a 14-week period involved allegations of family violence, leading him to suggest that the "average" FCCA case involves such allegations (Harman, 2017, p. 8).

There are no definitive data on the extent of cases involving both allegations of family violence and an SRL, but Harman's analysis found that in cases involving family violence, applicants were unrepresented at the first court date in 28.8 percent of cases, with respondents unrepresented in 38.6 percent of cases (2017, p. 17).

Against the backdrop of a fragmented legal system with limited resources, family law matters involving both SRLs and family violence pose substantial challenges. This report draws out these challenges and intersecting issues, and points to policy and legal responses that can improve safety for victims of family violence, support SRLs in proceedings and reduce their impact on the courts.

Figure 1.1: Intersections



Scope of the research

The research is exploratory and draws from interviews, court observations and examination of court files. We observed matters and examined court files across eight court sites of the FCA and the FCCA in three states on the Australian eastern seaboard. We analysed matters from the perspective of SRLs or those who face SRLs, as well as from the perspective of legal and other professionals involved, including judicial officers.

The focus on SRLs necessarily means that the research has concentrated on the practices and process of litigation. It is important, however, to recognise that the Australian family law system emphasises the resolution of matters outside of court.[3] Research has demonstrated that parties whose matters are resolved in court often have particularly complex needs and have lower levels of satisfaction with arrangements reached (Kaspiew, Carson, Qu, et al., 2015; Kaspiew, Carson, Dunstan, De Maio, et al., 2015). We wanted to investigate this cohort with a focus on the added complexity of self-representation. We are aware that some people may resolve their cases outside of court either privately or by Family Dispute Resolution (FDR), or simply "walk away", precisely because they do not have legal representation or because of the presence of family violence (Barlow et al., 2017; Batagol & Brown, 2009; Carson et al., 2013). This group may constitute a "hidden statistic" in the extent of self-representation in family law proceedings (Caruana, 2002, p. 38; see also FLC, 2000). The research does not specifically investigate SRLs' experiences of FDR or their particular pathway to litigation, although some of the interviewed SRLs did comment on these issues.

Our investigation concentrated on experiences of SRLs in cases involving allegations of family violence, particularly intimate partner violence. We viewed family law proceedings from their commencement—including whether an SRL obtains advice, the completion of documentation, navigation through the court process, presentation in the courtroom—to the final outcome and the post-order environment.

We recognise that for many families, family violence is not the only issue that influences family law decisions. Many families have complex needs that may intersect with family violence, such as concerns about child abuse, the use of alcohol and other drugs, parenting capacity or allegations of child neglect (FLC, 2016). It may be the case that these complex and intersecting challenges play a more determinative role than family violence in the outcome of those cases.

Recognising shared experiences

While our report focuses as much as possible on the intersection of self-representation and family violence, we recognise that many of the issues we identify are shared with SRLs generally and/or with victims of family violence who have legal representation. Any SRL may experience difficulties in navigating the forms and processes required to represent themselves in family law proceedings (see Chapter 6). Similarly, victims of family violence who have legal representation may still have concerns about their safety at court (Chapter 8), the making of unsafe orders (Chapter 12) or ongoing litigation (Chapter 13). Many issues with the family law system such as the complexity of the matter, the vagaries of a discretionary system and delays in seeing a family consultant or in obtaining a hearing date are issues for all litigants, whether represented or not, and whether family violence is an issue in the case or not. While we seek to focus on the specific issues that SRLs face in family law matters involving family violence, particularly as they exacerbate or expose broader concerns, we recognise the intersecting nature of these concerns (see Figure 1.1).

3 Family Dispute Resolution (FDR) is a pre-filing requirement for parenting matters except in certain circumstances including family violence: see *Family Law Act 1975* (Cth) s 60I. Attempts to resolve a dispute are required before the filing of property matters in the FCA: see *Family Law Rules 2004* (Cth) r 1.05 and sch 1.

Key concepts

We use a number of concepts and terms in this report, and these are defined and explained below.

Legal representation

Having legal representation means a person has a lawyer acting for them "on the record". The lawyer has carriage of the case for as long as the client instructs them. The lawyer will file a Notice of Intention to Withdraw as Lawyer when they formally withdraw from the case and the client ceases to instruct them. In the absence of legal representation, an SRL may still obtain legal advice when preparing and presenting their case, or be assisted by a duty solicitor who may also appear in court for them. In these circumstances, the lawyers are not on the record as acting for the person.

Self-represented litigant

Various terms describe people who conduct legal proceedings without legal representation. SRLs may also be referred to as unrepresented litigants, litigants in person (LIPs), party litigants or pro se litigants. The FCCA and the FCWA use the term "self-represented litigant" in their most recent annual reports (FCCA, 2019a, p. vi; FCWA, n.d., p. 4); the FCA uses "unrepresented litigants" in its annual reports (FCA, 2019a, p. 25). While acknowledging these variances, we use the term SRL, as it is the term most frequently used in Australia. Some of the literature draws a distinction between "unrepresented" litigants (those ineligible for legal aid and who cannot afford a private lawyer) and "self-represented" litigants (those who choose to self-represent; Richardson et al., 2012). Our definition of an SRL encompasses all litigants who, regardless of the reason, represent themselves at some time during their legal proceedings. This includes people without representation for the entirety of the proceedings (full self-representation) as well as those with legal representation at some stages who represent themselves at others (partial self-representation).

Family violence

Our report concentrates on violence perpetrated between intimate partners. The primary focus of our report is how that experience impacts a person representing themselves or facing an SRL, whether as an alleged victim or an alleged perpetrator. There are a range of terms used to describe violence in intimate relationships (see MacDonald, 1998). In this report we use the term "family violence" as this is the language used in the Australian family law system. Family violence is defined broadly in s 4AB(1) of the *Family Law Act 1975* (Cth) as "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful".

While our primary focus is on intimate relationships, it is important to note that the definition of family violence is wider than this and applies to violence perpetrated against other family members. Section 4AB(2) of the *Family Law Act 1975* (Cth) adds a non-exhaustive list of behaviours that "may constitute family violence", including physical violence, sexual violence, stalking, "repeated derogatory taunts", property damage or destruction, harm to pets, financial abuse, and isolation from family and friends. Although we focus on violence between intimate partners, we also discuss, where it is raised in the data, child abuse, which is defined under s 4 of the Act to mean the physical or sexual assault of the child; causing the child to be involved in sexual activity with that person or another person; "causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence"; or "serious neglect of the child". Section 4AB(4) of the Act also makes it clear that being exposed to family violence is not limited to the child directly witnessing violence, but includes the child overhearing threats, hearing an assault take place, comforting the victim, assisting in cleaning or tidying up after a violent event, or being present when emergency services attend.

Allegations of family violence

Our study was not able to assess the veracity of allegations made about family violence. We use the term "allegation" to recognise that such claims have not yet been legally proven, rather than to question whether family violence took place. In many family law matters, there may be no finding as to whether the family violence occurred; rather, the court will make an assessment of risk when determining parenting orders.

Use of the term "victim"

In this report we use the term victim (rather than "survivor" or "victim/survivor"). The reason for this is that many, if not most, of the victims who engaged with this research were still experiencing violence, and were often recently separated from their former partners. In addition, these victims were still engaging with the family law system (and often other areas of law) to obtain a response to that violence to ensure their safety and that of their children (see Rathus et al., 2019).

Gendered language

We use gendered language when discussing family violence, generally referring to victims as women and perpetrators as men, recognising that women comprise the majority of victims of family violence and men the majority of perpetrators. The gendered nature of family violence is reflected in data on civil protection orders, criminal offences, homicides and hospital admissions, and in general population surveys (see discussion of statistics from different data sources in State of Victoria, 2016; for homicide data see DVDRT [NSW], 2020; for general population data see ABS, 2016). Gendered language does not discount the possibility that men may be victims and women may be perpetrators of family violence in heterosexual or same-sex relationships—they can be and are. Indeed, we interviewed a small number of men who identified themselves as victims and their former female partners as perpetrators of family violence.

Structure of this report

- Chapter 1 (the current chapter) is the introduction and provides context for and background to the research project.
- Chapter 2, the literature review, sets out what is already known about SRLs in family law proceedings involving family violence through past research and reports.
- Chapter 3 outlines the methodology, theoretical framework and limitations of this research project.
- Chapter 4 provides an overview of the SRLs who participated in this study, whether through interviews or court observations: who they are, their reasons for self-representation and their experiences of family violence.
- Chapter 5 explores the resources and sources of information that SRLs in our study relied on to obtain advice in preparation and conduct of their family law matter.
- Chapter 6 focuses on the difficulties SRLs face in completing the key documentation required to initiate, or respond to, family law proceedings. A key concern in this chapter is how well SRLs who have experienced family violence are able to evidence that in their documentation.
- Chapter 7 discusses the services available at court to assist SRLs on the day(s) their matter is listed.
- Chapter 8 details the safety measures available to victims of family violence when attending family law courts and the concerns that victims who are also SRLs raised about their safety when attending court.
- Chapter 9 details SRL experiences in the courtroom, identifying the misalignment of SRLs' and other actors' expectations. The chapter also considers accommodations for SRLs made by other actors.
- Chapter 10 focuses on personal cross-examination in family law proceedings, particularly looking at difficulties when cases involve family violence. The chapter provides some insight into the early operation of the Family Violence and Cross-Examination of Parties Scheme.
- Chapter 11 explores negotiations that take place after proceedings have commenced. SRLs do not always know that negotiations are an expected part of the family law process. The chapter explores the difficulties and pressures to negotiate faced by SRLs.
- Chapter 12 considers outcomes achieved by SRLs. It also considers the impacts of self-representation on the SRLs and their families.
- Chapter 13 considers ongoing litigation for SRLs, particularly for matters involving family violence. The chapter considers contravention proceedings, enforcement proceedings, applications to vary final parenting orders and appeals.
- Chapter 14, the conclusion, sets out the themes and key findings that emerged from the research and suggests ways forward that are flexible and adaptive to an ever-changing environment.

CHAPTER 2

A review of the literature

This chapter reviews what is known generally about SRLs and considers research on family law decision-making in the context of violence in order to inform the overall understanding of self-representation in family law matters involving allegations of family violence. It draws, in part, on general research on SRLs across a wide range of proceedings (e.g. see Macfarlane 2013; Richardson et al., 2012; Richardson et al., 2018), and focuses in detail on the studies that concentrate on SRLs' involvement in family law proceedings in Australia and recent studies from other common law countries (Dewar et al., 2000; Hunter et al., 2002; Knowlton, 2016; Trinder et al., 2014). While some of these studies have touched on matters involving family violence, none have explored this intersection in any detail. This chapter draws on more recent work focusing on specific aspects of proceedings involving SRLs and family violence, such as direct cross examination (e.g. Carson et al., 2018; Loughman, 2016), and other research that has explored the experience of victims of family violence in the family law system more generally (e.g. Hunter et al., 2020; Kaspiew et al., 2017; Laing, 2016; Roberts et al., 2015).

Methodology

The literature review was undertaken between May 2018 and December 2019.

Using a wide variety of search terms for SRLs (including SRL, litigant-in-person, party litigant, pro se litigant, unrepresented litigant) independently and in combination with terms for family violence (including family violence, intimate partner violence, domestic abuse, domestic violence, violence against women) and family law, key electronic databases were accessed to locate academic literature of relevance, including Lexis Advance Pacific, Informit, Google Scholar, HeinOnline, Trove, Westlaw AU and Westlaw UK. We generally focused on literature published since 2000 (when the FCA-commissioned research on litigants in person was published; see Dewar et al., 2000), to December 2019, although a few earlier studies were included as well as some key reports and research published in early 2020.

We also searched Australian websites of key organisations and services including the FCA, the FCCA and the FCWA ; the various LACs; AIFS; community legal centres (CLCs); law reform commissions; legal professional bodies; and judicial organisations. Relevant reports were also identified through general internet searches. The bibliographies and footnotes of various pieces of literature were "mined" in order to identify other relevant research material, and key researchers working in the area were identified (and their publications lists searched). Finally, a number of general online searches were conducted following references to particular programs or innovations in the literature. The literature search was ended when "thematic saturation" was achieved, at which point the research team was confident it had identified the main issues pertaining to SRLs in family law proceedings involving allegations of family violence.

What is known about self-represented litigants?

The literature clearly indicates that people who represent themselves in family law proceedings are a diverse group (Dewar et al., 2000; Trinder et al., 2014). Despite differences in aims and methods employed in the various studies which make it difficult to generalise about SRLs in family law proceedings, there are some shared findings:

- SRLs are more likely to be male (Carson et al., 2018; Dewar et al., 2000; Hunter et al., 2002; Moorhead & Sefton, 2005; Smith et al., 2009; Trinder et al., 2014).
- While some SRLs are self-represented for the entire proceedings, research studies have documented a sizeable proportion who are partially represented (Hunter et al., 2002; Moorhead & Sefton, 2005; Trinder et al., 2014).
- SRLs are more likely to be respondents than applicants at first instance (Hunter et al., 2002; Macfarlane, 2013; Moorhead & Sefton, 2005; Smith et al., 2009).
- SRLs tend to be of low income status and are more likely to be reliant on welfare than fully represented litigants (Hunter et al., 2002; Knowlton et al., 2016; Macfarlane, 2013; Richardson et al., 2018; Scarrow et al., 2017; Smith et al., 2009).
- Matters involving SRLs tend to have only one party without representation rather than both (Hunter et al., 2002).
- SRLs are more likely to be involved in parenting rather than property proceedings (with the exception of divorce proceedings; ALRC, 2019; Carson et al., 2018; Dewar

et al., 2000; FCWA, n.d.; Hunter et al., 2002; Hunter et al., 2003; Moorhead & Sefton, 2005; Smith et al., 2009). Some studies found a dominance of SRLs in enforcement or breach of parenting matters (FLC, 2007; Rhoades et al., 1999).

Research from the United Kingdom highlights additional complexities for SRLs who demonstrate a level of disadvantage, marginalisation or "vulnerability". Moorhead and Sefton (2005) identified key indicators of SRL vulnerability as past victimisation; depression; alcoholism; being a young, single parent; past or current drug use; history of imprisonment; mental illness; living with children in temporary accommodation; illiteracy; terminal illness; and involvement with social services. Significantly, Trinder and colleagues (2014, p. 27) found that being a victim of family violence was "the most frequently occurring single form of vulnerability". Disability may also affect a person's capacity to represent themselves (Ahmed et al., 2017). There are added challenges for SRLs with limited or no English: they may require interpreters, leave "crucial information" out of their court forms and rely on non-legal services for assistance with forms (Judicial Council on Cultural Diversity [JCCD], 2016a, p. 39; see also JCCD, 2016b).

Research suggests Aboriginal and Torres Strait Islander peoples' engagement in family law litigation is lower than might be expected, due to well-documented barriers to access to legal systems (JCCD, 2016b; Titterton, 2017).[4] Ralph (2011, p. 22) found that fewer Aboriginal and Torres Strait Islander participants (46%) represented themselves in Family Court matters compared to non-Aboriginal and Torres Strait Islander participants (64%), suggesting that this is a product of lower socio-economic status and availability of legal representation through specialist Indigenous legal services, and that non-Indigenous people may be "more litigious". Additionally, Aboriginal and Torres Strait Islander women are over-represented as victims of family violence (Stubbs & Wangmann, 2017), which may act as a barrier to their self-representation. Those Aboriginal and Torres Strait Islander peoples who have low levels of literacy would also have heightened difficulty in understanding court forms, orders and judgments (JCCD, 2016b).

Reasons for self-representation

Many studies have asked SRLs why they represent themselves (Birnbaum & Bala, 2012; Knowlton et al., 2016; Macfarlane, 2013; McKeever et al., 2018; Moorhead & Sefton, 2005; Toy-Cronin, 2015; Trinder et al., 2014). Reasons are "multiple and overlapping", change over time, and are primarily financial (Toy-Cronin, 2016, p. 742). Many litigants cannot afford private legal representation, while any legal aid provided is insufficient (Birnbaum & Bala, 2012; Dewar et al., 2000; Hunter, 2002; Hunter et al., 2002; Macfarlane, 2013; Matruglio, 1999; Parkinson & Knox, 2018; Trinder et al., 2014). Litigants may also have taken "an economic decision not to spend money on litigation" (FLC, 2000, para 2.10; see also Dewar et al., 2000; Knowlton et al., 2016).

Limited funds might be coupled with other reasons for self-representation (Turner, 2018). Some litigants believe they can best explain the merits of their case (FLC, 2000; McKeever et al., 2018; Toy-Cronin, 2015) or want to retain control over their case (Knowlton et al., 2016). Others believe their case is simple and does not require a lawyer (Williams, 2011). Some litigants distrust lawyers (FLC, 2000; Knowlton et al., 2016; Macfarlane, 2013), or the legal system generally (Birnbaum & Bala, 2012; Macfarlane, 2013; Moorhead & Sefton, 2005; Toy-Cronin, 2015; Trinder et al., 2014), or may be unable to get a lawyer to accept their instructions (Dewar et al., 2000; McKeever et al., 2018). Others may avoid "lawyering up" to promote an amicable outcome (Knowlton et al., 2016, p. 8).

Research also indicates that some litigants self-represent to intimidate, control and harass their former partner (Douglas, 2018; Kaspiew et al., 2017). In the United Kingdom, Thiara and Gill (2012) observed that men who used child contact proceedings to control their former partners often prolonged the proceedings as much as possible (see also Coy et al., 2012). This type of "systems abuse" may occur across multiple proceedings and could influence family law proceedings. Victorian research found vexatious applications for protection orders could enable men to "gain the upper hand" in family law proceedings (Reeves, 2020, p. 103).

4 Attempts to address these barriers include the introduction of Indigenous lists in certain Family Court registries in which litigants are supported by Aboriginal community workers and can be referred to culturally relevant services as required (National Legal Aid submission to the ALRC Issues Paper No. 48, 21 June 2018, p. 29).

There are little data about the differences in men's and women's motivations to self-represent. One exception is a Canadian survey of lawyers, revealing a belief that women are more likely to self-represent for financial reasons while men are more likely do so from a desire to deal directly with their partner or because of confidence in their ability to self-represent (Birnbaum et al., 2018).

The self-represented litigant in court

Research exploring how SRLs experience court proceedings has revealed that their ability to negotiate family law varies substantially, "from a small minority with competence to advocate on their own behalf" (Barnett, 2017, p. 233) to those unable to communicate at all. Trinder and colleagues (2014, p. 26) described the latter as "vanquished" and noted that they included SRLs "who simply cried in court … or who were so paralysed by fear, overwhelmed or intimidated that they were incapable of advocating for themselves and their children". These SRLs often faced other challenges (e.g. mental health issues, illiteracy and language difficulties; Trinder et al., 2014). This study found that even highly educated SRLs struggled with legal concepts and procedures (Trinder et al., 2014).

Seeking advice and assistance

Many SRLs seek advice from multiple sources, although they vary as to how "proactive, reactive or passive" they are (Richardson et al., 2018, p. 63). Some, particularly those with language barriers, face difficulties in accessing and understanding these resources (Thiara & Gill, 2012). Almost one third of SRLs interviewed in an early Australian study did not know where to obtain relevant information (Dewar et al., 2000, p. 43).

Many, if not most, SRLs rely on court-affiliated and independent websites to prepare their case and to find information on court practice and procedure. In one US study, over two thirds of participants found online resources helpful (Knowlton et al., 2016, p. 26). However, drawbacks to these resources include limited availability of information, limited reliability, the digital divide, difficulties finding information, and SRLs being overwhelmed by the amount of information available (Crowe et al., 2019; Laster & Kornhauser, 2017; Lee & Tkacukova, 2017; Richardson et al., 2018). Moreover, while websites can provide information, it is not tailored to the litigant's specific case and does not offer the support provided by interactive assistance (Crowe et al., 2019; Hunter et al., 2003; Maclean, 2015).

Many SRLs seek advice from court or registry staff (Dewar et al., 2000; Macfarlane, 2013; McKeever et al., 2018; Trinder et al., 2014). Most SRLs are positive about court staff, describing them as dedicated and attentive (Macfarlane, 2013; McKeever et al., 2018). However, some SRLs are unrealistic about the assistance that court staff can provide and have difficulty distinguishing between legal advice (which cannot be provided) and legal information (e.g. McKeever et al., 2018; Trinder et al., 2014)—a distinction that is also difficult for court staff (Dewar et al., 2000; Trinder et al., 2014). Overseas studies have found that court staff have some sympathy for SRLs (Macfarlane, 2013; Ministry of Justice New Zealand, 2015; Moorhead & Sefton, 2005), although staff ability and willingness to assist varies (Trinder et al., 2014). Research from the United Kingdom has found that reduced resources for registry counters lessened the capacity of court staff to assist SRLs (McKeever et al., 2018; Trinder et al., 2014). Other studies show court staff may bear the brunt of emotional outbursts by SRLs, with staff feeling "vulnerable" to SRLs' unpredictability, and "obsessive" litigants cause staff severe strain (McKeever et al., 2018, pp. 113–114).

Some SRLs obtain legal advice before and/or during legal proceedings from a private legal practitioner, CLC, legal aid lawyer or duty lawyer (Macfarlane, 2013). This assistance may be non-representational, such as "unbundled" services or "outside litigation" services (Castles, 2016; Russell, 2019; Scott & Sage, 2001). One early study found 18 out of 49 SRLs obtained legal advice before a hearing (Dewar et al., 2000, p. 43).

Duty lawyer services are a critical resource for SRLs (Coumarelos et al., 2012). Evaluations of legal aid and duty lawyer services have been positive (Mussared, 2016; Victoria Legal Aid [VLA], 2015a). A recent evaluation of the Family Advocacy and Support Service (FASS), an integrated duty lawyer and family violence support service available at some Australian Family Court sites, found that it provided SRLs with a greater range of legal supports than other duty lawyer

services, primarily due to its greater discretion, "including with management of matters across jurisdictions, and resourcing of additional duty lawyer services" in cases of conflict of interest (Inside Policy, 2018, p. 6). Critically, FASS duty lawyers may advise victims on how to collect and present evidence of family violence (i.e., "the story of coercion and control") in ways acceptable to the court (Inside Policy, 2018, p. 32).

Some SRLs are supported by a "McKenzie Friend" (from *McKenzie v McKenzie* [1971] P 33), a person providing non-legal support such as sitting at the bar table with the SRL and taking notes. While this assistance is not common in Australia (Hunter et al., 2002; Productivity Commission, 2014), the use of McKenzie Friends has increased in the United Kingdom, including those who charge fees (Citizens Advice, 2016; Legal Services Consumer Panel, 2014; Lord Chief Justice, 2016; Trinder et al., 2014). Research from Northern Ireland found that while many SRLs appreciated the support of McKenzie Friends, their ability and role in court procedures varied (McKeever et al., 2018). Furthermore, some studies have expressed concern about a distinctive group of McKenzie Friends who primarily assist fathers in family law cases and may be connected to men's rights groups (Legal Services Consumer Panel, 2014; Trinder et al., 2014).

Preparing and presenting a case

Research suggests that most SRLs lack the legal knowledge and skills to effectively litigate a family law case (Richardson et al., 2018; Smith et al., 2009; Toy-Cronin, 2015; Trinder et al., 2014), particularly understanding and complying with the procedural technicalities (Barnett, 2017; Judicial College, 2018). SRLs struggle to initiate proceedings because they may not be able to identify the correct form to initiate proceedings or know how to complete and file the forms and identify "salient points" in their case (Judicial College, 2018; Ministry of Justice New Zealand, 2015; Trinder et al., 2014; Weihipeihana et al., 2017). This may be exacerbated in Australia where the FCCA and FCA have different rules and forms,[5] and where cases may be transferred between the courts (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

Studies have found that SRLs might be unaware that the bulk of family law work "is conducted before and between hearings rather than in the courtroom" (Trinder et al., 2014, p. 35) and may experience difficulty with the vast array of paperwork involved (see McKeever et al., 2018; Trinder et al., 2014).

Nature and quality of the evidence of violence presented

Allegations of family violence are only considered in family law proceedings where there is sufficient probative evidence. While the quality of evidence substantiating violence allegations is a problem generally (Moloney et al., 2007), SRLs in particular may struggle to provide evidence of violence. The Family Law Council (FLC) noted that SRL cases were "significantly less likely" to present the evidence necessary for determining matters involving child safety (e.g. child protection notifications) than cases with fully or partially represented litigants (2016, p. 22). This may be because SRLs omit to file and serve witness statements as required (Judicial College, 2018), make insufficient "use of documentary or photographic evidence" (Judicial College, 2018, p. 18), have insufficient funds to instruct experts, do not realise they have to give evidence themselves or ask the court to make inquiries (Judicial College, 2018; see also House of Commons Justice Committee, 2015). SRLs struggle with the legal concept of relevance and frequently try to introduce evidence relevant to their own "perceptions of fairness but irrelevant to the legal adjudication of the dispute" (Moorhead, 2007, p. 409). Finally, SRLs may omit salient information in the forms designed to alert the court to family violence or child abuse allegations, or fail to disclose child abuse and family violence (Kaspiew, Carson, Coulson, et al., 2015).

Subpoenas

In family law proceedings, subpoenas can be directed to third parties, such as medical personnel, law enforcement bodies or child protection authorities, to bring evidence of family violence before the court. While the *Family Law Act 1975* (Cth) s 69ZW provides that family courts can subpoena government agencies to produce certain documents, research indicates that this rarely happens (Chisholm, 2009). The courts rely on the parties to issue subpoenas, but SRLs rarely do

5 At the time of writing, the FCA and the FCCA were working to harmonise the rules for the two courts (FCA, 2019a).

so (Chisholm, 2009). The subpoena process has been found to be "expensive, complicated and difficult to navigate for a victim of family violence, especially if they are unrepresented" (FLC, 2016, p. 56; see also Harman, 2017).

Advocacy in court

Verbal advocacy is a key requirement of adversarial proceedings. Research indicates that an SRL's capacity to advocate depends on whether proceedings are straightforward, procedural or more substantive (Trinder et al., 2014). In straightforward family law matters, being self-represented may pose few problems. However, in "highly emotional and stressful" matters, having legal representation can offer some "distance", reducing hostility and stress and aiding the acceptance of a final decision (ALRC, 1997, para 11.15).

Some SRLs tend to make statements in court instead of asking questions or fail to appreciate the need for witnesses to support submissions (Judicial Institute for Scotland, 2014). Some struggle to understand the "fragmentary nature and nonlinearity" of the legal narrative (a concept entirely familiar to lawyers) and the way in which "satellite narratives" (elicited from legal forms and witness statements) form multi-perspective "master narratives" of a case (Tkacukova, 2016, pp. 442–443). Some SRLs lose confidence in their ability to present their case after being corrected by the judicial officer, and may give up trying to provide evidence (Ministry of Justice New Zealand, 2015). Others may freeze in court and be unable to support their case (Citizens Advice, 2016).

In the context of family violence, some women express fears about a perpetrator's demeanour in court. For, example, one woman interviewed in the United Kingdom by Coy and colleagues (2015) stated that when her former partner represented himself, it "gave him a platform for a performance of charm and disavowal of violence" (p. 64). However, Barnett (2017, p. 239) has noted that lawyers may help to "erase the unappealing aspects of perpetrators", which would otherwise be more apparent when a perpetrator represents themselves.

Cross-examination

Cross-examination is difficult for SRLs to undertake (McKeever et al., 2018; Trinder et al., 2014). It requires an unfamiliar question and answer pattern (Tkacukova, 2016) and personal cross-examination can be especially challenging where parties have been intimate partners and may have to cooperatively parent in the future (FLC, 2000).

It can be difficult for SRLs to cross-examine expert witnesses. It may even be re-traumatising, as in an SRL cross-examining a psychologist on a report describing the SRL's psychological assessment in a non-therapeutic context (Craig, 2018). Cross-examination of a Family Report writer may also be "extremely challenging" for an SRL (Rathus et al., 2019, p. 27). The Family Report is expert evidence that informs the court "about what post-separation arrangements will best serve the interests of children, including the issue of, and appropriate responses to, family violence" (Field et al., 2016, p. 212). Any challenge to the Family Report is by way of cross-examination of the Family Report writer. This is of concern, particularly where an SRL is undertaking that cross-examination, given research suggests that not all Family Report writers understand the dynamics of family violence (Jeffries et al., 2016; State of Victoria, 2016; Shea Hart, 2011).

Personal-cross examination in family violence cases

Allowing alleged perpetrators of family violence to directly cross-examine their victims has long been recognised as a problem in Australia (Carson et al., 2018; FCA, 2003; FLC, 2000; Women's Legal Services Australia [WLSA], 2017b). There is general consensus that victims are fearful of being cross-examined by their former partners (Barnett, 2017; Chisholm, 2009; FLC, 2016; House of Commons Justice Committee, 2015; Kaye et al., 2017; Loughman, 2016), a fear heightened if the court has not already acted on women's safety concerns (Coy et al., 2015). Abusive men have been shown to use cross-examination as an opportunity to further harass and intimidate their former partners (Coy et al., 2012; Loughman, 2016; Trinder et al., 2014; WLSA, 2017a). It is also difficult for victims of family violence to effectively cross-examine their alleged perpetrator. Coy and colleagues (2012, p. 40) noted that many women did not "ask sufficiently probing questions or challenge responses", affecting the quality of evidence of violence. Fear of personal cross-examination by or of a violent former partner may influence a woman's decision to settle or abandon proceedings (Loughman, 2016).

Judges can employ several strategies to ameliorate the difficulties associated with personal cross-examination (FLC, 2016; Kaye et al., 2017). These include facilitating the cross-examination themselves, relaying the questions to the witness on behalf of the SRL, permitting a third party to conduct the cross-examination on behalf of the SRL, and using screens and video link technology (Corbett & Summerfield, 2017). Implementation of these strategies is variable and "dependent on the individual judge" (VLA, 2017, p. 19; see also Carson et al., 2018; Corbett & Summerfield, 2017).

In Australia, amendments to the *Family Law Act 1975* (Cth) which came into force on 10 September 2019 prohibit personal cross-examination of a victim by an alleged perpetrator, and direct cross-examination of an alleged perpetrator by a victim, in certain triggering circumstances (s 102NA). The amendments also require the court to consider protections for the alleged victim when the triggering circumstances for a mandatory prohibition order do not apply and the court does not use its discretion to prohibit cross-examination (s 102NB).

Safety at court

Separation is one of the most dangerous times for women. "Actual or impending separation [was] a characteristic" of 47 percent of intimate partner homicides in New South Wales between 10 March 2008 and 30 June 2016 (Domestic Violence Death Review Team, 2020, p. xvi). Thus, many women fear for their safety at court, particularly if their partner has a history of violence in public (Coy et al., 2012; Neate, 2015). Research from the United Kingdom has found that many women have been abused by their ex-partners in the Family Court (All-Party Parliamentary Group on Domestic Violence, 2016; Neate, 2015).

Safety at court involves being able to arrive and leave court safely, access to safe rooms, availability of security staff and other assistance, and use of alternative means of giving evidence. Family courts do not always provide the same protections for vulnerable witnesses as criminal or state courts (Thiara & Harrison, 2016; see also All-Party Parliamentary Group on Domestic Violence, 2016; Kaye, 2019b; Rogers & Woodhouse, 2016; Women's Aid, 2016). Safety concerns extend beyond the court building, with some victims reporting that they have been followed home after court (Coy et al., 2012; Hunt, 2010), an issue that may be exacerbated in rural and regional areas (George & Harris, 2014).

Family court staff can play an important role in victim safety. In the United Kingdom, some victims have reported that court staff did not notice or respond to acts of intimidation by their abuser (Coy et al., 2012, p. 42).

Even when safety measures do exist, they are not always easily accessed by SRLs. Women's Legal Service Queensland (WLSQ) has noted that safety measures work well when the victim has representation, as the lawyer can assist with making arrangements. Without such representation SRL victims will often be waiting "in the same general area outside the courtroom as the perpetrator" because they are unaware of safety measures, and if it is the first return date it "is unlikely that the court would even be aware of the issue of family violence in matters where clients are self-represented" (WLSQ as cited in Chisholm, 2009, p. 158).

Family violence and family law proceedings

Successive reports have documented concerns about the extent to which the Australian family law system adequately addresses and responds to family violence (e.g. ALRC & NSWLRC, 2010; ALRC, 2018b; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009; FLC, 2009, 2016; Kaspiew et al., 2009; Laing, 2016; Moloney et al., 2007). Research with women victims of violence characterises the experiences of women who have experienced family violence negotiating the family law system as secondary victimisation; the process of engagement with the Australian family law system exacerbates and compounds the traumatic impacts of family violence (Laing, 2016) and causes considerable distress (Roberts et al., 2015; see also Francia et al., 2019).

Research has long suggested that some family law professionals fail to recognise and/or understand the complex and controlling aspects of family violence and its effect on victims (Bagshaw et al., 2010). Calls for improved training and education of lawyers, judges and family consultants have been made in

numerous reports (ALRC, 2019; ALRC & NSWLRC, 2010; Bagshaw et al., 2010; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009; FLC, 2009, 2016).

Since the mid-1990s, there have been successive developments that have sought to improve the way in which family violence is responded to in the family law system. These include the recognition of the significance of family violence to parenting and property in case law,[6] the formal recognition of family violence in the *Family Law Act 1975* (Cth),[7] and policy and practice initiatives to better assist families when they engage with the family law system (e.g. the development of *Family Violence Best Practice Principles;* FCA & FCCA, 2016).[8] Despite these changes, concern about the adequacy of the family law system's response to family violence has remained.

Parenting matters

If allegations of family violence are disbelieved or minimised in parenting proceedings, mothers may be transformed from victims of abuse into perpetrators of abuse—implacably hostile mothers or parental alienators (Rathus, 2020; Rhoades, 2002). Studies report mothers experiencing pressure from courts, their own lawyer, their ex-partner's lawyer, the ICL and their ex-partner to agree to contact arrangements and shared parenting with their violent ex-partner (Laing, 2010; see also Barlow et al., 2017; Hunter et al., 2018; Kaye et al., 2003).

Successive legislative amendments to the *Family Law Act 1975* (Cth) have sought to address both family violence and the continuing role of both parents in the lives of children. Research has consistently found that these are in tension and that maintaining contact has tended to trump safety concerns. For example, in a study after the 1995 amendment, Rhoades and colleagues found that in the period after that amendment there was a "trend away from suspending contact at interim hearings as a way of ensuring the child's safety" and greater use of contact centres to facilitate changeover (2001, p. 6). These two tensions were further reinforced by substantial amendments made to pt VII of the *Family Law Act 1975* (Cth)—the part that deals with parenting orders—in 2006. The new framework introduced a presumption of equal shared parental responsibility (ESPR; i.e. joint decision-making by parents about major decisions such as health and education), which was linked to shared parenting time. The Act provides, per ss 61DA(2) and 61DA(4), that the presumption does not apply in cases of family violence and/or child abuse and is rebuttable where it is not in the best interests of the child. The framework also introduced two key concepts: the best interests of a child require maintaining a "meaningful relationship" with both parents after parental separation, and children should be kept safe from harm.

The overall legislative framework produced was extremely complex (Rathus, 2007; Rhoades et al., 2014; Riethmuller, 2015). Post-amendment evaluations and analyses highlighted the need for reform to support better handling of family violence and child safety (Bagshaw et al., 2010; Chisholm, 2009; De Maio et al., 2014; Kaspiew et al., 2009). In particular, Kaspiew and colleagues (2009) found that families in which there had been a history of family violence and/or the ongoing presence of safety concerns were slightly more likely than families without these concerns to have shared time parenting arrangements.

Further amendments were made in 2011 to prioritise the need to protect children from harm, but the framework continues to generate a widespread misunderstanding that the legislation introduces a presumption of, or even mandates, equal shared time (ALRC, 2019). Evaluations continue to suggest that violence and abuse is sometimes poorly dealt with and that victims of family violence do not feel heard or protected (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Kaspiew et al., 2017).

6 For parenting see *In the Marriage of JG and BG* (1994) 18 Fam LR 255. Before this time, allegations of family violence had largely been seen as raising issues of fault, and hence not permissible, under the *Family Law Act 1975* (Cth). For property see *Kennon & Kennon* (1997) 22 Fam LR 1.

7 For example see the *Family Law Reform Act 1995* (Cth), *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

8 We note that the FCA and FCCA continue to work to address this issue and a new project, the aforementioned Lighthouse Project, specifically aims to respond to these repeated concerns. This project is currently being developed and is hoped to commence by the end of 2020 (see http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/media-releases/2020/mr280820). It is discussed in more detail in Chapter 14.

Property proceedings

Economic abuse may mean that some victims of family violence have limited financial resources to pursue a property settlement (Women's Legal Services Victoria [WLSV], 2018). They may struggle to achieve a fair division of property in the family courts and may suffer long-term financial disadvantage as a consequence (Kaspiew & Qu, 2016; Kaspiew et al., 2017). Unlike the constant legislative reform in relation to family violence and parenting proceedings, there has been little change in the legislation in relation to property division, and taking account of violence in property disputes depends on a "vague" judicial test (known as the Kennon[9] test or principle) which has the "unfortunate effect of operating to exclude the consideration of violence in a great many cases" (Easteal et al., 2018, p. 213). The ALRC (2019, para 1.39) noted that because there is no legislative recognition of the relevance of violence to property division, SRLs are unlikely to be aware of the possibility of making a legal argument in relation to the relevance of family violence.

Unsafe and less successful outcomes for self-represented litigant victims

Although the impact on substantive outcomes is not easy to assess (Toy-Cronin, 2015), a number of judicial officers in one study thought that SRLs were "seriously disadvantaged" in this regard (Dewar et al., 2000, p. 50), while almost half thought the other party was disadvantaged (p. 55). In family law, it is seen as "inappropriate to talk of 'winners' and 'losers'" (Bevan, 2013, p. 45). However, lack of legal support may mean less "optimal outcomes for the parties and their children" (Maclean & Eekelaar, 2012, p. 231).

SRLs who are victims of family violence may settle for or achieve unsafe or less successful outcomes than if they had been legally represented (Chisholm, 2009). Research from the United States (Kernic, 2015) compared parenting outcomes achieved in cases involving family violence when the party was unrepresented to those achieved in cases with legal aid or private representation. This study found that legal representation made a significant difference in terms of protective mechanisms being included in orders (including more orders for no contact with the perpetrator parent), where the lawyers had expertise in family violence. Poorer outcomes for SRLs can be linked to the difficulties in preparing and presenting their case and the extra pressures to settle which might be placed on victims who do not have the protection of legal representation. In circumstances where an SRL does not present sufficient probative evidence of violence, courts may be more likely to make unsafe or inappropriate parenting orders (Coy et al., 2012; Kaspiew, 2005; Moloney et al., 2007; Trinder et al., 2014). Such orders may lead to further violence against the SRL, as child contact has been highlighted by numerous studies as a key site for continued abuse (Kaye et al., 2003; Radford & Hester, 2006; Thiara & Gill, 2012; Women's Aid, 2016).

While Australian judicial officers have noted that they have a limited supervisory role in the context of a system that encourages agreements, they may seek further information in relation to consent orders in matters involving family violence, or where the parties are SRLs or litigants are from a culturally and linguistically diverse (CALD) background (Kaspiew et al., 2009). However, a Canadian survey of lawyers found that only 44 percent believed that SRL victims of family violence received "adequate protection" when their case settled (Birnbaum et al., 2012, p. 89; see also Hunter & Barnett, 2013).

Australian studies have shown that victims of family violence achieve less satisfactory financial outcomes in family law matters, and that outcomes were worse when women did not have legal advice (Fehlberg & Millward, 2014; Sheehan & Smyth, 2000; Qu et al., 2014). Obtaining a property settlement in family law is difficult without representation and legal aid for property matters is limited (Howieson et al., 2018; WLSV, 2018). These difficulties may be compounded where victims give precedence to safety "over the right to a fair share of the matrimonial property" (Sheehan & Smyth, 2000, p. 16).

9 *Kennon & Kennon* (1997) 22 Fam LR 1.

The impact of self-representation on litigants and their children

Self-representation can have a negative emotional and psychological impact on litigants, causing stress, anxiety, panic, frustration, depression and bewilderment (Citizens Advice, 2016; Dewar et al., 2000; Hunter et al., 2002; Judicial College, 2018; Knowlton et al., 2016; Lee & Tkacukova, 2017; Lin et al., 2015; Macfarlane, 2013; McKeever et al., 2018; Ministry of Justice New Zealand, 2015; Toy-Cronin, 2015; Trinder et al., 2014). A study of SRLs in Canada noted that most began their case with "a reasonable sense of confidence", only to become disillusioned, frustrated and in some instances overwhelmed within a short period (Macfarlane, 2013, p. 9).

McKeever and colleagues (2018) found that SRLs scored poorly for mental health and wellbeing, despite often appearing to cope well during the proceedings. Furthermore, SRLs involved in family proceedings had greater problems with their mental health than other SRLs. Family violence can increase the emotional impact of family law proceedings, with victims potentially feeling re-victimised and re-traumatised (All-Party Parliamentary Group on Domestic Violence, 2016; Coy et al., 2015).

Few studies on self-representation have considered impacts on children as they are difficult to quantify (Caruana, 2002), meaning children may be hidden victims of self-representation (Birnbaum et al., 2018). Adverse effects on children and parenting capacity could be expected if self-representation prolongs proceedings, increases parental conflict or negatively impacts a litigant's wellbeing.

The impact of self-represented litigants on the legal system

The impact of SRLs on the functioning of the legal system is a major theme in the literature.

Duration

While the family law system is oriented towards settlement, imposing duties on lawyers to encourage negotiation and settlement,[10] the research indicates that SRLs appear to be less likely to settle matters (ALRC, 2019; Dewar et al., 2000; Hunter et al., 2002). This reluctance to settle may be due to SRLs' lack of understanding about the court's emphasis on negotiation and agreement; unrealistic expectations of the merits of their case (Birnbaum & Bala, 2012; House of Commons Justice Committee, 2015); inability to maintain a "professional distance from the issues" (Trinder, 2015, p. 232); or inability to negotiate or refine contested issues (Emmerson & Platt, 2014 as cited in Barnett, 2017). A mutual lack of trust between SRLs and legal representatives may also require all communication to be on the court record rather than in out-of-court negotiations.

It has been argued that SRLs' inability to identify, refine and articulate legal issues and arguments might lengthen family law proceedings by increasing the need for case management, preliminary listings and adjournments (Dewar et al., 2000; House of Commons Justice Committee, 2015; Trinder et al., 2014). SRLs' non-attendance at court might increase the likelihood of adjournments and subsequent re-listing of cases (Maclean & Eekelaar, 2012). Hearings involving SRLs may also take longer if judges need to explain matters of law and procedure, and SRLs need to undertake their own legal research and draft orders that ordinarily would be prepared by legal representatives. Conversely, the duration of any hearing involving an SRL may be shorter if they do not lead evidence or comprehensively cross-examine witnesses (House of Commons Justice Committee, 2015). There are little quantitative data on whether the presence of SRLs results in longer proceedings (Trinder, 2015).

Some studies have shown that matters involving SRLs are "more likely to collapse", as SRLs terminate proceedings due to litigation fatigue (Trinder et al., 2014, p. 58), or parties give up or decide to "lump it" (Hunter, 2014, p. 662). Kaganas (2017, pp. 182–183) has suggested that the "more quiescent mothers" and "less dominant and aggressive" fathers "give up", while fathers posing threats or problems for mothers and children "will persist in litigating".

10 See *Family Law Act 1975* (Cth) s 63DA and *Family Law Rules 2004* (Cth) r 1.05.

Multiple applications and violent litigants

Concerns have been raised about the few SRLs described as "serial", (Hunter et al., 2002), "obsessive or vexatious" litigants (Moorhead & Sefton, 2005, p. 80; see also Paxton, 2003; Trinder et al., 2014). Though small in number, they have "a disproportionate impact on the court system" (Trinder et al., 2014, p. 32). Campbell and Macfarlane (2019, p. 14) suggest that behaviour labelled vexatious, or what they term "vexatiousness lite", may be "the result of unintentional frustrations or obstacles SRLs are faced with as they navigate the courts".

Concerns have been expressed that the court may fail to recognise "how abusive men use multiple applications as a tool to harass and control their ex-partners, and to maintain instability in the lives of their children" (Coy et al., 2012, p. 76). Douglas (2018) found a variety of ways that abusive men pursued endless litigation: making repeated applications, requests for adjournments and appeals against orders; firing lawyers; and complaining about lawyers and judges. If a victim represents herself, she may not know how to apply for orders restraining further applications (Trinder et al., 2014).

Finality of proceedings and appeals

There are limited data as to whether SRLs are likely to be involved in ongoing proceedings compared to those with legal representation. Early research by Rhoades and colleagues (1999) found that almost all of the contravention proceedings they observed involved an SRL and that many of those applications lacked merit or were designed to harass the other parent. More recently, Cashmore and Parkinson (2011, p. 186) suggested that many "repeat players" are likely to be SRLs. However, in the United Kingdom, Trinder and colleagues (2014, p. 11) found that "serial litigants" and those who bring "unmeritorious applications" were just as likely to be legally represented as to be unrepresented.

When compliance issues arise, the court may encourage or order parents to attend Parenting Orders Programs (POPs) run by external providers. An evaluation of enhanced POPs set up for families with high and entrenched conflict including family violence showed positive gains overall for families (Clancy et al., 2017). The ALRC (2019) has noted that non-compliance may arise from not understanding orders. It recommended that parties meet with a Family Consultant to assist with understanding final parenting orders after a contested hearing.

Levels of self-representation are higher in appeals than in first instance matters (FCA, 2019a). This is despite the procedural complexity of the appeal process (Hunter et al., 2002).

Cost

The evidence is mixed regarding whether reduced legal aid and increased self-representation saves resources (Richardson et al., 2018). Some literature suggests that increases in self-representation represent a false economy due to demands that SRLs place on court time and resources (Dewar et al., 2000, p. 80; VLA, 2015a, p. 42). Potential associated costs include additional work borne by the opposing party, the judge, court staff and lawyers to assist SRLs (Feldstein, 2016; see also FCA, 2018). Delays and adjournments caused by self-representation almost certainly increase the other side's legal costs, as well as general court costs (Toy-Cronin, 2015). In the United Kingdom, a reduction in civil legal aid spending saw "a potentially significant rise in costs" generated by increased numbers of SRLs (Kaganas, 2017; National Audit Office, 2014). Some authors suggest that this simply moved the financial burden "from one publicly funded agency … to another" (Richardson & Speed, 2019, p. 136).

Fairness

SRLs may be denied the right to a fair trial (Barnett, 2017; Choudhry & Herring, 2017) and may also deny the other party's right to a fair trial (Barnett, 2017; Dewar et al., 2000). It "is consistent with a lawyer's duty to their own client to ensure that the self-represented party receives procedurally fair treatment" (FLC & Family Law Section of the Law Council of Australia [FLS], 2017, p. 15). The Full Court of the FCA has issued guidelines to assist judicial officers in their exercise of discretion in cases involving SRLs (see *Re F: Litigants in Person Guidelines* [2001] FLC 93-072). However, by assisting SRLs who may be vexatious litigants, "the Family Court may be unwittingly drawn into assisting an abusive partner to harass" their former partner (Paxton, 2003, p. 12), which may also lead to victims consenting to unsafe orders to avoid further proceedings (Kaspiew et al., 2009).

The impact of self-represented litigants on other key legal players

Empirical studies have highlighted that SRLs affect other key players in the legal system, including judicial officers, registrars, lawyers for the other party, ICLs and other court staff (see environmental scan by Richardson et al., 2018).

Judicial officers

Family law proceedings in Australia are adversarial, making the role of judges "generally passive [and] non-intervening" (Moorhead, 2007, p. 406). However, the rise in self-representation has led some judges to report that their independent arbiter role is

> being undermined as they struggle to assist parties who have little or no understanding of the legal issues involved in their cases, the process and procedures of litigation and unrealistic expectations as to outcomes. (Family Justice Council, 2014 as cited in Barnett, 2017, p. 235; see also Dewar et al., 2000; Moorhead, 2007)

SRLs can make it difficult for judges to "provide all parties with a fair trial" (Richardson et al., 2018, p. 41; see also Dewar et al., 2000). Judicial attempts to assist SRLs can be perceived as bias (Bevan, 2013; FLC, 2000; Thiara & Harrison, 2016). Judges may need to become multi-skilled, such as by mediating or performing some social work tasks (Langan, 2005).

Research has highlighted how managing a case where parties may be distressed and without legal support is hard work for judicial officers (Maclean & Eekelaar, 2012) and that judicial officers vary in the level of assistance they provide to SRLs (Caruana, 2002; FLC, 2000). Moorhead (2007) found that some judges read all the material before a case and tried to steer SRLs towards legally relevant matters (which could have led to undesirable pre-determination of relevant matters); others altered the order of presentation, permitting the represented party to submit or cross-examine first (which could have led some SRLs to conclude that the judicial officer is biased). In the United Kingdom, judicial officers have disagreed on the extent to which judges should intervene to assist direct cross-examination (Barnett, 2017; Mant, 2017; Moorhead, 2007; Moorhead & Sefton, 2005; Zuckerman, 2016).

Judges' attitudes to SRLs may also influence judicial adjustments to better accommodate SRLs (Lewis, 2007; Moorhead, 2007). Judicial officers may experience "frustration, stress, annoyance and irritation" with SRLs (Dewar et al., 2000, pp. 48, 51). Henschen (2018, p. 40) noted that in the United States, judges may "chafe" at the delay caused by SRLs, and adjudicating a case involving SRLs may "sap a judge's energy". When judges hold negative attitudes towards SRLs, they may subtly discourage them, for example by "restricting access to counsels' benches in the court and not allowing costs awards in [their] favour" (Toy-Cronin, 2015, p. 235).

Lawyers

Lawyer for the other party

Cases involving SRLs can be difficult and frustrating for lawyers acting for the other party (FLC & FLS, 2017; Macfarlane, 2013; McKeever et al., 2018). Specific concerns for lawyers include:

- performing additional work, such as informing the SRL about practice and procedure, preparing exhibit books or statements of fact, or drafting court orders and agreements (Bevan, 2013)
- being asked for legal advice by SRLs when acting for the other party, placing them in "a precarious ethical position" (Birnbaum et al., 2012, p. 79; see also Henschen, 2018)
- having SRLs misinterpret or misunderstand legal information offered by lawyers acting for the other party. An SRL might blame the opposing lawyer for their confusion (Feldstein, 2016)
- experiencing negative communications with SRLs. Lawyers in Northern Ireland reported limited training in dealing with SRLs and feeling "exposed and vulnerable" when dealing with difficult or abusive SRLs (McKeever et al., 2018, p. 79), while some SRLs have reported negative experiences with lawyers for the other party, including feeling "bullied" (Lee & Tkacukova, 2017, pp. 14–15).

In Australia, the FLC and the Family Law Section of the Law Council of Australia (2017, p. 15) have observed that there is no "clear answer" to address all issues when acting against SRLs. Lawyers' professional associations have produced guidelines to assist lawyers dealing with SRLs (Law Society of New South Wales, 2016; New South Wales Bar Association, 2011).

Independent children's lawyers (ICLs)

In Australia, a Family Court can, pursuant to s 68L of the *Family Law Act 1975* (Cth), appoint an ICL to represent the interests of a child who is the subject of a family law dispute. In 2012–13, ICLs were appointed in around a quarter of all family law cases involving children (Kaspiew, Moloney, et al., 2015, p. 19). Around one third of ICLs often or always had cases where both litigants were SRLs (Kaspiew et al., 2014, p. 27). In Harman's research, the rate of appointment of ICLs in the FCCA was a little over one third in cases involving allegations of family violence; this increased to almost 90 percent when there were allegations of family violence and one or both parties was self-represented (2017, p. 18; in the case of *Re K*,[11] the Full Court suggested some guidelines to assist courts in deciding whether to order separate representation for children).

The extent to which child representatives are "mitigating the effects" of self-representation is unclear (Birnbaum et al., 2018, p. 129; see also McKeever et al., 2018). In Australia, Kaspiew and colleagues (2014, p. 56) found that an ICL will be primarily responsible for gathering evidence in cases involving SRLs and that they can "ameliorate the imbalance" in these cases. This may place added burdens on ICLs (Kaspiew et al., 2014; see also Kaye, 2019a).

Reforms and strategies to assist and accommodate self-represented litigants

McKeever and colleagues (2018) have noted the multiple and varied support needs of SRLs and the limited solutions to support them or ameliorate their impact on the courts. Australia has employed diverse measures to assist SRLs (Richardson et al., 2018). Three common suggestions emerge from the literature: get SRLs lawyers, make them lawyers and change the system (Faulks, 2013; McKeever et al., 2018).

Get them lawyers

Limited legal aid budgets and pro bono lawyers (Richardson et al., 2018) have led to proposals of other means of providing legal assistance to SRLs. "Self-representation services" include LAC or CLC initiatives that provide duty lawyers or other advice services (Forell & Cain, 2012). Other suggestions to allow paralegals or student family law clinics to assist SRLs (Macfarlane, 2013; VLA, 2015a, 2015b) have been argued against, noting that narrowing disputed issues in a conflict and facilitating negotiation requires substantial training and knowledge (Feldstein, 2016). Services such as the Queensland Public Interest Law Clearing House (McCowie, 2014) were considered by Victoria Legal Aid to be inappropriate for family law matters as "genuine discrete task assistance is difficult" for such matters (VLA, 2015b, p. 29). Some research has cautioned generally against relying on summary advice (Macfarlane, 2013; Trinder, 2015).

Much of the literature has focused on unbundling legal services (Castles, 2016; Feldstein, 2016; Mansfield, 2015; McKeever et al., 2018). This would, for example, enable SRLs to obtain advice about their prospects of success and drafting assistance from a lawyer before filing and continuing proceedings themselves (Feldstein, 2016). However, the later a lawyer assists an SRL, the "more onerous and time consuming" the task, as well as the "riskier" for the lawyer in not having "access to all relevant information" and not being "across the full context of the dispute" (VLA, 2015a, p. 43; see also FLC & FLS, 2017).

Make them lawyers

The literature recommends providing SRLs with information about how to conduct a case, for example through self-help kits, videos (Greiner et al., 2017; VLA, 2015a), mobile telephone applications (National Legal Aid, 21 June 2018), factsheets (Domestic Violence NSW, 2015), workshops, or even text messages (Clark, 2019). McKeever and colleagues (2018) provided SRLs with access to a procedural advice clinic as part of their research project. Clinic advice centred on expected behaviour in court, managing emotions and note-taking. SRLs gave mostly positive feedback on the clinic but stated that the advice provided was "too little" or "too late" and such advice clinics are not a substitute for legal representation (McKeever et al., 2018, p. 182). Trinder (2015, p. 238) noted that "improved information will doubtless meet the needs of some, but … will not address all the needs of all litigants".

11 *Re K* (1994) 17 Fam LR 537.

Change the system

The literature recognises the extent to which the current legal system prevents the effective participation of SRLs. Many jurisdictions have considered whether the adversarial family law system needs to be adjusted to accommodate SRLs (e.g. Judiciary of England and Wales, 2013).

McKeever and colleagues (2018, p. 204) considered building a new system, or adjusting or "tweaking" the current legal system so that it "at least appears to be more friendly" for SRLs. Trinder and colleagues (2014) proposed changes to court procedures to incorporate inquisitorial features. Others have suggested providing extra guidelines to lawyers, judges or court staff on dealing with and responding to SRLs (Macfarlane 2013; Toy-Cronin, 2015); redesigning court forms and other documents to improve their user-friendliness (Trinder et al., 2014); providing increased online access to advice and courts (Barlow & Ewing, 2018; Ho, 2014; Toy-Cronin et al., 2018); and creating a role for an SRL "support worker" in court registries (McKeever et al., 2018, pp. 226–9).

Conclusion

There is a large body of literature examining the challenges that SRLs face and the impact they have on other key players. There is also extensive research on how victims of family violence experience family law proceedings and on outcomes in family law matters that involve allegations of violence. However, there is very limited literature on SRLs in family law proceedings involving allegations of family violence. The exception was research on personal cross-examination by SRLs. Australian legislative changes that aim to prevent such cross-examination has provided our research with a unique opportunity to examine the situation before and after the *Family Law Act 1975* (Cth) amendments came into effect.

The finding that SRLs are not homogeneous formed the foundation for our research. Any solutions or recommendations for SRLs in family law proceedings involving allegations of family violence must recognise this diversity. Importantly, the needs of the broader SRL population may be obscured by a currently unknown, but probably small, group of SRLs regarded as "obsessive", "difficult" (Genn, 2013, p. 433) and engaged in "high conflict behaviour" (Sourdin & Wallace, 2014, p. 62).

CHAPTER 3

Methodology

Our research project explored self-representation by one or both parties in Australian family law proceedings involving allegations of family violence. We analysed this issue from multiple perspectives: parties who represent themselves (for the whole or part of proceedings), parties who face SRLs, and professionals who engage with SRLs in this context, including judicial officers, legal practitioners and other professionals who support SRLs.

The research was guided by the following questions:

1. How do parties in family law proceedings involving allegations of family violence experience legal processes and courtroom procedures when one or both self-represent?
2. What resources or measures are used by SRLs in family law proceedings and what additional supports are needed?
3. How does the absence of legal representation impact both family law proceedings involving allegations of family violence and the professionals associated with the case (judicial officers, legal practitioners and other professionals)?
4. How might policy and legal responses be developed in order to improve participants' experiences, the conduct of matters, case outcomes, and safety more generally in family law processes that involve family violence and SRLs?

A socio-legal framework

We adopted a socio-legal approach (Banakar & Travers, 2005; Cownie & Bradney, 2013; Halliday & Schmidt, 2009) which focused our research on family law processes *in action*, and the social, gendered and political factors that influenced the operation of these laws and processes *in practice*. We questioned how laws and processes work in this context, and the concomitant issues and challenges that arise in such proceedings, from the perspectives of those directly involved. We addressed this issue from a combination of theoretical perspectives. We drew on feminist research practices (see generally Gelsthorpe, 1990; Maguire, 1987; Reinharz, 1992; on researching violence, see Westmarland & Bows, 2018) to:

- explore victims' experiences of violence (including legal systems abuse) and victims' actions in legal proceedings in response to that violence, when representing themselves (see Douglas, 2018; Stubbs & Wangmann, 2015) or facing an SRL
- explore women's and men's stories of violence and self-representation, to understand the actual workings and impact of legal rules and legal institutions on those involved or directly affected (Lewis et al., 2003; McGarry & Walklate, 2015).

We also drew on critical victimological approaches to examine the impact of violence on women and children when they participate in non-criminal law proceedings (Mawby & Walklate, 1994; Spencer & Walklate, 2018) and to understand if secondary victimisation, as occurs in criminal justice, is replicated in different ways in the family law system (Herman, 2003; Laing, 2017).

Research design

The study was a qualitative exploratory study that used a multimethod approach (Bryman, 2004) to enable a comparison of findings for "convergence or divergence" (Guest et al., 2012, p. 85). Our research comprised two key components: the general interview sample and the intensive case study.

General interview sample

The general interview sample comprised semi-structured interviews with two broad cohorts:

1. SRLs: 35 people who represented themselves or faced a person representing themselves in family law proceedings involving allegations about family violence. The data collected were particularly relevant to research questions 1, 2 and 4.
2. Professionals: 68 professionals who engaged with SRLs involved in family law proceedings, including 22 judicial officers (judges and registrars of the FCA and FCCA), 34 legal professionals and 12 other professionals, such as support workers. The data collected were particularly relevant to research questions 1, 3 and 4.

These data allowed us to gain insight into the direct experiences and perspectives of SRLs and professionals in family law matters involving family violence and also informed our interpretation and analysis of court observations and analysis of court files.

Interviews with self-represented litigants (SRLs or people who faced SRLs)

Recruitment and profile of self-represented litigants

Recruitment of SRLs was achieved through distribution of information and flyers about the research to women's legal services in New South Wales, Queensland and Victoria; services in New South Wales assisting women; Victoria Legal Aid; Legal Aid NSW; Relationships Australia; and No To Violence. Flyers were displayed in some court registries and posts uploaded to a dedicated Facebook page and Twitter.

We interviewed 35 people (24 women and 11 men) between December 2018 and December 2019. Participants were aged from 33 to 66, with an average age of 44.37; all said their first language was English, and 26 were born in Australia. At interview, most participants lived in metropolitan areas across five states or territories: Victoria (n=15, including two in a regional area and another who lived in a rural area at the time of litigation but was living in a metropolitan centre at the time of the interview); New South Wales (n= 9, including one in a regional area and another who lived in a regional area at the time of litigation but was living in a metropolitan centre at the time of the interview); Queensland (n=8); Western Australia (n=2); and the Australian Capital Territory (n=1). Thirty-four participants were self-represented at some stage in their proceedings; a small number of them also faced an SRL. One person became self-represented post-interview. Not all matters involved intimate partner violence (IPV); two participants' matters involved allegations about their former partners' abuse/neglect of their children only. Most matters concerned parenting and financial orders (n=20), a smaller number involved parenting matters only (12), and fewer still involved financial matters only (3).

Self-represented litigant interview data collection and analysis

We conducted 30 interviews by telephone and five face-to-face. Interviews ranged from 60 minutes to 3 hours, with most lasting around 90 minutes. Interviews were audio-recorded with participants' consent in all but one case, a telephone interview where detailed notes were taken. Interviews were transcribed verbatim and copies made available to the participants (23) who requested them and checked for inaccuracies or clarifications. Once a participant checked the transcript or chose not to do so, the transcript was de-identified and each participant was assigned a pseudonym. All data were handled in accordance with the Australian Code for Responsible Conduct of Research and the University of Technology Sydney (UTS) Vice-Chancellor's Directive on Research Data Management; hard copy material was stored in a locked filing cabinet at UTS and electronic material was stored on a password-protected computer.

Interviews explored participants' experiences of family law processes inside and outside the courtroom. The interview schedule (see Appendix A) was arranged around themes and topics that emerged from the literature. It covered demographics, background to the relationship and experience of family violence, an overview of the family law matter(s) involved, SRLs' experience of being or facing an SRL, advice to SRLs and recommendations for reform. Several open-ended questions allowed participants to raise new issues about their experiences (Bryman, 2008; May, 1997). The semi-structured format permitted comparative analysis (Bryman, 2008), while the in-depth nature of interviews generated rich, nuanced data (McGarry & Walklate, 2015; Reinharz, 1992). Most interviews were conducted by two research team members to enhance data collection and support debriefing (Beale et al., 2004; Booth, 2011). We followed up with participants post-interview if they requested this and/or had appeared distressed at interview (Lee, 1993).

Interviews with key professionals

Recruitment and profile of key professionals

We interviewed 68 key professionals between June 2019 and January 2020. To recruit judicial officers, the Chief Justice of the FCA and the Chief Judge of the FCCA sent information about the research to all judicial officers, advising that permission was granted for their participation. A research flyer was distributed at the judicial plenary in August 2019. Purposive sampling was then used to recruit additional judicial officers, as well as to recruit legal and other professionals.

Of the 22 judicial officers interviewed, 12 were men and 10 were women. While this cohort was not intended to be representative, all participants were currently sitting in the FCA or FCCA with direct experience of SRLs in matters

involving family violence: FCCA (n=13), FCA (n= 6) and FCA registrars (n=3). They were located across eight registries in three states, in metropolitan and regional areas. Experience as a judicial officer ranged from 3 to 20 years, with a mean of 11.05 years. We interviewed 34 legal professionals (27 women and seven men) across Victoria, New South Wales, the Australian Capital Territory and Queensland. Their experience ranged from 2.5 to 39 years, with a mean of 14.1 years. All participants worked mostly, if not exclusively, in family law, and the majority worked for LACs or CLCs:

- 13 worked in different LACs, with many at some stage working as duty lawyers (e.g. as part of FASS or as a duty lawyer);
- nine worked in CLCs, with some acting as duty solicitors
- five worked in private practice (including one barrister)
- one worked in an Aboriginal legal service (ALS)
- six worked in other legal services, such as non-profit legal practices, university legal clinics, or innovative legal services that provide certain services.

We interviewed 12 other professionals (nine women and three men) across Victoria, Queensland, New South Wales and Western Australia. Most were drawn from FASS or other court support services; two were from specific interest groups promoting issues related to fathers' rights and parental alienation.

Key professional interview data collection and analysis

Interviews with judicial officers, legal and other professionals were a mixture of face-to-face and by telephone. Interviews were conducted individually, with three exceptions: one interview involved two solicitors from the same legal service, one involved two court support workers from the same service, and another involved two judges from the same registry. Interviews were audio-recorded with the consent of the participants in all but four cases, where detailed notes were taken. Interviews were transcribed verbatim and the transcripts provided to 21 legal and other professionals and six judicial officers who requested them, to check for accuracy and provide any comment or clarification. Once a participant checked the transcript or chose not to do so, the transcript was de-identified and each participant was assigned a code (J for judges, R for registrars, L for lawyers and O for other professionals). Storage of data was as described above.

Interviews explored participants' perspectives and experiences of SRLs in family law proceedings involving allegations of family violence, and their impacts on the participant's role and on proceedings. The interview schedule for professionals was semi-structured with several open-ended questions. Although separate interview schedules were developed for each cohort to account for their different roles, the schedules covered similar topics such as work experience, perspectives on SRLs, dealing with or assisting SRLs, the impact of SRLs on proceedings, training and education, and recommendations for reform (the legal professional interview schedule provides an example; see Appendix B). Most interviews were conducted by one research team member.

Analysis and coding of interviews

NVivo 12 software was used for a qualitative analysis of the transcribed interviews. The first three interviews in each category were closely analysed to develop codes, firstly by research team members independently, and then collaboratively to enhance reliability (Guest et al., 2012). All interviews were coded, with new codes added as they emerged from data in subsequent interviews. Data were then analysed against themes identified both in the literature review and as emerged from the data (Charmaz, 2006; Kennedy & Thornberg, 2018). An iterative approach was adopted, and we transitioned between data collection and analysis during the 12 months of fieldwork to enable comparison and confirmation of data, and to identify emerging themes.

Intensive case study

We modelled the intensive case study on research conducted in the United Kingdom (Trinder et al., 2014) and Australia (Dewar et al., 2000). The intensive case study had three components:

- observation of court events
- semi-structured interviews with people involved in the case—the self-represented party or parties, and/or the legal representative representing the other party (if applicable), and/or the ICL
- analysis of the relevant court file.

We drew from these three data sources via multiple methods to allow for a "detailed and multilayered" analysis of each case (Trinder et al., 2014, p. 138) and triangulation (Bryman, 2008). This component gathered data relevant to all research questions and enabled comparison (convergence or divergence) with the perspectives and experiences of SRLs and professionals captured in the general interview data (Kennedy & Thornberg, 2018).

Court site and case selection

The intensive case study was conducted between April 2019 and December 2019 at eight court sites across three states on the Australian eastern seaboard. One to two weeks were spent at each site. Site selection was guided by our advisory committee. The sites selected reflect a mix of metropolitan and regional centres, including circuit courts (i.e. where judges travel from a nearby centre and courts sit monthly or quarterly). The range of sites allowed for comparison of court resources, such as legal advice and representation, as well as social and safety supports for SRLs.

We liaised directly with the court manager of each registry to determine the best weeks for fieldwork and to organise access to the court site and court files. Court managers informed court staff and judicial officers of our research at their registry. Whether we could observe matters in a courtroom was ultimately a decision for each individual judicial officer and only one refused the team access. At each court site we received a copy of the court list; where possible this indicated representation status and, in some instances, whether there was a safety plan in place (however, given the fluid nature of proceedings, this was not necessarily up-to-date). Where possible we targeted matters where one or both parties were SRLs in cases involving allegations of family violence. However, it was generally difficult to know if family violence was involved from the list alone, and as a result we sought to observe all matters involving SRLs, as well as fully represented matters for comparison. Where there was more than one court at a site, we targeted those cases with SRLs.

A prominent notice about the research project was placed on the door to each court room in which observations were being conducted and, if the court agreed, this notice was also placed on the bar table (Appendix C).[12] This notice enabled parties to advise the research team if they did not want to be included in the study.

To preserve confidentiality, we refer to the states as State A, State B and State C; the courts by a letter; and the case by a number. For example, an observation in State A at Court B of case number 14 is referred to as A-B-14.

Data collection

For each observed case, it was not possible to gather data from all three sources. While we were able to conduct observations of court events and reviews of court files in the majority of cases (of 243 matters observed involving SRLs, 180 court files were examined), only 12 cases also included an interview (in two cases more than one person was interviewed, and as a result there are a total of 14 interviews; see discussion below). For reasons detailed below, only 10 cases have a complete triangulation.

Observation of court proceedings

We observed a total of 512 court events.[13] Of these court events, 253 involved one or both parties representing themselves (see Figures 3.1 and 3.2), relating to 243 individual matters. We classified court events as follows: brief matter (mention, call-over or directions hearing); interim hearing (parties made submissions and judgement was handed down or deferred); final hearing (a trial); and undefended hearing. Of the 253 court events observed, 83.4 percent were brief matters (211/253); 5.1 percent were interim hearings (13/253); 6.3 percent were final contested hearings (16/253); 3.6 percent were undefended matters (9/253); and 1.6 percent (4/253) were not known. We observed multiple court events for eight of the 243 matters:

- A-A-2: 1 day call-over, 1 day final hearing
- A-B-22: 2 days final hearing
- B-C-13: 2 days mention
- C-B-39: 3 days trial
- C-A-20: 1 day call-over, 2 days final hearing

12 Following consultation with judicial officers at one court site, we amended the notice required by the UTS Ethics Committee to clarify that the research was completely independent of the FCA and FCCA.

13 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 or final hearings. If a matter spread over more than one day, one court event counted for each day.

Figure 3.1: Total number of matters observed for self-represented litigants and represented parties

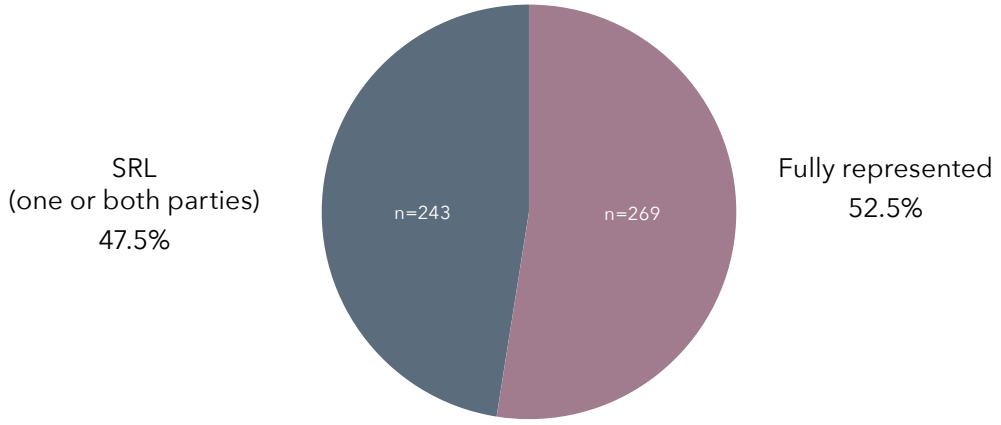
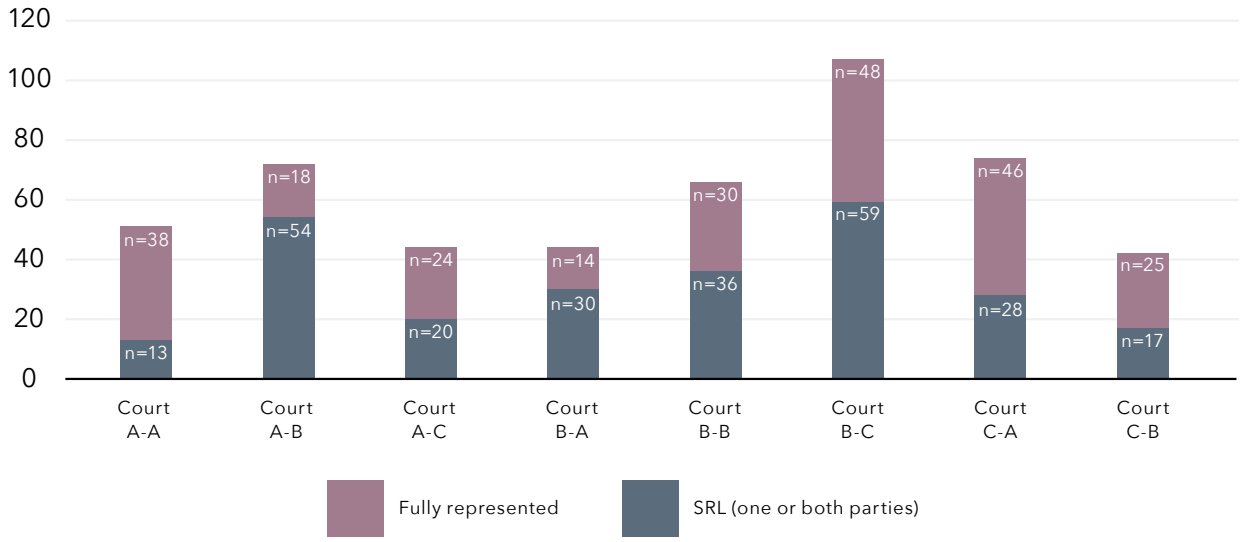


Figure 3.2: Number of matters observed at each court site



- C-A-1: 2 days mention
- A-C-1: 2 days interim hearing
- A-C-6: 2 days mention.

Our observations provided an insight into courtroom interactions, dynamics, words and demeanours of participants (Hunter, 2005; Ptacek, 1999; Roach Anleu et al., 2016). We observed proceedings from the public gallery at the rear of each court, without interaction with participants (Gold, 1958). Each researcher recorded their observations in detailed field notes, recording speech verbatim where possible. While we had developed an observation schedule following pilot fieldwork, we found free-form notes were easier to manage in the court setting. The schedule's themes informed our observation work and field notes. We transcribed field notes daily and made reflective notes to elaborate on observations (Bryman, 2008).

All research team members actively engaged in data generation and analysis which meant that we were "inextricably implicated in the data generation and interpretation process" (Mason, 2002 as cited in Roach Anleu et al., 2016, p. 381). We worked in pairs at all but one court site, with pairs generally observing the same cases, discussing observations and interpretation of events, and preparing field notes together. Even when observing cases separately, we discussed the matters observed. This ongoing dialogue enabled "comparison [of] and reflection" (Roach Anleu et al., 2016, pp. 381–82) on the data collected. We coded and analysed the data using the same method as for the interview samples. We focused on the themes that emerged from the general interview sample, as well as themes from the court observations themselves (Charmaz, 2006; Kennedy & Thornberg, 2018).

Examination of court files associated with observed cases

Examination of court files was a key component in the triangulation of data and enabled us to identify the involvement

of family violence in a matter. We learned from court files how observed SRLs dealt with the paperwork requirements of litigation, which is critical to how well SRLs present their case and to legal professionals' responses. The court files helped us to better understand the court events, issues being litigated, any previous orders, capacity of SRLs to present their cases (particularly documentation of and response to violence allegations), and the case trajectory.

We examined 180 court files of the 243 observed matters involving SRLs. Sixty-three files were unable to be examined as they were with the judicial officer or had been transferred to another court, or it was obvious from the observation that the matter did not involve family violence.

Of the 180 files, we examined 98 in depth and overviewed 82. We selected files for in-depth examination if the matter clearly involved family violence or raised relevant SRL-related issues (e.g. the judge commented on the poor documentation filed). Overview files were examined briefly to determine whether they involved allegations of family violence.[14]

Prior to our observation fieldwork, we conducted a pilot study of closed files at a metropolitan court registry, and developed a coding sheet for the in-depth examination of court files (Appendix D). We examined files for evidence of family violence and other vulnerability or safety issues; procedural history, whether the SRL was always or partially an SRL, and the nature and quality of any documents completed by the SRL on the file (including any correspondence). We designed the coding sheet for overview files to quickly assess whether the matter involved allegations of family violence and the nature of those allegations. Data from the examination of the court files were recorded in handwritten notes or directly onto a laptop at the court site. We did not photocopy or photograph documents on file.

Interviews for observed cases

The triangulated case studies were designed to capture three data sources around a single court event: the court observation, the examination of the related court file and an interview with the SRL or legal professional involved in the matter. The conduct of the related interviews proved more challenging than the other components and fewer interviews were conducted than had been anticipated due to the following:

- The focus on matters involving family violence meant several SRLs were too distressed or vulnerable to be approached, or approaching them was assessed to be unsafe.
- Several SRLs appeared by telephone and were unable to be approached on the day at court.
- Legal professionals were too busy (particularly if it was a duty list day) to participate in an interview at or after court.
- If there was only one researcher on site, we prioritised court observations over interviews.

While many people received information sheets about the research, few subsequently contacted us to participate in an interview. This relative lack of success stands in contrast to the study by Trinder and colleagues (2014), which included many more interviews. We suggest that the focus on family violence in the present study was a key influence on the lower numbers; because of this focus the research team adopted a conservative approach in deciding which SRLs to approach, to avoid adding unnecessarily to their stress.

We interviewed 14 people involved in 12 of the observed matters in which one or both parties were self-represented. In most matters only one person involved in the matter was interviewed:

- in seven cases the interview was with the SRL (or one of the SRLs) involved in the matter (ICS-C, ICS-D, ICS-G, ICS-I, ICS-J, ICS-K and ICS-L)
- in two cases the interview was with the ICL who had been appointed to the matter (ICS-F and ICS-H)
- in one case this was with the barrister acting for the applicant father (ICS-A).

In the remaining two matters, we interviewed two people involved in the case: in ICS-E the instructing solicitor and barrister representing the applicant husband were interviewed, and in ICS-B both parties were SRLs and both were interviewed.

14 We prioritised in-depth files due to the limited time between ethics approval from the courts and the dates for reporting to ANROWS.

Unlike the interviews for the general interview sample (discussed above) the interviews that formed part of the intensive case study were brief and focused on the observed matter (for the interview schedule with SRLs see Appendix E, and for interviews with a legal professional see Appendix F).

Triangulated case studies

Ten cases have all three data sources. A further two have the court observation and interview components but no court file because the court file was unavailable to the research team at the time of inspection.

Almost all (8) of the triangulated cases involved parenting applications (ICS-A, ICS-B, ICS-C, ICS-D, ICS-F, ICS-I, ICS-K and ICS-L), with four of these involving a contravention at the same time (ICS-A, ICS-F, ICS-I and ICS-K), and one also involving property (ICS-L). There was only one matter concerning property only (ICS-E), and another case that was a stand-alone contravention application concerning parenting orders (ICS-J).

Eight of the triangulated cases were heard in the FCCA, with two being dealt with in the FCA (ICS-E and ICS-F). Most of the triangulated case studies concerned brief court events (mentions, directions hearings and so on) and were only observed on the one occasion (ICS-A, ICS-B, ICS-C, ICS-D, ICS-I, ICS-K and ICS-L). Another matter was listed for a final hearing but ended up being dismissed by the judge as an abuse of process (ICS-J). One matter was observed on two occasions in both a brief court event (directions hearing) and the final hearing (ICS-F). Another matter (ICS-E) which involved a final hearing was also observed over a number of days.

In four of the triangulated cases both parties were SRLs (ICS-B, ICS-F, ICS-J and ICS-K), in three cases the SRL was the respondent mother or female former partner (ICS-A, ICS-D and ICS-E), in two cases the SRL was the applicant father (ICS-I and ICS-L), and in one case the SRL was the applicant mother (ICS-D). With the exception of two cases (ICS-E in which judgment had been reserved, and ICS-J where the matter had been dismissed), all matters were ongoing.

Advisory committee

An advisory committee of 10 voluntary members supported this research. The committee provided advice and input on the research method, fieldwork and other issues. The committee's broad membership (Appendix G) included representatives from federal family law courts, LACs and CLCs, and academics with expertise in the research topic.

Ethics approval

Given the sensitivity of the subject matter and potential risk of harm from violent perpetrators for victims of violence and professionals interviewed, we were concerned about preserving the anonymity of participants. All SRLs who participated in the research have been accorded pseudonyms and the professionals de-identified. The locations of observations and cases referred to have also been coded.

We obtained ethics approval for the research from the UTS Human Research Ethics Committee (UTS HREC) in two stages, and from other institutions where required.

For the general interview sample:

- 24 September 2018, UTS HREC (ETH18-2698)
- 24 June 2019, the Chief Justice of the FCA and the Chief Judge of the FCCA granted approval to interview judicial officers subject to minor amendments to the interview schedule
- 8 January 2020, Victoria Legal Aid granted approval to interview their solicitors.

For the intensive case study:

- 24 January 2019, UTS HREC (ETH18-3133)
- 3 April 2019, FCA Ethics Committee granted approval for court observations and inspection of court files, under *Family Law Rules 2004* (Cth) r 24.13, however, approval was not granted for interviews or focus groups with court registry staff, citing the *Public Service Act 1999* (Cth) s 13. Approval was subject to background checks of the research team and the completion of confidentiality agreements. This approval was endorsed by the FCCA.

Limitations

A number of limitations should be borne in mind when considering the findings of this research.

Given it is an exploratory study, the extent to which the findings from the general interview sample are generalisable is limited. The research is not intended to be representative of all SRLs or legal professionals in this context; it is designed to illuminate issues that can provide the basis for further research. For the general interview sample of SRLs, most participants were from the eastern Australian states (n=32) and their experiences may not reflect the experience of SRLs in other locations. Most of these participants held a higher level of education, which may not represent SRLs more generally. To an extent, this was balanced by the broader SRL cohort in the intensive case study. We focused on participants who were involved in litigation and did not include the views of those who did not commence litigation because they could not retain legal representation. We acknowledge the limited cultural diversity in the profile (few CALD and no Aboriginal and/or Torres Strait Islander SRLs) and that all interviewed SRLs identified as heterosexual. To an extent, this was balanced by the more diverse backgrounds of the broader SRL cohort in the intensive case study. Additionally, most participants were SRLs (n=34); only a small number also faced an SRL (n=3).

In the general interview sample of professionals, most lawyers were from LACs or CLCs, many of whom acted as duty lawyers. Very few were from private practice, which limited the gathering of information about the experience of facing an SRL beyond that of duty lawyers. Other professionals were limited mostly to FASS or court support. Judicial participants were mostly from the FCCA, with few registrars and no justices from the Full Court of the FCA (Appeal).

With respect to the intensive case study, we achieved triangulation of data in only 10 cases. The court sites we visited were limited to the eastern states and a small number of circuit courts. We observed few same-sex relationship cases and no appellate cases. Due to ethics restrictions, we were unable to obtain the perspectives of court staff dealing with SRLs.

Our observations were made at points in time and not continuously, which means we may not have captured a full picture of a case or SRL behaviour. For example, an SRL who conducted themselves well in a mention or directions hearing may not have handled a hearing well. Similarly, observations confined to one day of a hearing may not have provided a full account of the parties or allegations. Court files were not closed at the time of examination, which meant they did not contain the full account of the litigation when examined (e.g. documentation later filed by an SRL respondent).

CHAPTER 4

Self-represented litigants in family law proceedings involving violence

This chapter builds a picture about people who represent themselves in family law proceedings involving family violence, their reasons for self-representation and the nature of the allegations made about family violence. In doing so it draws on two samples: 1) the intensive case study sample, which is able to provide a broader picture about a larger number of SRLs involved in family law proceedings involving family violence; and 2) the general interview sample, which is able to provide deeper qualitative insights, particularly into experiences of family violence.

We begin with an overview of the characteristics of SRLs in the intensive case study sample. The findings in this area echo those of previous research (outlined in Chapter 2). Consequently, we report only briefly on the areas of commonality and more fully explore areas that are new or distinct, particularly in terms of the intersection with family violence. In order to fill out this overview picture, the chapter then moves to the more detailed qualitative data provided by the non-representative general interview sample about the reasons for self-representing and the nature of the allegations about family violence raised, or faced, by those SRLs.

Who were the self-represented litigants in this study?

In the intensive case study, we observed 243 matters involving one or two self-represented parties; these involved 292 individual SRLs. These observations confirmed that, in family law proceedings, SRLs were:

- slightly more likely to be male (see Figure 4.1): men were self-represented in 56.2 percent (164/292) of the matters, while women made up 43.8 percent of the SRLs in the observed cases (128/292). This confirms the findings of previous studies (Carson et al., 2018; Dewar et al., 2000; Hunter et al., 2002; Moorhead & Sefton, 2005; Smith et al., 2009)
- more likely to be respondents (see Figure 4.2): of the 292 individual SRLs, people were more likely to be respondents (164/292; 56.2%)[15] than applicants (94/292; 32.2%).[16] The status of the SRL was unclear in 34 cases (11.6%). This finding regarding the proportion of respondents and applicants is in line with previous research (Hunter et al., 2002; Moorhead & Sefton, 2005; Smith et al., 2009; Trinder et al., 2014). Of the matters in which the gender and party status was known (n=258), men comprised 61 percent of respondents (100/164) but only 49 percent of applicants (46/94), whereas women comprised 39 percent of respondents (64/164) and 51.1 percent of applicants (48/94)
- more likely to involve one SRL rather than both parties being SRLs (see Figure 4.3): of the 243 matters where an SRL was involved, this was far more likely to be only one party (194/243; 79.8%), rather than both parties being self-represented (48/243; 19.8%). In one matter it was unclear whether either party was an SRL. These findings reflect previous research (Hunter et al., 2002; Moorhead & Sefton, 2005; Trinder et al., 2014)
- more likely to be involved in child-related matters (see Figure 4.4): of the 243 matters observed, 158—nearly two thirds—were parenting-only matters (including parenting matters that had a contravention on foot at the same time). Twenty-five (10.3%) were financial matters only (property, spousal maintenance, child support or enforcement); 19 (7.8%) involved parenting and property; eight (3.3%) were standalone contravention proceedings; and 20 (8.2%) involved other types of proceedings (e.g. costs, contempt, divorce or nullity of marriage).[17] The nature of the matter was unclear in 13 cases. The predominance of SRLs in parenting-related proceedings is documented in the literature (ALRC, 2019; Carson et al., 2018; Hunter et al., 2002).

15 Note that in some cases there was more than one respondent (often another family member such as a grandparent). For the purposes of this calculation we have counted the first respondent only.

16 Six of these cases involved an SRL grandparent who was the applicant.

17 We recognise that most divorce applications will involve SRLs. As we observed the divorce list at one court only, our data on self-representation in divorce matters do not reflect the true extent of this issue, which would be much higher given that it is "largely [an] administrative procedure" in Australia (Hunter et al., 2002, p. 1).

Figure 4.1: Gender of self-represented litigants in observed matters

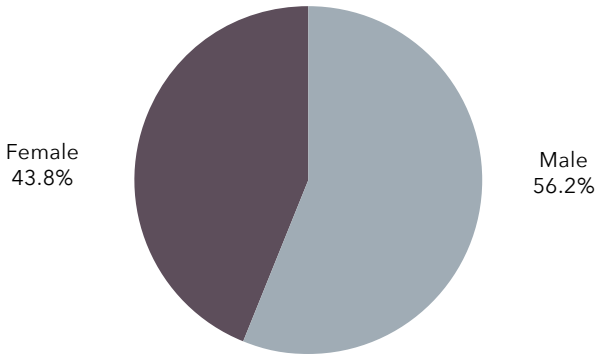


Figure 4.2: Self-represented litigant respondents and applicants in observed matters

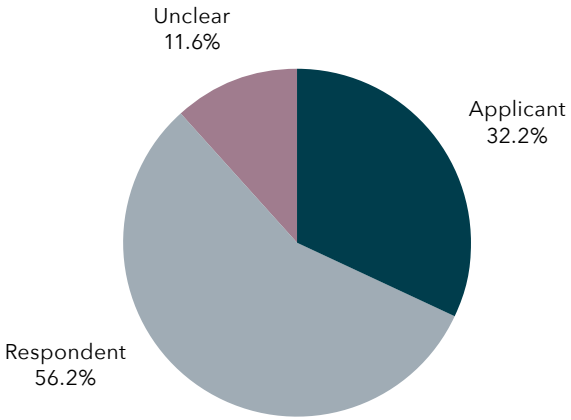


Figure 4.3: Observed matters involving one or both parties as a self-represented litigant

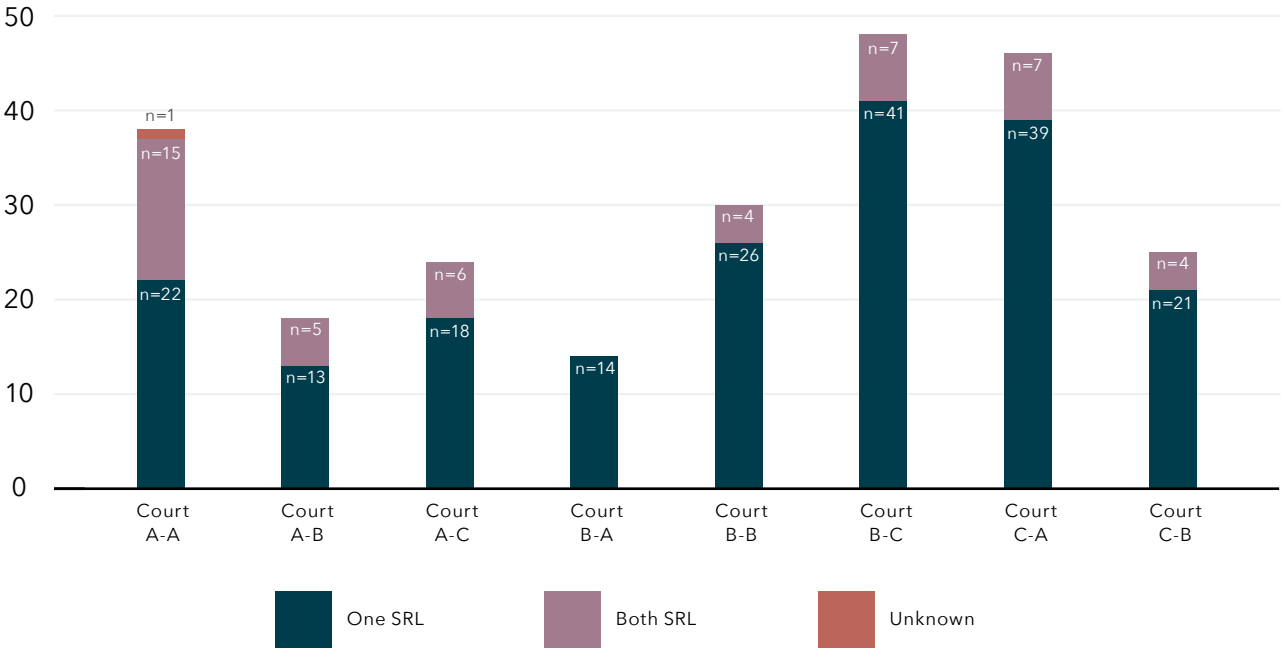


Figure 4.4: Nature of proceedings involving a self-represented litigant in observed matters

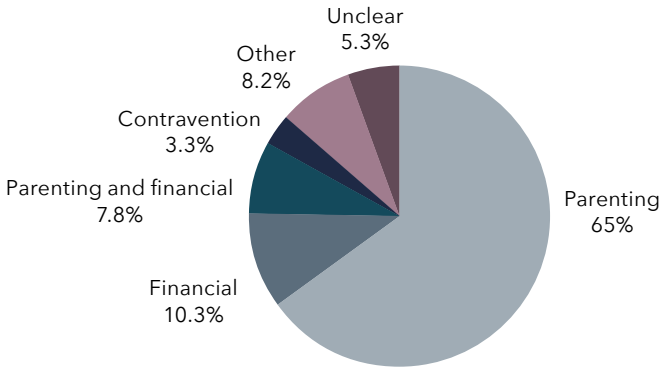
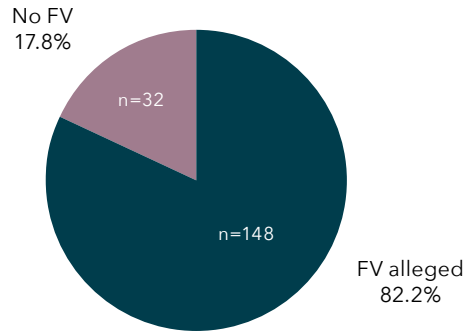


Figure 4.5: Presence of allegations about family violence in the intensive case study sample



Of the SRLs involved in parenting proceedings (including contraventions on foot and standalone), 36.5 percent were male respondents (76/208), 19.7 percent were female respondents (41/208), 17.3 percent were female applicants (36/208), and 16.3 percent were male applicants (34/208). The status of 21 SRLs was unknown in these parenting matters.

Of the SRLs involved in financial proceedings only, 35.7 percent were male respondents (10/28), 28.6 percent were female respondents (8/28), 10.7 percent were male applicants (3/28), and 27 percent were female applicants (3/28). The status of four SRLs was unknown in these financial proceedings.

It was not possible to ascertain the extent of partial and full representation from the intensive case study, as court files were examined at a point in time rather than after closure. This means we were unable to note whether representation status changed after the file was examined. However, almost two thirds of the general interview sample reported dipping in and out of legal representation over single or multiple matters. This reflects the literature which has noted the "phenomenon of partial representation" (Trinder et al., 2014, p. 21; see also Hunter et al., 2002). The general pattern in our data is one of commencing with legal representation and later representing oneself. However, some people do appear on the first return date without representation, due to a lack of time to arrange for a lawyer, and then proceed to be legally represented.

Extent of family violence in the intensive case study sample

The intensive case study sample relied on observations and examination of the court files to confirm whether a case involved allegations of family violence. As noted in Chapter 3, it was rare for it to be evident from the court observation that a matter involved family violence; in most cases this could only be confirmed through examination of the court files. This information was gathered through examination of the Notice of Risk form (FCCA) or the Notice of Child Abuse, Family Violence or Risk of Family Violence form (FCA), any affidavits, copies of civil protection orders or other documentation on the file that mentioned allegations about family violence between the parties and/or towards the children of the relationship.

We examined 180 court files from the 243 matters involving SRLs that we observed to ascertain whether they involved allegations about family violence. Of these 180 files, 148 (82.2%) raised allegations about family violence, while 32 (17.8%) did not mention any family violence (see Figure 4.5).

Figure 4.6: Nature of family violence in the intensive case study cases that raised allegations

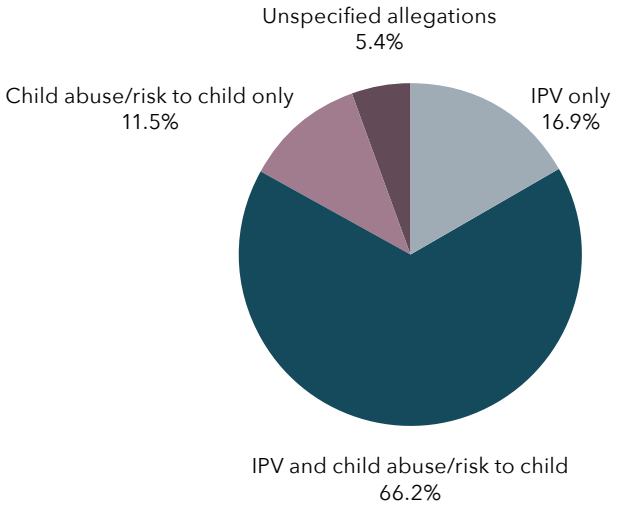


Table 4.1: Extent of family violence in the observed matters involving self-represented litigants (in matters where the presence of allegations was known)

	Court site								
	State A			State B			State C		
	A-A (n=25)	*A-B[a] (n=12)*	*A-C[a] (n=17)*	*B-A (n=12)*	*B-B (n=12)*	*B-C[a] (n=28)*	*C-A (n=30)*	*C-B (n=44)*	**TOTAL (n=180)**
FV alleged	22 (88%)	8 (66.7%)	13 (76.5%)	9 (75.0%)	11 (91.7%)	26 (92.9%)	25 (83.3%)	34 (77.3%)	148 (82.2%)
No FV alleged	3	4	4	3	1	2	5	10	32 (17.8%)

Note: [a] The columns shaded in green indicate the courts in which all matters were observed in that day/week list.

Of the 148 matters that alleged family violence, 98 (66.2%) concerned IPV and child abuse or neglect; 25 matters (16.9%) alleged IPV only; and 17 matters (11.5%) alleged child abuse and neglect only. In eight cases it was unclear what the allegations entailed. In 63 of the 243 observed cases it was not possible to examine the court file (see reasons detailed in Chapter 3), and as a result it is not known whether these matters involved family violence (see Figure 4.6).

This assessment of the presence of allegations about family violence simply records whether an allegation was made in any of the documentation contained in the court file and does not reflect whether the family violence alleged was a live or central issue in the case. In some of these cases, other concerns, such as drug and alcohol use or violence by a new partner, may be a more determinative, current issue. For example, in ICS-A, while there had been family violence perpetrated by the father (the represented applicant) against the mother (the respondent SRL), the central issues in the parenting matter concerned the mother's drug use and the violence perpetrated against the mother by her new partner, and the subsequent risks to the children.

The high rate of allegations of family violence in matters involving SRLs in the present study (82.2%) is partly explained by the purposive nature of the sampling method employed at some court sites (Courts A-A, B-A, B-B, C-A and C-B) where we did not observe all SRL matters listed at that court, but rather "followed" some SRL matters that we were aware involved family violence (as a result of the court observation or information provided by court staff such as the fact that there was a safety plan in place). However, it is important to note that the high rate of family violence in SRL matters was also evident at those court sites where we observed *all* cases listed at court the day/week that observations were conducted (Courts A-B, A-C and B-C; 82.5%), and therefore the data from those court sites are more representative of general rates (see Table 4.1).

Motivations for self-representation

Our research confirms findings of earlier studies that the principal motivations for self-representation in family law proceedings are financial in nature (Birnbaum et al., 2012; Dewar et al., 2000; Hunter et al., 2002; Macfarlane, 2013; Matruglio, 1999; Trinder et al., 2014). As in other studies (McKeever et al., 2018; Toy-Cronin, 2016), we found that there are overlapping reasons for self-representation that may change over time. It should be noted that most SRLs in our general interview sample would have preferred legal representation.

Financial reasons

The main reasons SRLs in our general interview cohort were self-represented were financial in nature. Typically this meant they were ineligible for legal aid due to the operation of the means or merit test, their legal aid was terminated or limited in some way, they could not afford private legal representation (particularly for the duration of the case), or they made a decision about how to spend the limited funds they had available.

Eligibility for legal aid

Some SRLs expected to receive legal aid and did not appear to be aware that grants of aid are subject to eligibility tests. Legal professionals acknowledged that the various LACs impose stringent eligibility criteria (see L8, L12, L15, L19, L23, L33 and L34), including the need to "have a significant issue in dispute" (L24). Most SRLs reported being ineligible for legal aid for the following reasons:

- They had too high an income or owned assets that raised them over the means test threshold (e.g. Grace, Jenny, Lydia, Samuel, ICS-C and ICS-D).
- They failed the merit test (e.g. Megan's actions during the course of the proceedings led to the withdrawal of aid).
- They had a matter of a type other than one funded by legal aid (e.g. Fiona's matter concerned property only).

Some professionals pointed out the ramifications of assets testing for SRLs who own property in metropolitan centres where property values are high (e.g. L9; similarly L1). One professional also noted that protective steps taken by some women when escaping a violent relationship later affected their eligibility for legal aid:

> They've, for example, taken $24,000 from the family account to try and set themselves and their kids up in a new home … and they'll get knocked out for legal aid because they've got $24,000 in the bank, and they can't draw upon their former partner's reserves anymore because they're not together. (L17)

When the legal aid merit test intersects with family violence, it can have significant consequences. L15, who works for a women's legal service, explained that a "very traumatised person … may act in a way that … gives Legal Aid rights to take away their funding". This lawyer described a case in which a woman had legal aid terminated following an unfavourable Family Report that stated she was not "supportive" of the father spending time with the children. This father had spent time in prison as a consequence of his violence against the mother.

The gap between legal aid and being able to afford legal representation

Many SRLs interviewed fell into the gap between legal aid eligibility and being able to afford legal representation on an ongoing basis. L33 described this gap as a "massive cavern" (similarly L20). All SRLs interviewed spoke about the high costs of legal representation, frequently exacerbated by the length and complexity of court proceedings. SRLs expended a range of amounts on legal representation[18] ranging from nothing to in excess of $700,000:[19]

- seven spent more than $100,000 (Alison, Angela, Anita, Carol, Emma, Grace and Justin)
- three spent between $50,000 and $99,000 (Karen, Katherine and Tim)
- seven spent between $20,000 and $29,000 (Anna, Danielle, David, Hayden, Hayley, Maxine and Natasha)
- four spent between $10,000 and $19,000 (Fiona, Kate, Lydia and Robyn)

18 Not every SRL interviewed provided an estimate of their legal costs.

19 Alison stated she had spent in excess of $1 million for legal representation in multiple family law and other proceedings; it appears that around $700,000 of this was spent on family law litigation.

- four spent between $1000 and $9000 (Hugh, Jenny and Lachlan)
- three spent less than $1000 (Bradley, Elizabeth and Joanne).

The high cost of legal representation led some SRLs to question whether they were receiving value for money (e.g. Danielle; similarly SRL applicant mother in ICS-C, and the applicant father in ICS-L). A number reported that they borrowed money, particularly from family, to fund part of their litigation (Angela, Danielle, Karen and Maxine). After spending over $100,000 on legal fees, Angela had become an SRL. However, she wanted to be represented at trial and so borrowed a further $20,000 from her mother to pay for counsel. Unfortunately, the trial was adjourned on the first day due to the judge being unavailable. Angela had to pay a cancellation fee for the barrister and was going to have to self-represent at the adjourned hearing as she had no further access to funds. Jason said that he was considering withdrawing money from his superannuation if his case went to a defended hearing.

People whose cases involved only financial matters ended up being without representation, not only because they were ineligible for legal aid, but also because private lawyers were not interested in cases where the property pool was small[20] or they had limited funds to pay a lawyer's retainer (L9). In other cases, such as spousal maintenance claims, it is not economically viable to pay a lawyer to run the case (L15). Some professionals noted that people living in rural or regional areas often represent themselves because of the limited availability of either legal aid or private lawyers which exacerbates conflict of interest problems (L6 and L24).

20 As part of the Commonwealth's Women's Economic Security Package, two trials were introduced at the beginning of 2020. For couples with assets of less than $500,000, a legal aid-assisted property mediation trial was offered in all state and territories, limited to 650 couples. Despite this pilot only being in operation for a short time, Victoria Legal Aid has reported that their 100 available grants under this trial have been "exhausted": see https://handbook.vla.vic.gov.au/handbook/4-commonwealth-family-law-and-child-support-guidelines/guideline-9-property-disputes. Additionally, a small claims property pilot was introduced in the FCCA registries of Adelaide, Brisbane, Melbourne and Parramatta: see http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr010310

The point in time in proceedings when people become self-represented litigants

As indicated above, most SRLs were partially self-represented. The point in time when litigants come to represent themselves can be critical (O4 and L32). Many professionals pointed out that litigants can run out of money or have legal aid terminated just before their matter is listed for trial (e.g. Bradley). One judge noted:

> The real problem is the delay in obtaining the Family Report and the expert's report. Because, you see, Legal Aid make their assessment based on that document. That document takes so long to get that it often comes in, in the last three or four weeks before the hearing and that leaves Legal Aid with very little time to act. And of course, it leaves the litigant, the self-represented litigant, with very little time to respond to whatever decision is made. (J8)

Lack of trust in, or dissatisfaction with, lawyers

Many SRLs explained that they represented themselves because they were dissatisfied with their lawyer's performance or, more generally, did not trust lawyers. This factor has been documented in the literature (e.g. FLC, 2000; Knowlton et al., 2016; Macfarlane, 2013). Our research revealed several dimensions to this factor, including that SRLs considered that their lawyer:

- was only interested in money and "treated me like an ATM" (Katherine)
- was not very skilled and was incompetent and/or lazy (e.g. Carol, Maxine, Megan and ICS-I)
- failed to protect them from abuse in the courtroom (e.g. Carol)
- did not understand family violence (e.g. Joanne explained: "I've had so many lawyers that didn't seem to understand DV at all. They just didn't seem to get the context")
- "bullied" them into consent orders that they did not feel were safe (Kate).

A small number of SRLs noted a great variability between lawyers, and that it was difficult to know if they were instructing a good or competent lawyer. Kate observed, "You really don't know what you're going to get … there

is no guarantee that I would be any better off having gone down that path [of legal representation]".

Other SRLs were adamant that having a lawyer did not necessarily lead to better outcomes and reported that they had achieved unsafe and/or undesirable outcomes when they had legal representation (e.g. Carol and Tim).

Confidence in representing themselves

Two male and two female SRLs reported feeling more confident in their own ability, compared to that of their legal team. David described how poorly he felt his barrister had performed in his matter, concluding that, "If he does as shit a job as that, even if I do a bad job I've got to be as good as that and I'm $1500 better off" (similarly Tim). When she started to run out of funds, Jess said she was encouraged by her lawyer to think that she was capable of representing herself, while Hayley decided she was "sick and tired of paying for legal representation when I can do this myself".

For other SRLs, the decision to represent themselves was linked to their assessment that they were in the best position to tell their own story (see also Knowlton et al., 2016), for example, "I felt that nobody can represent me as I can myself, because I know what happened" (Kristy); "No one knows your case better than you" (Jess); and "I just [felt] like it was something I should do on my own and speak from the heart" (John). Two women (Katherine and Maxine) linked this view to what they saw as their respective lawyers' failure to understand the family violence they had experienced, or put forward their arguments around violence. As Katherine explained, no matter how good one's lawyer is, they are not in a position in the courtroom to "respond to stuff that he's [violent ex-partner] saying because they're not living it and they don't know the facts". For Katherine, it was the patterned nature of family violence—the repetitive small events—that her lawyer was unable to package effectively in the courtroom because her lawyer had not "lived" the full picture.

A small number of professionals noted that "choosing" to self-represent was rare and contended that an SRL's belief in their ability did not translate into better outcomes (J2 and L24). Other professionals described people who chose to self-represent as being egotistical or narcissistic (e.g. L4). One professional suggested that some people may choose to do so on the misguided basis that they can "prove" their "innocence" (O2).

Unable to accept the legal advice

Some SRLs felt that their lawyers were not acting on their instructions or listening to them (e.g. John), while professionals pointed out that some SRLs do not want to hear the legal advice they are given or cannot see the limitations or flaws in their own case (O2, O10 and O12). This was perceived to lead those SRLs to bring forward unmeritorious claims (e.g. ICS-E). A few judicial participants noted that some SRLs "have had lawyers but they don't like the advice they get, so they sack them. That happens all the time" (J14; similarly J15). A men's worker employed with FASS felt that mental health issues may be a factor for some SRLs who become

> rigid in their thinking, polarised, black and white, mental health issues … they've got … high expectations of what they want to happen. And realistically, when the … family law practitioner, gives them the realistic answer about what will happen, so their expectations are so high that they just go, "Well you're not helping me here, you're working against me". (O3)

Intersection with family violence

A small number of SRLs and professionals were of the view that some SRLs choose to self-represent to deliberately abuse their former partner (L17, L23 and O12), a tactic well documented (see Caruana, 2002; FLC, 2000; Hunter et al., 2003), particularly in the context of direct cross-examination (Kaye et al., 2017). For example, L17, a solicitor working in a not-for-profit legal centre, stated that there were some "men who wish to use court processes as a means to continue to perpetrate abuse and control". L23, a solicitor for a women's legal service, was more blunt, and identified three reasons for self-representation: 1) ineligibility for legal aid; 2) cost of private representation; and 3) "in some cases I think our assessment would be that it's … a deliberate strategy" on the part of the perpetrator.

A small number of the SRLs we interviewed saw the former partner's self-representation in this way. In Carol's opinion, her former partner became self-represented because "he actually

wants to engage me in court". Similarly, the female applicant in ICS-B noted that after she became self-represented "he dropped his lawyer too because then he could just harass me in person. He didn't have to go through a lawyer anymore".

Some professionals suggested that for perpetrators, the decision to self-represent might be linked to a more arrogant mindset or a rejection of legal advice:

> A small group of people who choose to be self-represented … is significantly made up of perpetrators of family violence. And I don't suggest that they do that deliberately so that they can directly cross-examine their victim, but I think it's just part of their mindset and their personality: "I don't need a lawyer, I'm clever". (J12; similarly L17)

Another factor is that families affected by family violence are likely to engage in multiple legal proceedings. Research conducted in New South Wales found that people who experienced family violence in the previous year "were 10 times more likely than others to experience other legal problems, including a wide range of family, civil and criminal law issues" (Coumarelos, 2019b, p. 1). As a result, perpetrators with limited financial resources may prioritise paying for legal representation in criminal or protection order proceedings over representation in family law proceedings (L22).

Regardless of whether furthering abuse is a motivation for acting as an SRL, the very fact of being an SRL can "provide an opportunity for a violent partner to continue to exercise power and control over the victim" (State of Victoria, 2016, p. 178). Kaspiew and colleagues (2017, p. 180) describe this as "legal systems abuse" and a clear tactic to perpetuate the dynamics of control. Certainly, some alleged perpetrators of family violence, whether or not they have legal representation, adopt litigation strategies that have financial implications for alleged victims (Douglas, 2018; see also ALRC, 2019). Female interviewees identified strategies used by their former partners to deplete their funds and force self-representation, including excessive correspondence or documents that their lawyers would respond to (Alison, Karen, Katherine and the applicant mother in ICS-B), or failing to turn up to court on days that women attended with representation (Fiona). Some women reported that their former partner made multiple applications to keep bringing them back into the family law system (e.g. Carol, Grace, Karen, Katherine and Megan; see also ALRC, 1997, 2019). Marie recognised that her former partner would not cease legal proceedings: "My ex won't stop".

In other cases, it was the lack of compliance with court orders or procedures, or delays in complying, that were identified as deliberate strategies to prolong the process and lead to additional costs for the other party. This was how the SRL applicant mother in ICS-C characterised the father's continuous lack of compliance with court orders (including an order to participate in a behaviour change program) during their parenting litigation. Similarly, a lawyer for a women's legal service (L15) referred to alleged perpetrators of family violence who refuse to disclose their finances as required in property proceedings:

> [For] my clients, there's the perpetrators of the highest order. So, they don't do any disclosure, you are going to court trying to seek, you know that they've got money, because they've got a million-dollar business. But you, they won't disclose and they obfuscate and they adjourn. So it's just this never-ending cycle of, if that client had paid me in private practice, we'd be up to $150,000 easily in fees, just for her property matter.
>
> So, she wouldn't have had any assistance at all with respect to the property matter because she wouldn't have been eligible for legal aid, because there's too much in the pool. And then no [lawyer] is going to spec the matter [i.e. take on the matter on a speculative basis], because of the nature of the domestic violence. And also the fact that the property pool consisted of his business, which was him. If he decided to close it, which he ended up doing. They were just bankrupt essentially. (L15)

While no male SRLs interviewed reported such tactics being used against them, we observed this in one of the intensive case studies, ICS-E. In this case, it was the female party who failed to disclose financial information in the property proceedings. This increased the husband's legal costs considerably as he then had to obtain that information via subpoena. In this matter, the SRL wife engaged in multiple legal actions and measures that delayed and extended the proceedings.

Table 4.2: Making allegations and facing allegations: Men and women in the general interview sample

	Women (n=24)	Men (n=11)
Alleged former partner used IPV	23	8[c]
Alleged former partner perpetrated child abuse/neglect[a]	18	6
Faced allegations that they had used IPV[b]	12	10
Faced allegations that they had perpetrated child abuse/neglect	2	2

Notes: [a] Includes using children to convey messages, withholding children/not letting children see parent, denigrating other parent to the child.

[b] Includes the making of cross-applications in protection order proceedings.

[c] Another man alleged that his former partner making allegations about family violence against him amounted to family violence (this has not been included as IPV).

Allegations of family violence in general interview sample

Our general interview sample included people who raised allegations about family violence (IPV and child abuse) by their former partner and people who faced such allegations (see Table 4.2). In many cases, the person who raised allegations also faced allegations.

For SRLs who are victims of family violence, the experience of violence is the context in which they are litigating and is central to the process and outcomes of their litigation journey.

We interviewed women and men, and while in some instances their experiences of family violence were similar, some distinct differences emerged (discussed below). None of our interviewees (men or women) acknowledged that they were a perpetrator, although some admitted to inflicting some acts of violence and abuse. As noted in Chapter 1, it was not possible in our study to assess the veracity of any allegations reported in interviews.

Self-represented litigant interviews: Overview of family violence allegations

Almost all interview participants, women and men, reported that they had experienced different forms of violence and abuse from their former partner, during and after their relationship. There was one exception, Justin, whose "allegation" was in effect that he viewed the allegations that his former partner made against him as a form of family violence. Table 4.2 overviews the allegations made by men and women in the general interview sample and the allegations raised against them.

Almost all women interviewed alleged that they had experienced IPV, and many also alleged that their former partner abused or neglected their children. The exception was Natasha, whose allegations centred on child abuse (physical and sexual). A similar picture emerges for men at this broad level, with all but three making allegations about IPV and just over half alleging child abuse and neglect. The difference was the extent to which men and women in the general interview sample faced allegations that they used IPV, with 10 of the 11 men facing allegations, compared to only 12 of the 24 women.

Consistent with previous research (Kelly, 1998), several women said they had not recognised that what they experienced was violence until after they had left the relationship (Emma, Danielle, Katherine, Marie, Megan and Robyn). For example, Marie said:

> What I realised now, yes, he was [violent] from the very beginning. He had—he did things that I wasn't comfortable with, you know? Even when I would tell him "No" and all that sort of stuff. And I, kind of, didn't realise until after, many years after I'd left him, that what he did was rape.

Similarly, in response to the question "When did the violence start?", Katherine stated, "I think it was always violent. I just didn't understand that that kind of coercive and psychological abuse was family violence". None of the male interviewees made similar observations.

Forms of violence

We did not specifically ask about the types of violence people experienced—rather, we asked general questions about who raised allegations about family violence, what that involved,

Table 4.3: Types of family violence alleged by the interview cohort pre-separation

	Women (n=24)	Men (n=11)
Emotional/psychological abuse	18	2
Physical violence	16	3
Controlling behaviours (including isolating from family and friends, limiting work)	13	3
Verbal abuse	13	2
Financial abuse	12	2
Threats	10	1
Sexual violence	6	-
Technology-facilitated abuse	5	-
Property damage	4	-
Other (including stalking, intimidation, harassment and violence to pets)	10	2
Child abuse and neglect/risk (including physical abuse, sexual abuse, excessive discipline, verbal abuse and emotional/psychological abuse)	10	3
Did not experience violence during the relationship	1	6

when the violence started and whether it continued after separation. These questions enabled participants to tell their stories and identify issues important to them; however, it also means a participant may not have mentioned all of the forms of violence and abuse they experienced. It is likely that the discussion below presents an under-representation of the violence that men and women allege took place in their relationship, given the general level of under-reporting documented in the literature (Cox, 2016).

The definition of family violence in s 4AB(1) of the *Family Law Act 1975* (Cth) provides a frame for the experiences reported by SRLs in their interviews (see discussion in Chapter 1). This definition is an open and contextual one enabling flexibility and adaptability to capture a wide range of behaviours and acts that might be experienced as coercive or controlling or cause a person to be fearful. While s 4AB(2) of the Act provides a useful list of examples of behaviours that might fall within this definition (such as assault, sexual assault, "repeated derogatory taunts", withholding of financial support and so on), this is a non-exhaustive list and is not intended to exclude other forms of abuse not listed there (e.g. technology-facilitated abuse).

Violence before separation

Almost all of the SRL participants alleged that they had experienced IPV in their relationship prior to separation, with a number also making allegations about child abuse and neglect. There were six exceptions: five men (Bradley, David, Lachlan, Samuel and Tim) and one woman (Natasha). While these interview participants reported that they did not experience violence during the relationship, all but one raised allegations about family violence after the relationship ended. The exception was Tim, who did not make any allegations about his former partner's behaviour (pre- or post-separation) but did raise concerns about her care of the children. Table 4.3 notes the types of violence alleged to have been experienced prior to separation. Proportionally, more women than men made allegations about every type of violence or abuse identified.

It was rare for SRLs to experience just one form of violent and abusive behaviour. Consistent with previous research, most SRLs described being subjected to multiple forms of violence (Kaye et al., 2003; Laing, 2010). Moreover, the violence experienced was ongoing rather than a one-off event (Coy et al., 2012). For example:

> … physical violence, so it started when I was pregnant, and kind of, verbal abuse, shouting, screaming, threats. Threats to take the child away, threats that he was going to have me sectioned, hitting, spitting, dragging the child away from me in the middle of the night. He tried to strangle me at one point. There was financial violence, he wouldn't give me any money. Yes, the whole gamut really. (Maxine)

Physical violence

Two thirds of the female participants reported physical violence, compared to three of the 11 men. Physical violence generally involved being hit or punched, but also included being pushed or shoved, pinned to a wall or down on the floor, or having their arms twisted. Seven interview participants (men and women) noted that the physical violence they experienced was minimal (Alison, Angela, Elizabeth, Hugh, Jason, Joanne and Robyn) but was used in conjunction with other forms of abuse.

Some forms of physical violence were only nominated by women; for example, only women alleged that they had been strangled by their former partner (three of the 16 who reported physical violence). Megan, for instance, described, how her former partner

> had me against the wall, and then choked me … But I can't … my daughter remembers it. I can remember going against the wall and all I can remember is grabbing the kids and going to the car, just going off to McDonalds … just to kind of debrief and give us a breath of fresh air.

Strangulation is notably gendered and is seen as a "red flag" for increased risk of further violence and homicide (Douglas & Fitzgerald, 2014, p. 231).

Sexual violence

Six women reported that they had experienced sexual violence or sexually coercive behaviours during their relationship. This ranged from rape to coercing women to engage in sexual activities. Jess also described reproductive coercion, which meant she had multiple pregnancies within a short period (Douglas & Kerr, 2018). Two women explained the sexual violence that they experienced in terms of their former partners seeing them and their bodies as possessions to be used whatever way the men wanted (Marie and Jess). No men reported sexual violence in their relationship.

Psychological and emotional violence

Psychological and emotional violence encompassing a range of behaviours was the most common form of family violence reported by women in the general interview sample (18/24). Carol described her abuser as going "into rages over minor things", causing her to live her "life on eggshells, not knowing what the next thing is going to set him off". Megan said that her former partner

> was for me, a psychological risk. He would do all sorts of weird things, like he'd put the cats in the dryer and do this evil smile … and he would tell the kids certain terrible things were going to happen and saying it's just a joke when it would actually terrify them.

Eight women referred to "gaslighting"[21] (Anita, Elizabeth, Grace, Hayley, Jenny, Lydia, Marie and Megan). Jenny reflected that there was a "lot of gaslighting throughout the whole marriage. I actually thought I was going nuts. I had letters sent to me by people and it was actually him writing letters". Lydia said:

> He would isolate me from people and then he would sort of gaslight me, like he would say something and then when I said, "What do you mean we can't do that?" he'd be like, "I never said that". And just, yes, it was just, he's just creepy.

Only two of the 11 men interviewed reported that their female partner had been emotionally or psychologically abusive. Hugh says it was "psychological and really, more the manipulative type long-term emotional stuff against me". Lachlan was the only man who referred to gaslighting, and he mentioned it as an allegation that had been made against him.

Controlling behaviours

Several SRLs reported that they had been subjected to coercive and controlling behaviours. For many SRLs, their former partners controlled most, if not all, aspects of their lives and isolated them from family and friends. Female participants were more likely (13/24) than the men (3/11) to nominate that they had experienced coercive control:

> He controlled what time I went to bed. What time I woke up. What I ate. What I wore. You know? What books I could read, what TV shows I could watch. He literally controlled everything. (Marie)

21 "Gaslighting" is a term used to describe measures taken by a perpetrator of violence to undermine a victim's sense of reality and to make her question her sanity. The term comes from the Ingrid Bergman movie *Gaslight* (see discussion in Abramson, 2014).

> I wasn't allowed to go to the toilet. It sounds stupid but I as an adult would tell him I needed to go, and he just didn't care … so wouldn't make any allowances, wouldn't pull over. There were a few incidents with him when I nearly wet myself in the car, like it got damn close. (Danielle)

The few men who reported that they experienced controlling behaviours pointed to similar experiences including control over their parenting or undermining their parenting decisions (Hayden), taking advantage of a disability to control aspects of their life (Jason) and preventing continued contact with family and friends (John).

Financial abuse

Half of the women (12) and two men reported experiencing financial abuse, including the perpetrator maintaining control of household funds, making decisions about expenditure and demanding that the victim account for their expenditure. For example, Fiona worked full-time in the family business with her former partner and, while they had a joint bank account, her access to it was controlled. Karen reported:

> When I was a first-time parent, he wouldn't let me have money for basics like food and medication. Just kept on telling me I had to get a job if I wanted to eat. Kept making threats about if I went to the police, he'd lose his job and if he lost his job, it would be me and the kids that would be homeless because we'd lose the family home. And he'd go and stay with friends and would be me and the kids out on the streets.

Some SRLs were unaware of how much money their former partner earned until after they separated. For instance, Megan discovered that she had been a victim of financial abuse after separation:

> And I would be going off to work and he was saying, because he's had his own business … "Oh it's doing really badly". And it wasn't until I put in for child support that I found that he was actually earning $200,000–$300,000, putting away and I was doing the whole lot. I was paying for the rent, the mortgages.

Some SRLs reported that their former partner tried to diminish them financially to prevent them leaving. For instance, Kate said that her former partner used

> all sorts of … family violence to try and stop me from leaving. I was financially stripped of everything in that respect … he made me bankrupt to try and stop me from leaving.

Two men reported that they experienced financial abuse. Jason reported that his former partner had taken advantage of his disability and controlled his income: "I gave her all my money because I'm dyslexic and she started to give it out in small amounts and I wasn't able to access it". In Richard's case he stated that the joint decision to put all assets in his former partner's name for taxation purposes enabled his former partner to control the finances.

Threats

Female SRLs were more likely than the men to report that they had been threatened by their former partners during the relationship (10/24 women compared to one man). The nature of the threats that women experienced included threats to kill and threats to harm, many of which were coercive (i.e. what the perpetrator would do if the victim left or reported his behaviour). For example, Megan's former partner told her: "If you leave me, I'll hunt you down and shoot you like a dog".

The one man who reported a threat during the relationship described a threat of quite a different nature. Richard stated that his former partner and her lawyer told him, "Unless you move out of the house, we will bring a [protection order] against you". While the nature of this threat requires more contextual information, it reflects research (Durfee, 2011; Wangmann, 2010) that found that some men's accounts of victimisation are about a fear of women utilising their legal rights to obtain or enforce a protection order or to report the man to the police.

The picture of violence during these relationships illustrates the gendered nature of family violence, as reported in the literature (Dobash & Dobash, 2004; Hamberger & Larsen, 2015; see also gender perpetration data presented in Chapter 1). In our research, women SRLs clearly reported violence indicative of more chronic, sustained and controlling relationships than that experienced by most of the men interviewed.

Post-separation violence

Most women (23/24) and men (9/11) reported family violence and abuse in the post-separation period (see Table 4.4). While Grace did not report violence after separation, she did characterise the extent to which her former partner kept dragging her back to court for "silly things" as a form of abuse. Most of the allegations raised by men post-separation centred on concerns for their children (6/9); most of the women's post-separation allegations concerned IPV and child abuse or neglect (18/23; only five women alleged child abuse or neglect only).

The women we interviewed who experienced post-separation violence reported violence perpetrated against themselves and, in a number of cases, the start of, or increase in, violence against their children. No woman reported ongoing physical violence after separation, but other forms of violence continued or became more prominent. A number of men reported post-separation violence and abuse, although the numbers were much smaller than those for women. Tactics of violence included:

- Technology-facilitated abuse: this involved abusive or threatening text messages (Anita, Anna and Elizabeth) or posts on social media (Katherine), installing CCTV cameras on the property next door to the woman's home (Jess), and taking photos of or filming the woman without her permission (Carol and Jess). Among the men, David, who had not experienced any violence during his relationship, discovered a GPS tracking device in his child's bag when the child was spending time with him, and he was filmed by his former partner in breach of a court undertaking.
- Financial abuse: this concerned non-payment of child support (Fiona, Jenny, Joanne and Robyn), refusal to pay for things for the children (Carol), non-payment of rent or mortgage repayments (Jenny, Megan and Robyn), refusal to sign a rental bond refund form (Katherine), and the deliberate destruction of property or the failure to upkeep property to maintain its value (Fiona, Jenny and Megan). Kate reported that her former partner put her in a position where she became bankrupt so that she would return to live with him. Not surprisingly, it "had a big impact on my life and my ability to create a life for my children". This meant that utilities would not provide services because of her poor credit record. Even now, she says, "I'm just coming up to two years out of bankruptcy but that's only a technicality. I am still a leper to any banking institution". Among the men, only Hayden reported experiencing non-payment of child support, and Jason described "economic punishment" following the end of his relationship (this was a continuation of the financial abuse experienced during the relationship).
- Stalking: a quarter of the women reported stalking behaviours post-separation. Fiona and her children have had to move several times because her former partner constantly "tracks" her down. This was exacerbated by an FCCA error which saw her address included on documentation in the Courts Portal, requiring her to move again. Joanne reported that her former partner would drive by her property and "lurk", leaving things on the front steps and beeping the car horn. Carol complained that "all he has ever done is stalk and monitor me, he has never stopped".

Nine women stated that their former partner had breached their protection order, indicative of repetitive behaviour by perpetrators (Wangmann, 2010). No men reported breaches of protection orders.

Allegations concerning children post-separation

As noted above and evidenced in Table 4.4, violent and neglectful behaviours towards children by former partners post-separation were emphasised by men (7/11) and women (16/24). Again, there were some distinct differences in women's and men's allegations. For example:

- Physical violence (including excessive discipline): only women alleged physical violence by their former partner against the children following separation. Five women raised this allegation. Katherine described an incident, which took place at changeover, in which her child was physically used by her former partner to also harm her. In this incident, the father was returning the child to Katherine. On seeing Katherine the child was excited and "put her arms around [Katherine's] neck", however the father did not let go of the daughter's legs:

  > So he essentially has me in a headlock using my daughter and he might just stand there and laugh until the police come out or he might shout or he might spit

Table 4.4: Types of family violence alleged by the interview cohort post-separation

	Women (n=24)	Men (n=11)
Technology-facilitated abuse	10	1
Financial abuse	9	2
Stalking	6	-
Verbal abuse	4	1
Property damage	3	1
Threats	3	1
Controlling behaviours (including isolating from family and friends, limiting work)	3	-
Emotional/psychological abuse	1	-
Intimidation/harassment	1	-
Physical violence	-	-
Sexual violence	-	-
Threats	1	-
Other (including reports to agencies)	4	2
Child abuse and neglect	16	7
No violence alleged post-separation	1	2[a]

Note: [a] Justin describes an incident post-separation, however, it appears that it was his behaviour that was at issue during the incident given the police sought a protection order to protect his former partner and her brother.

> or he might, who knows what he does. Sometimes he just won't do anything, just walks around in a circle but I'm effectively having to walk around in a circle too because my daughter's got her arms around my neck and he's holding on to her legs.

- Sexual abuse or sexualised behaviours: only women alleged sexual violence by their former partner against children. Three women alleged that the father was sexually abusing the children or exposing the children to sexualised behaviours (e.g. showing them child pornography).
- Withholding or preventing contact with the other parent: in itself, withholding or preventing contact with a child is not necessarily family violence under s 4AB of the *Family Law Act 1975* (Cth); like all the acts and behaviours listed as examples under s 4AB(2) of the Act, such acts and behaviours must coerce or control the person or cause the person to be fearful to amount to family violence.[22] However, we mention it here because both men and women raised allegations of this kind (four women and four men). Men tended to characterise this behaviour as "parental alienation"[23] (Hayden, Lachlan, Richard and Samuel).

Allegations made by both parties

Twenty SRLs were involved in matters in which both parties raised allegations that the other party perpetrated family violence, whether IPV or child abuse (see Table 4.5). Just over half of the women raised and faced allegations, and nearly three quarters of the men raised and faced allegations. Other studies have noted the extent to which both parties raise allegations in family law proceedings, particularly those that are judicially determined (Carson et al., 2018; Kaspiew Carson, Qu, et al., 2015; Moloney et al., 2007).

Five men (Bradley, Hayden, Justin, Samuel and Tim) and two women (Karen and Maxine) referred to the allegations made against them as "false". As noted above, Justin viewed his former partner's allegations against him themselves as a form of family violence.

Violence or abuse at court

Several interview participants mentioned violence taking place at court. This included intimidating behaviours inside and outside the courtroom, such as being yelled or stared at (Angela, Jenny and Katherine); having a fist or hand shaken at them (Angela); having abuse "mouthed" at them (Joanne); being prevented from exiting an area (Danielle); or being

22 *Carra & Schultz* [2012] FMCA Fam 930.

23 "Parental alienation" has a problematic usage in Australia (see Rathus, 2020).

Table 4.5: General interview sample: Both parties making allegations against each other

Men (n=11)			Women (n=24)		
Only the man raised allegations	Only the woman raised allegations	Both parties raised allegations	Only the man raised allegations	Only the woman raised allegations	Both parties raised allegations
2	2	7	0	11	13

followed home from court (the SRL respondent mother in ICS-D). Overwhelmingly, women SRLs spoke about abuse or intimidation at court or shortly afterwards. Jenny reported that, after each court event, her former partner "would send a text message with a little smiley face", which she identified as a continuation of his emotional or psychological abuse. Other women expressed feeling unsafe or scared at court (Anna, Danielle, Hayley, Jess and Robyn). Only one man expressed safety concerns and used the safe room (Bradley). We discuss safety at court in Chapter 8 and violence and abuse inside the courtroom in Chapter 9.

Other women described the use of court processes, such as their former partners bringing multiple applications against them (Carol, Grace, Karen, Katherine and Marie) or their failure to follow court orders (Fiona, Jenny, Karen and the SRL applicant mother in ICS-C), as a continuation of the violence that they had experienced.

Compounding disadvantage

The final aspect of SRLs' characteristics and circumstances to be considered is personal disadvantage in addition to family violence that impacts on their capacity to litigate. J8 explained:

> It's never just family violence … ? It's family violence and drugs and alcohol and mental health. And that's why I said to you before, there's no straight lines in any of this, okay? There are intersections of all of these issues that just make them really hard to work out.

As discussed in Chapter 2, Moorhead and Sefton (2005, p. 70) identified a number of disadvantages, including being a victim of violence, as "vulnerabilities" for SRLs (see also Trinder et al., 2014). Our research confirms many of these additional disadvantages and challenges for SRLs. These factors are intersecting and compounding, and may change over time. SRLs and professionals raised these additional disadvantages in their interviews; they were also evident in court observations and were detailed or alleged in documents on the court files. Compounding disadvantages experienced by SRLs in our study included:

- English as a second language (J1, L15, L24 and C-A-28)
- drug and alcohol use (J12, L24 and ICS-A)
- low levels of literacy (L14, L24 and R1)
- mental health concerns (Jess, Kate, Maxine, L2, L24, L32, A-B-22, ICS-A and ICS-C)
- homelessness (Fiona, Hayley, Lydia and O5)
- incarceration at the time of the proceedings (A-C-3 and B-B-3)
- disability, including cognitive disorders (Jason, Karen and L15).

Conclusion

This chapter provides an overview of the SRLs who participated in this research—whether through the general interview sample or the intensive case study sample. This overview confirms earlier Australian and overseas studies on SRLs in family law proceedings—namely, that financial reasons (including not being eligible for legal aid, having legal aid terminated and being unable to afford private representation on an ongoing basis) remain the main motivations for being self-represented. Importantly, the experience of family violence emerged as an intersecting factor for some people. For example, some victims of family violence may take actions that they perceive are for their safety and that of their children, but those actions may in turn have a negative impact on merit assessments for legal aid. In addition, a number of women SRLs reported that their abusive former partner adopted litigation strategies that appeared to be designed to prolong proceedings and deplete the limited funds the woman had available for private representation, leading her to become self-represented.

The majority of SRL matters that were observed in the intensive case study involved allegations of family violence. While the high rate found in this research (82.2% of SRL matters involved allegations of family violence) is partly the result of the purposive sampling strategy employed at some court sites, it is important to note that the same high rate was also found at those court sites where all matters were observed

(there were three court sites where all matters were observed and 82.5% of SRL matters observed at those sites involved allegations about family violence).

The chapter provides deeper exploration of the nature of family violence alleged by SRLs through the general interview sample. This picture deepens our knowledge about family violence as a compounding disadvantage for SRLs and the context in which they are litigating where the experience of violence necessarily shapes and impacts victims who are attempting to conduct their matter themselves or who face a perpetrator without representation. We found key differences for men and women, even when both are making allegations about violence. These differences include that women tend to experience multiple forms of abuse and gendered forms of violence (e.g. strangulation and sexual violence), and that these often intersect with concerns about their children (Laing, 2010).

The findings in this chapter enrich the context for understanding the experience of SRLs in preparing for court (Chapters 5 and 6), conducting their family law matters in the courtroom (Chapters 7–11), and in the outcomes achieved (Chapter 12) and lack of finality for some SRLs (Chapter 13).

CHAPTER 5

Obtaining information and advice

> I still don't think women know where to go, they don't know what to do and I certainly don't believe there is anywhere near the adequacy of services and support required. (Kate)

Research indicates that SRLs seek assistance from a wide variety of legal and non-legal sources, for example court websites, court staff, CLCs, duty solicitors, LACs, online sources, libraries, advice agencies, McKenzie Friends,[24] other SRLs, family and friends (Dewar et al., 2000; Knowlton et al., 2016; Lee & Tkacukova, 2017; Moorhead & Sefton, 2005; Richardson et al., 2018; Toy-Cronin, 2015; Trinder et al., 2014). Some SRLs are active in seeking information and advice, whereas others may have less capacity or access to resources, and may be more "passive" in their support-seeking behaviour (Trinder et al., 2014, p. 88).

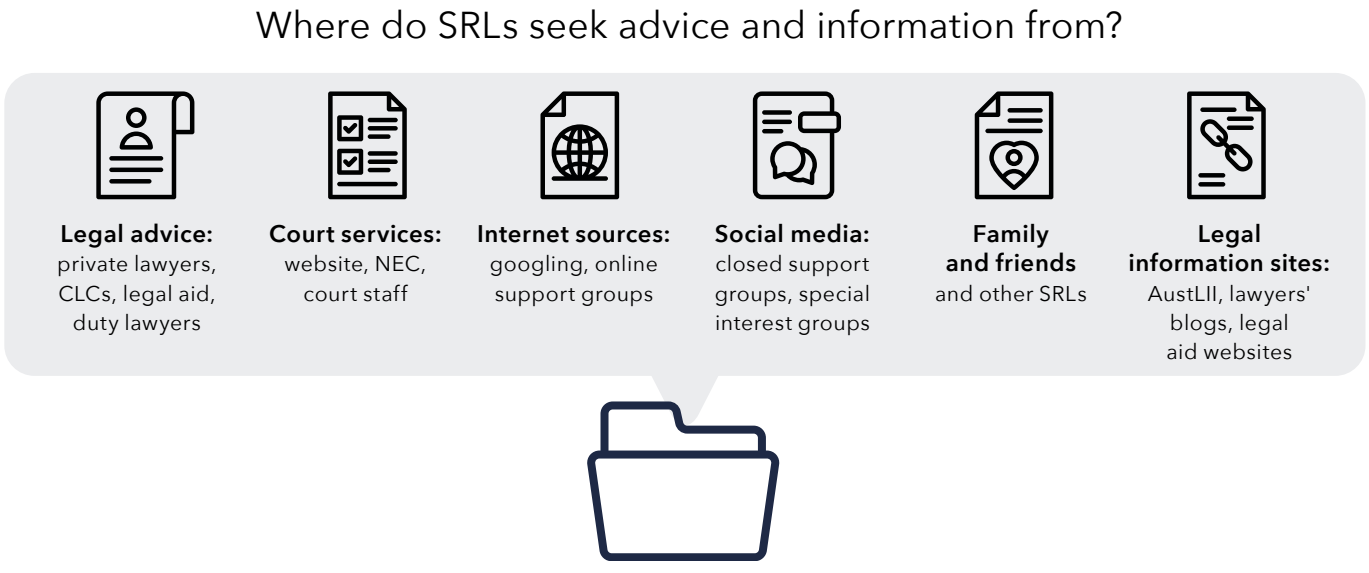
This chapter examines the sources of advice and information (legal and non-legal) accessed by SRLs in our study to assist them in the preparation and conduct of their case. SRLs seek information generally about the how the family law process works: what the law is, what the forms are to fill out, and how to conduct litigation. SRLs also seek advice that is specific to their matter and the orders they are seeking, including their prospects of success. The chapter explores the complexity surrounding SRL needs for information and advice (procedural and substantive) and discusses how heterogeneity among SRLs makes it difficult to point to universal strengths and weakness of different resources. In doing so, this chapter raises many issues that are shared by SRLs generally (Denvir et al., 2013), although SRLs affected by family violence may seek some more specific understanding in relation to their rights and next steps.

Different advice and information needs

Our research clearly showed that SRLs have diverse needs for information and advice, and differing capacities to digest and apply information. A range of factors personal to SRLs shaped their needs and capacity to access and use information, including the following:

- level of education, as well as comprehension and critical analysis skills
- level of computer literacy and access to the internet and computers more generally

Figure 5.1: Self-represented litigants' sources of information and advice



24 McKenzie Friends are discussed in Chapter 7. The name derives from *McKenzie v McKenzie* [1971] P 33.

- financial resources to pay for advice and information
- knowledge of how the Australian legal and court system operates (even at a general level)
- gender, as some CLCs are only available to women
- location relative to services
- convenience, especially for those who were time poor (such as single parents with children)
- time to access information (i.e. for those who lose representation at a late stage in proceedings)
- circumstances of a matter, such as its complexity or stage in proceedings when advice was sought
- experience of family violence, as either an alleged victim or perpetrator of family violence
- nature of family violence experienced and its legal relevance to proceedings.

Resources for and used by self-represented litigants

We asked SRLs about the resources they used to prepare and conduct their litigation and which were the most and least useful resources used. We did not necessarily ask SRLs to comment on a fixed list of services but did use prompts to assist interviewees to recall services used. The resources and sources of information that SRLs in our cohort nominated as the most and least useful are detailed in Table 5.1. Not all SRLs commented on resource usefulness. Some nominated more than one resource as most and least useful, and others indicated that nothing was particularly useful (Angela, Bradley and Lydia). We note the extent to which the same types of resources are nominated on both sides of the ledger. SRL diversity limits any objective assessment of the strengths and weaknesses of different resources, and assessments of usefulness may vary as a result of the following:

- whether a service provided the information and advice needed at that point in time
- tensions between SRL expectations and the services that can be provided
- whether an SRL was receptive to the advice or information given
- an SRL's capacity to use the information received.

For example, the trauma of family violence meant that Jenny had little capacity to understand advice given by a women's legal centre:

> I went and saw [women's legal centre] … but I was in a state of trauma, living in fear and, you know, conversations that I'd had with them at the time I'm sure were very helpful and if you understood … had the capacity to understand … I just didn't have capacity to understand what was needed of me.

The diversity among SRLs and their cases means that no single form of information or service can meet everyone's needs. This reflects previous research (Commonwealth Attorney-General's Access to Justice Taskforce, 2009; McKeever et al., 2018).

Interestingly, a small number of SRLs identified their level of education as their greatest asset and most useful resource (Hayley, Joanne and Robyn). This helped them not only to access information but to apply it to their matter. Two SRLs had commenced or completed a law degree to assist their case (Megan and Tim), with Tim nominating his law degree as his "most useful legal resource".

Advice and information from lawyers and legal services

Despite the many measures designed to assist SRLs, only lawyers can provide legal advice (procedural and substantive) of direct application to their individual matter. In cases where family violence is a factor relevant to risk in parenting cases, or to property cases, good legal advice can be crucial to ensure the family violence is accepted as a relevant consideration by a court.

Most SRLs we interviewed had obtained legal advice, frequently on more than one occasion, from different types of legal services, including:

- paying for legal advice from a private practitioner, in some instances on an ongoing basis
- obtaining free advice from a Legal Aid lawyer/advice line, duty lawyer, CLC or other non-profit legal service
- accessing pro bono or low-cost legal advice.

Table 5.1: Self-represented litigants' assessment of most and least useful resources

Most useful	Least useful
Lawyers and legal services:	***Lawyers and legal services:***
Lawyers (pro bono; mentoring; n=3) Duty lawyers (n=2) Women's legal service (n=1) CLC (n=1) ICL (n=1)	Lawyers (n=5) Legal aid (n=4) CLC (n=4) Duty lawyer (n=1) Women's legal service (n=1) Generic legal services (e.g. Legal Aid or CLC advice lines; n=1)
Court resources/ initiatives:	***Court resources/ initiatives:***
Commonwealth Courts Portal (n=2) Court websites (n=2) NEC (n=1)	Court websites (n=1) NEC (n=1)
Victim support resources/services:	***Victim support resources/services:***
Other victims who have had similar experiences (n=2) Women's community health centre (n=1) Victim support group (n=1)	Domestic violence/victim services (n=2)
Other support groups:	***Other support groups:***
Closed Facebook groups (n=2) Online closed websites that provide legal information and/or support (n=2)	Social media (n=1)
Legal information resources:	
Legal websites produced by law firms with articles/ commentary (n=1) Good law books (n=1) SRL manual prepared by a CLC (n=1)	
Other:	***Other:***
Psychologist (n=1) Strategic letter writing/complaints to the Attorney-General as this provided information about the case (n=1)	"Advice from people who don't know what they are talking about" (n=1)

SRLs nominated lawyers and legal services as both the most and least useful resource (see Table 5.1). One reason for being "least useful" was the variability in advice given by lawyers. Family law is highly discretionary and legal outcomes are "often situational and depend upon the decision-maker's view of the facts" (Crowe et al., 2018, p. 318). Marie said she used free legal clinics, which proved unhelpful, "because you could ask six different solicitors the same, exactly the same question, and you'll get six different answers". Legal professionals stressed the difficulty of giving advice in a discretionary jurisdiction where judges "all take different views" (L28). In this discretionary environment, the advice of a local, experienced legal professional can be invaluable. L28 and L29 both mentioned tailoring their advice to the "particular judicial officer, because some [judges] are known to be more sensitive to self-reps whereas others are not …" (L29).

Advice from a private legal practitioner

More than half of our general interview sample (n=18) paid for a private legal practitioner for discrete components of their case (as distinct from ongoing legal representation). This is commonly referred to as the provision of unbundled services. Most SRLs in our cohort who used unbundled services did so to minimise costs and to better target their limited funds to particular legal tasks. A few SRLs secured pro bono legal advice (Kate and Megan; Danielle was applying for pro bono at time of interview) and Robyn accessed the free first advice sessions offered by private law firms. SRLs paid for legal services as they needed to and when they could afford it. For example, Lydia scraped together "enough money for a couple of times to hire a solicitor or barrister just for an appearance" and then took them back off the record because she "couldn't afford to have ongoing assistance".

SRLs sought unbundled legal advice to advise on prospects of success, explain the law and procedure, draft documents or complete court forms and prepare for a court event, and for representation at court (e.g. Hayley and Danielle). Maxine borrowed money from her mother for a lawyer because she did not know how to proceed in her case and was "doing everything wrong", which she felt "enraged" the judge.

Some SRLs described the legal assistance they received as "mentoring" or "coaching" (e.g. Lachlan and Samuel). For Lachlan, the not-for-profit law firm that he accessed was "really good":

> … because you get access to a professional lawyer and I'm treating it like a mentoring arrangement. You do all the work and go check section 33 or whatever it is you know, here's a template … She's told me the process and I've got a flowchart she did on her whiteboard …

Two SRLs in the intensive case study (ICS-C and ICS-D) paid for private legal advice outside court events to check their paperwork and advise on the next court event. Relying on the same solicitor to do this as the matter progressed provided continuity with a solicitor fully apprised of the case. SRLs who consulted different lawyers at points in time found those lawyers were unable to view the dispute in its entirety. Without obtaining further advice, the information they provided was static, requiring SRLs to adapt the advice as circumstances changed. For victims of family violence, this issue is critical. Private practitioners engaged for one-off, unbundled services are unlikely to fully understand the violent context of the dispute, or the impacts of violence on victims.

Two SRLs (Jess and Katherine) found it difficult to engage private lawyers for court representation as an unbundled legal service, noting that few barristers "are happy to have you do most of that legal work to reduce the cost" (Katherine).

Advice from a community legal centre or legal aid commission

For those unable to pay for legal services, free advice and assistance is available from lawyers working for LACs (advice lines or clinics) and/or a range of CLCs, including generalist and specialist legal centres such as women's or Aboriginal legal services (ALSs). Assistance from CLCs is generally restricted to providing advice and assisting with drafting documents, although some have capacity to take on casework with representation. Many SRLs sought advice from these services and expressed mixed views about their usefulness.

Some SRLs felt they had benefitted from the legal advice they had received from CLCs or LACs, and spoke very highly of these services (Anita, Hugh and Joanne). For example, Joanne, who had a high level of education, found her 20-minute legal advice session was sufficient to identify what to focus on and what to ignore, and how to apply that advice to her circumstances.

However, almost all SRLs reported that CLCs and LACs were overstretched, making access difficult. Fiona felt significantly let down by Legal Aid, which she said was "just way, way too busy", constantly promising "'we're going to get to you', and never do[ing] it". Negative assessments of CLCs centred on limited opening times, long waiting times, limited time allotted to advice sessions, and dissatisfaction with general rather than specific advice. Carol's comments were indicative:

> A lot of places won't actually let you do phone appointments, so you have to go in person and they usually have a several-week waiting list. So if you've got anything urgent that needs to be dealt with today, like when he's withheld children … you get no help … and Women's Legal Service, you call them … they have minimal hours. I think it's now

> about four or five hours a week in the evening … you're trying to get [small children] to bed, you've got to be on hold … And the first thing they do when they answer their phone is say, "I can only give you basic advice that can't really help you".

Maxine's strategy to maximise the limited access when she needed help to prepare an affidavit was to sit in a CLC waiting room daily, "asking one question a day".

Perhaps the most problematic aspect of CLCs for SRLs is their provision of general rather than specific advice on individual cases (Trinder et al., 2014). The SRL applicant mother in ICS-K had seen two duty solicitors, spoken to Legal Aid over the phone and sought assistance from a women's legal service. She commented,

> They're great, don't get me wrong, but they don't help you fill out the documents, they don't represent you in court. It's literally, "These are what you need to fill out".

She explained that finding the forms was not the issue for her—filling them in was the challenge.

Alleged victims of family violence SRLs often described their cases as "too complex" or "complicated" for this model of advice (e.g. Marie). Maxine said, "There was nothing they [the women's legal service] could really do because it was all so complicated". Two alleged victims of family violence were particularly critical of the women's legal service they accessed. Emma felt she was given a "bum steer" by a service, noting that for family violence cases, "They're not thinking outside the square". Katherine suggested the women's legal service might be "excellent" and helpful to the small number of people subjected to extreme physical violence but that, due to poor resourcing, they were "useless" in assisting the majority of cases that involve emotional, psychological or financial abuse.

Legal professionals working for CLCs confirmed that resource constraints limit the number of people they can assist and that casework is prioritised according to need. One private practitioner volunteering for a CLC free advice clinic explained, "It is hard because you are having to give advice, it's limited to 30 minutes, and you see five to six people on that advice night" (L13). Despite their resource constraints, the legal professionals interviewed (e.g. L15, L26 and L31) believed that their help with drafting documents, particularly affidavits, provided a key area of assistance for SRLs. One solicitor stated that, even if a person falls outside the criteria for assistance, their service would still provide advice about process and provide copies of "pro forma orders" that SRLs could use (L26). A solicitor from a women's legal service (L15) also said that they would refer SRLs to other legal services to assist them to move through the process.

Other information from legal services

Some legal services provide online information and resources. Karen spoke highly of the information available on the Victorian Legal Aid website, despite not being a Victorian resident. Hayden found an online kit for SRLs from Redfern Legal Centre very useful, despite living nowhere near Redfern (a Sydney suburb), and the SRL mother in ICS-J primarily used the Legal Aid NSW website to assist her with her contravention application, despite not being a New South Wales resident. Two SRLs (Maxine and SRL female in ICS-D) noted that some private lawyers post blogs about important cases or developments in the law, which helped them keep up to date as their matters progressed.

Family Violence Law Help website

Family Violence Law Help is a national website[25] launched in 2019 by National Legal Aid and funded by the Commonwealth Attorney-General's Department. SRLs interviewed did not mention this site, probably due to its recency. The website is a welcome innovation, providing a "one-stop" location to assist people experiencing family violence. It provides information about family law and other legal proceedings, relevant legislation and processes, and explanations of what domestic violence is. It also has information for people concerned about their safety when attending court and information about alternative means of giving evidence—both areas that SRLs may be unaware of (see Chapters 8 and 9).

25 See https://familyviolencelaw.gov.au

Advice and information obtained from the family law courts

Court websites

The FCA and FCCA have comprehensive, user-friendly websites that provide information about the court, forms and procedures, and other relevant topics for users (Partridge et al., 2018; Richardson et al., 2018). They include prominent links for SRLs, a useful set of "how do I …" links on the home page, several do-it-yourself (DIY) kits, fact sheets and videos (Appendix H lists the information and resources provided). Almost all of the SRLs had accessed the relevant court website and commented on its utility.

A number of SRLs (e.g. Elizabeth, Hayden, Jenny, John, Lydia and Maxine) and professionals (L28 and O8) spoke positively about these websites. In particular, SRLs pointed to the FCA website's usefulness in providing information and clarity about court processes. It was described as easy to navigate, providing "good information regarding procedural things" (John); one of the best resources, with information on processes and forms, including basic instructions on how to fill in forms like affidavits (Hayden); and providing useful examples of affidavits, as well as "examples on what to do and what not to do" at court (Maxine). One court support worker was full of praise: "The Family Law website, Family Law Court, whatever, is absolutely amazing" (O8).

Nonetheless, many SRLs found the court websites difficult to use (e.g. Karen, Katherine, Natasha, Samuel and Robyn). Some found information was not readily located in one spot, requiring users to progress through multiple pages to locate information. Danielle, who had a young child, found this frustrating because her time to navigate around the sites was limited. Robyn thought the FCCA website was "quite confusing". Rather than one authoritative webpage, form or booklet, there were "lots of different booklets with lots of different information, and lots of pages were different variations of the process". Natasha struggled to locate forms on the FCCA website, finding it "really, really difficult … I couldn't work out which form to use for a particular application". In the end, she went to the registry in person for assistance. Lydia said it took "a long time" to learn to navigate the FCCA site even though "I'm pretty computer savvy".

Other SRLs criticised the court websites for lacking the type of information they were after. For Karen, the FCA website was "useless" because it did not help her find out "what you can and can't file, what's admissible and what's inadmissible". She described how, despite downloading the appeal document and reading through the online materials, she had "no idea. I look at the form and I know what I have to say … but I don't know how to answer the form". Marie considered the FCCA website to be the least useful resource she used, "because what they actually say and what they actually do are totally—two totally different things". While Anna found the parenting plan she accessed "very easy to use", she could not find advice on the best care arrangements for her child—that is, "professional advice about what other children have dealt well with, what's been best, what's worked well …" This suggests that Anna had unrealistic expectations about the type of information these websites can provide.

Two SRLs believed a user would need some legal knowledge to be able to locate relevant information and forms (Danielle and Lachlan). For example, Lachlan observed that the FCCA website "was great when you know what you're looking for … [and you learn] some of the jargon". Kate (who had been litigating for several years) considered that, despite its shortcomings, the FCA website had improved over time. A small number of legal professionals agreed that they also experienced difficulties locating information on the court websites (e.g. L25 and L26).

Do-it-yourself kits

The court websites offer DIY kits for some applications. L28, a private practitioner, described these as "pretty good", although other legal professionals questioned the utility of the kits. L25 was quite blunt about one kit's length and focus on the legislation, calling it "just a joke". In particular, DIY kits may not be an effective strategy for people with poor legal knowledge; limited technological capacity or access; limited literacy, language or communication skills; or multiple and complex legal and non-legal needs. Certainly, some SRLs

we interviewed did not find them useful. Jenny complained that some of the packs were "quite outdated" and "very hard to understand":

> Whether or not that was because I was in a trauma space and didn't have someone to actually give me instructions, I just … I felt like I was reading stuff and had no idea.

Giddings (2017, p. 57) has warned that DIY kits "may present a complex legal task as straightforward, based on assumed knowledge". Tim echoed this, noting that information packs inform about legal rules and forms, but do not spell out all the processes involved which can lead to mistakes:

> It's like most people forget the Notice of Risk with the FCC and all those other little things, and they don't get their affidavits witnessed properly or they don't know how to connect their annexures. They don't know to bind it … They don't even know what sort of font to use or what size …

The FCWA produces guides for SRLs in children's matters (FCWA, 2015a) and property matters (FCWA, 2015b). These guides cover preparing for trial, the relevant law and the trial process. We do not know if SRLs use these guides, but none of our participants referred to them (including one participant from Western Australia, Natasha). We have not found similar guides available for the federal family courts.

Court staff

Court staff are often the front line for SRLs seeking information and advice (McKeever et al., 2018). Many SRLs we interviewed asked court or registry staff for information. Consistent with other research (e.g. Macfarlane, 2013; McKeever et al., 2018), their views about court staff were mixed.

Some SRLs described court staff as "excellent", "very helpful" and "great". Fiona found staff "really genuine and wanting to help", providing her with phone numbers for free legal advice. Robyn described registry staff as "fantastic", noting that they offered to manually file her affidavit and helped her to locate the courtroom and judge's associate on her first return date (similarly Anita and Megan). Over time, Hayden felt he developed a "very good relationship" with registry staff.

In contrast, several SRLs described some registry staff as distinctly unhelpful (John, Natasha and Samuel). Natasha said, "They dismissed me. They're rude. If you ask a question, they get, you know, they get annoyed with you for not knowing the answer". Samuel thought staff were "definitely not" helpful, "especially being a man". He admitted to avoiding going into the registry when two particular female staff were working.

SRL assessments of court staff depended on their expectations. Hayden acknowledged the restrictions operating on staff: "They can't give you legal advice, they can only inform you of the correct processes to follow in lodging stuff". This aligns with earlier research indicating that the boundary between legal advice and information is difficult for SRLs to understand and challenging for staff to navigate (Dewar et al., 2000; McKeever et al., 2018; Trinder et al., 2014).

Two SRLs made negative comments about court staff's approaches to, and understanding of, family violence, suggesting a normalisation of violence within the court setting (Jenny), and an absence of support when clearly upset (Hayley). Ethics approval was not granted by the FCA to interview court staff (including National Enquiry Centre staff) about their experiences with SRLs or their views on resource needs or availability. This remains an area for further research, including staff responses to family violence allegations and the information they provide about safety measures.

National Enquiry Centre

The National Enquiry Centre (NEC) is a national information service for federal family courts. It provides procedural information and can help SRLs to identify and locate forms. It is contactable by telephone, email or live chat, and operates from Monday to Friday, 8:30 am until 5:00 pm (AEST). The NEC received 260,844 phone calls and conducted 62,256 live chats in 2018–19 (FCCA, 2019a, p. 56). Most SRLs we interviewed had contacted this service, with mixed responses.

Some SRLs found the NEC useful. Katherine checked with the NEC to identify the correct forms to use and documentation to gather. Fiona valued having the NEC walk her through

the administrative process: "They'll literally talk you through how you need to prepare your documents". Other SRLs found the NEC's usefulness tempered by the generality of information provided, as opposed to specific legal advice. Karen considered NEC staff "completely and utterly useless" in responding to individual cases (similarly Hayley). Kate, however, felt the NEC could still be useful in an advisory sense: "They can explain to you exactly what this form means, what this person's doing, this hearing is likely to, you know, go on to this, this and this".

Some SRLs had decidedly negative experiences with the NEC. For example, Natasha explained, "You're on hold for an hour before you get through. And then you get through and they don't know the answers to the questions". Samuel was frustrated when the NEC simply referred him back to the court website or to other services which were similarly overstretched. Karen reported that the NEC gave her "completely incorrect advice" more than once.

Commonwealth Courts Portal

The Commonwealth Courts Portal (the Portal) is an online service for the FCA, the FCCA and the Federal Court of Australia that provides a central location where litigants and lawyers file and access documentation and can see information about past and upcoming court events that relate to their matter. Many SRLs and professionals nominated the Portal as the resource that made a difference to the conduct of their matter. Fiona and Justin nominated it as the most useful resource they accessed. A useful step-by-step video about how to use the Portal is located on some FCA and FCCA webpages (FCA, 2018; FCCA, 2018). However, the video is not referenced elsewhere (e.g. not linked to the "How do I eFile" nor the "How do I navigate the Commonwealth Courts Portal" pages on the FCCA website, or on the Portal's own webpage).

Most SRLs had accessed the Portal and found it convenient and easy to use. One lawyer considered the Portal particularly helpful to SRLs for organising their documents, allowing them to file these online all in one place (L31). Kate found it "brilliant" and "a really good central point of data". Fiona admitted to having been "a little lost" before finding the Portal and considered it to be "the only thing that has made anything easy in this whole horrible situation". The Portal updates litigants about progress or developments in their cases, which Fiona found really useful. While Kate valued this aspect of the Portal, she would have liked it to do more in explaining and connecting processes:

> It doesn't give any clarity as to what links a document to a document, and it doesn't clarify what document is associated with a specific procedure or hearing … and that's where I'll usually ring the registry … and they'll sit there and then go through the Portal with me.

Some SRLs found the Portal challenging in its use of legal terminology and functionality (e.g. Samuel). Difficulties with using the Portal also emerged in the court observations. For example, the respondent father in C-B-23 told the judge that he did not know how to use the Portal. This created a number of delays in this matter including the adjournment of the final hearing because the SRL was unaware that the prohibition on direct cross-examination (see Chapter 10) applied in his case due to the fact that he was a defendant in a current protection order. At one regional circuit court (A-B), the judge regularly checked with SRLs that they could access the Portal. The judge was observed taking time to explain the Portal and e-Filing to SRLs, how to register for access, where to file documents, and where to find orders made (as they are no longer posted). As J7 reflected:

> We kind of expect everyone to be [internet savvy] these days, not everybody is. And [I] still get people who don't have an email … Or say, someone who can't read.

Internet sources

The internet houses a multitude of resources and sources of information of potential use to SRLs including formal sources (e.g. official court websites, legal information databases, websites for law firms/lawyers and so on; see Randell, 2018), as well as less formal sources of information (e.g. social media sites). The wealth of information available may mean that some SRLs are overwhelmed (Richardson et al., 2018), need to be able to filter conflicting or confusing sources of information, and may struggle to identify what is most relevant to their case (see Crowe et al., 2019; Hunter, 2003; Lee & Tkacukova, 2017). These are common challenges in any research conducted on the internet (see Denvir, 2016).

In addition, these sites tend to provide generalised and static advice that SRLs still need to apply to their matter (Mant & Wallbank, 2017). For example, information about a parenting matter involving family violence needs to be considered within the SRL's own factual circumstances and translated to risk.

The extent of online information may imply to litigants that self-representation is easy, when it is not. Some SRLs cautioned that simply finding information on the law does not make you a lawyer (e.g. Tim). While the mother in ICS-K commented that "Google is the best … Everything I can find on Google", she also cautioned, "But you know, when you're there and in front of [the judge], it's completely different because you get so nervous".

General internet searches

Many, if not most, SRLs obtained information, examples of documents and examples of how to behave at court from websites other than the official Family Court websites. For example, Tim found legal commentary on cases from law firms "really valuable":

> Like sometimes I read a case and I go, "Oh, I think it's that", then I read someone's commentary who actually knows what they're talking about and their perspective will be very different.

Unfortunately, some SRLs found their search strategies tended to be wide-ranging and inexpert, or they had limited time to conduct extensive or thorough searches (e.g. Emma and Kate). Many SRLs had difficulty assessing the accuracy or reliability of online information, given their lack of legal knowledge, and stressed the need to check the quality and authorship of websites or groups (e.g. David and Samuel). Others struggled with the legal language on some sites and preferred to use informal sites written in layman's terms, despite the risk of inaccuracies (e.g. Danielle). Joanne pointed out the danger of being misinformed when services included articles on their websites from overseas jurisdictions (a similar comment was made by the barrister in ICS-A).

J27 observed that some SRLs gather cases and information such as "Wikipedia articles about alienation" and other "information from dubious sources" that do not assist the SRLs to "interpret the law and make … legal arguments" relevant to their matter.

Researching the law online

Family law legislation and cases can be researched online through legal databases. Some SRLs found researching and interpreting legislation and other legal resources easier than others, by virtue of their education and work experience (e.g. Hayden and Hayley). Some SRLs, who had obtained legal advice, could interpret legal materials once the terminology was explained to them. Lachlan said that this "mentoring" on legal jargon from his solicitor helped him to do text searches for relevant cases so he could "use those to formulate orders sought".

However, many SRLs experienced challenges in locating relevant laws, court rules and practice directions, as well as in trying to understand and apply them. Most SRLs did not have a legal background and felt they lacked the skills and knowledge to conduct this research (e.g. Emma, Justin and Maxine). Some SRLs did not know how to identify relevant cases and did not understand the concept of precedent. Alison's search strategy was to locate a case, which in turn referenced other cases: "Just, you know like a blind person trying to find her way". Emma spoke of being confused by locating several different cases "that deal with the same thing but in slightly different ways" and called the process "a minefield". Lydia identified relevant cases on a legal database by reading them in reverse chronological order.

AustLII

One free online legal database is the Australian Legal Information Institute (AustLII) database.[26] This houses legislation, case law and secondary materials, and is managed by the Faculties of Law at UTS and the University of New South Wales. The AustLII website includes a user guide and help topics. While the AustLII does not appear to have produced any videos to assist users, a few produced by others are available on YouTube.

Eleven SRLs reported using AustLII. Hayden and John found the database useful and easy to use. However, others found it

26 See http://www.austlii.edu.au/

difficult to use "even though I'm reasonably computer literate" (Lachlan). David described AustLII as "an enigma", saying it was "very difficult to use" and "maybe if I had more legal training I would've understood".

Online support groups and forums

For advice and emotional support, many SRLs accessed an array of online forums and Facebook groups, many of which are closed to non-members. SRLs found these useful in learning from the experiences of others, who also shared information.

A number of support groups were hosted by special interest groups. Two SRLs found the Dads in Distress website useful. Tim appreciated users' warnings against certain actions, which helped him to "avoid mistakes". David found it useful when site users posted about useful evidence they had included in their affidavit, or spoke about helpful tactics. Similarly, Carol spoke about women on an (unnamed) family violence social media page who had provided advice that had "frequently been better and more accurate than lawyers' advice". Carol went further:

> [Women] will actually, some of them will contact you privately and they'll even give you copies of an example [of an affidavit] or you can post what your issue is.

Sharing such information or documents raises concerns. The highly discretionary nature of family law decision-making makes it dangerous to assume that a shared story specific to one situation will necessarily apply to another matter. The prohibition in the *Family Law Act 1975* (Cth) s 121 on publication of any parts of proceedings that would identify the parties impedes this practice and has serious implications. Three SRLs warned about liability under this section but suggested that users found ways around this constraint (Lachlan, Marie and Natasha).

A number of SRLs spoke of the convenience of social media, particularly for those caring for young children (Kristy), noting that you could post questions and gather a lot of responses (e.g. Justin and Natasha). Others valued social media as a space to access support (e.g. John and Lydia) or to express discontent with the legal process; as Lydia said, "There's sympathy and reassurance that you're not the only person who's been screwed over". Other SRLs were more cautious. Tim warned against expressing frustration on social media or texting the other party because "then, you know, that's it, it's in evidence". For some SRLs, social media was unhelpful. Robyn was disappointed with a site that

> just seemed to be a whole lot of single mothers whinging and complaining and I say I haven't got the energy for that … I get it but I needed real information and real advice.

Maxine avoided such forums for the same reason. Samuel observed that the discretionary nature of family law "creates a lot of different viewpoints". He cautioned, "There's a lot of hate-fuelled and vengeful people out there" and considered social media to be the worst resource he had used.

Conclusion

This chapter finds that SRLs access both formal and informal sources of information and advice. The diversity of SRLs and their mixed views of resources indicate a strong need to provide an array of resources, pitched at different levels. The SRLs in our sample spent a lot of time and effort navigating resources. A centralised authoritative source of information, particularly to assist SRLs in family law proceedings, which clearly signposted steps and forms and provided simple templates for orders would assist SRLs. The chapter identifies that victims of family violence face particular challenges; aside from the Family Violence Law Help website, there are few dedicated places that combine family violence and other areas of law. In order for the court to be able to fully take account of family violence in a meaningful way, victims must present a full and coherent picture about the extent and impact of the violence in a form acceptable to the court.

Ultimately, the chapter reveals that there is a considerable amount of information available to assist SRLs with procedural steps, but that there is far less availability of substantive advice about cases or assistance in applying that information analytically. Most avenues for legal advice or information are designed around a single point in time, and the advice

or information may become obsolete during lengthy family law proceedings. Only ongoing legal advice can fill these gaps. Without ongoing legal advice, SRLs need to analyse any information and advice they receive, apply it to their own legal argument or strategy and adapt to changing circumstances—a process that requires legal reasoning skills.

The next chapter explores the implications of this gap between the proliferation of generalised information and the need for substantive advice for document preparation. Without advice, SRLs may be unable to "translate" the issues of importance to them into documents that "make sense" to the courts (Barnett, 2014, p. 456).

CHAPTER 6

Completing documentation

> A lot of self-representeds don't understand, it's document-based and it's not what flourishing speech you can give from the bar table like they see on television. It's what's in the documents. (L22)

The documentation filed in family law is critical to the conduct of proceedings and any outcomes achieved. Research suggests that completing paperwork is where SRLs often perform poorly (Judicial College, 2018; Ministry of Justice New Zealand, 2015; Trinder et al., 2014; Weihipeihana et al., 2017). In Australia, completing documentation is complicated by the operation of the two federal family courts, with each having different rules and forms for commencing and responding to proceedings.[27]

Documenting evidence of family violence is a particular challenge for alleged victims who are SRLs. Previous research has found that SRLs may fail to disclose concerns about family violence and judicial officers have reported finding forms completed by SRLs unhelpful in understanding risks to parents or children (Kaspiew, Carson, Coulson, et al., 2015). Research and reports have suggested that women victims of family violence may believe or receive a message that they should not raise allegations of abuse or violence in their documentation or they may risk being seen as obstructive or even risk losing their children (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Laing, 2010; Roberts et al., 2015).

This chapter examines SRLs' capacity to deal with two main issues: being able to write and file documents and being able to present relevant evidential material that is critical to family law proceedings and in documenting family violence. We then look in more detail at SRL engagement with three documents or steps that are critical in informing the court about family violence: Notice of Risk (FCCA) or Notice of Child Abuse, Family Violence or Risk of Family Violence (FCA), affidavits, and subpoenas.

Completing paperwork

The SRLs we interviewed varied in their skills and capacities to deal with paperwork. The legal professionals interviewed confirmed this variability:

> It can be very varied, from something that you almost wonder how it got filed with the court because it's so lacking in substance, compared with something that can be relatively quite sophisticated and [a] very good start to a legal process. (L29)

Confidence

Many SRLs admitted to lacking confidence in their ability to complete paperwork to initiate or respond to proceedings, particularly when they first started litigating. Kate initially found it "incredibly overwhelming", although her confidence in writing affidavits grew considerably with practice. In contrast, while David felt "reasonably confident … [and] very competent", knowing where to find information and how to analyse the content of affidavits, he also reported that he found completing paperwork "daunting". He was unsure how the court would assess his affidavit and was nervous as to whether he had complied sufficiently with the rules for his affidavit to be accepted by the court.

Skills and capacity

Professionals identified a number of issues affecting SRL skills and capacity to complete paperwork, including their level of literacy, whether English is their first language, experience of family violence, and other compounding disadvantages. L16 related these issues to completing affidavits:

> I explain to them, you know, an affidavit is your story to the court … start off at the beginning and work your way through … and they'll say, "I just didn't know what to write". So, it's not just a practical issue, it's almost a capacity issue. Do they actually comprehend what advice they're being given?

Literacy and language background other than English

Literacy was not an issue in our general interview sample, but the intensive case study identified difficulties for some

27 At the time of writing, the FCA and the FCCA were working to harmonise the rules for the two courts (FCA, 2019a, p. 3).

SRLs. We observed a humiliating exchange in open court between a judge and an SRL to test the latter's literacy (A-C-13). In eight of the 98 in-depth court files (8.2%), we identified documentation that was poorly expressed and replete with spelling and grammatical errors. Professionals also raised literacy concerns for some SRLs (e.g. L16 and R1). L14 stressed the difficulty for clients who struggle with literacy and who also "don't have access to technology and sometimes they hand-write their affidavits. They're not great at spelling and grammar".

SRLs from language backgrounds other than English might struggle with legal paperwork. Our examination of the in-depth court files revealed five SRLs (5.1%) for whom English was a second language, as evidenced in their written language expression.

Experience of family violence

The emotional and psychological toll of family violence can affect an SRL's ability to fill out forms and to focus on relevant factors. The requirement for a victim to relive their experience of violence repeatedly in paperwork is likely to exacerbate any pre-existing trauma (Roberts et al., 2015). Fiona explained that years of experiencing violence had severely reduced her confidence in representing herself. She was

> not confident. Not one little bit. I don't know how many hours or days … I've spent just curled up in a ball, just crying … It just is all so overwhelming and frustrating and scary that if you didn't have to have all those emotions go along with it, you'd probably proceed … a lot better.

Some SRLs reported how experiencing ongoing violence during proceedings further compromised their ability to complete paperwork. As Carol explained:

> I struggle to work because of the ongoing abuse, because I've got to spend so much time on my phone trying to get advice and then trying to put together affidavits. And there are days I just can't do it. I'm too distressed and I can't spend another minute at my computer going over this stuff.

One lawyer reflected on how trauma affects capacity with paperwork. L15 spoke about a client who has English as a second language and was also experiencing ongoing family violence. The violence left the client "pretty traumatised, she just couldn't sit down and concentrate to draft [documents]".

Other experiences that compound disadvantage

Some SRLs are affected by compounding and intersecting disadvantages, such as mental health issues, disability, homelessness or incarceration (see Chapter 4). For example, Karen has Asperger's syndrome and attention deficit hyperactivity disorder, affecting her ability to write paperwork, "particularly anything stressful". Hayley failed to comply with court orders to file her response by a certain time because she was homeless. L15, a solicitor from a women's legal service, emphasised the difficulty in assisting women experiencing multiple forms of disadvantage, compared to other clients:

> … someone who might turn up who is [from a culturally and linguistically diverse background] or Indigenous, and they don't have, they may not have adequate or safe housing. They may be staying with someone else because of domestic violence, they may not have access to a computer. And the volume of the amount of material we send to them is quite extreme, because of the amount of different documents … And [so many women who approach our service] don't have the capacity to do that [work on their own with limited guidance] because they're traumatised. They're not well, it's a big job and it's overwhelming.

Access to computers and computer literacy

Accessing information and forms and filing documents with the court can now be done online via the Commonwealth Courts Portal (see Chapter 5). However, engaging with the Portal can be challenging. Katherine found it difficult to understand how to e-file and David encountered difficulties uploading files because his documentation was too large.

Further barriers may be experienced by those with low computer literacy or limited access to a computer or the internet. A number of SRLs in the intensive case study experienced these challenges. Eighteen of the 98 in-depth court files (18.4%) we examined had some handwritten forms and affidavits,[28] suggesting that several SRLs had limited

28 This does not include Notice of Address for Service forms that SRLs were frequently observed completing in the courtroom at the time their matter was being dealt with. The courts generally accept

or no access to computer technology. None of the SRLs we interviewed in the general sample reported that they had handwritten any of their documentation.

One legal professional pointed out that some SRLs "might have the internet on their phone" but no computer at home (L16). Two regionally based solicitors (L14 and L20) suggested that SRLs living in rural or regional centres may have more limited access to computers or the internet. Access may also be difficult for those experiencing homelessness or incarceration. We observed a case involving an SRL respondent mother who was incarcerated (B-B-3). She tried to file her handwritten affidavit via facsimile (a method not recently used by the court). She was unaware of the online Portal and had no access to computers.

Quality of documents

Knowledge of law and procedural requirements

For many SRLs interviewed, their limited knowledge of the law and understanding of procedural requirements proved an obstacle in preparing their documentation. Hayley described the process as "incredibly convoluted" and noted that her progress in learning the law was patchy: "I guess you become a little bit … knowledgeable but without any real concrete knowledge". Hayley drew an analogy to trying to complete a 500-piece puzzle but only having "30 [pieces] in your hand". It took time for SRLs to identify the correct forms and to understand the requirements for each document. Lachlan said it took him "a year" to get his initiating application done because he is "not a lawyer".

The layers of court rules and processes make preparation, filing and service of documents complex. Tim suggested that most SRLs make mistakes in their documents (e.g. fail to have affidavits witnessed, annexures connected or documents bound correctly) or failed to include key documents altogether (e.g. Notice of Risk). Joanne and Justin, who were both highly educated, found the court forms confusing; for example, Joanne said:

> The flow doesn't always seem to be intuitive in terms of: how much information do I have to give here? I could sometimes put in lots of information and then I'd realise later on, oh, I was actually supposed to do that in this section.

Other SRLs spoke about their unfamiliarity with legal terminology which made navigating the court website, selecting the correct forms and completing them challenging (e.g. Bradley). As one legal professional commented: "None of the family law forms are intuitively clear. They are impenetrable for someone who's unfamiliar with legalese or legal processes" (L11).

Maxine found articulating the orders she wanted more difficult than writing her affidavit and advised, "to get legal help then is really important". Two professionals (L16 and O2) observed that articulating the orders sought can present specific challenges to SRLs: they may not know how to draft the orders they want, they may be unaware of the range of orders available relevant to their circumstances (especially safety measures), and they may not consider the practical operation of orders.

Our intensive case study drew attention to the number of SRLs, generally respondents, who did not file any documentation (that is, 17 of the 98 priority files, or 17.3%, noting that court files were viewed at a point in time and documentation may have been filed later). One duty solicitor explained that some SRLs simply find the process too difficult: "[Clients say] 'It's just too hard, I don't know how to fill the forms in, I don't know what to say in the forms'" (L16).

Legal professionals confirmed that SRLs find the procedural requirements for documents challenging, with a few pointing out that such requirements are second nature for lawyers, for example:

> No, I think most [SRLs] don't know how to file a response or to how to file an affidavit, wouldn't even know how to file a Notice of Address for Service. It's just the most basic of forms that we as lawyers are used to dealing with every day, it's just a foreign language to most self-represented litigants. (L16; similarly L1, L11 and O10)

handwritten documents, however, in the FCA, affidavits must be typed: see *Family Law Rules 2004* (Cth) r 24.01.

Criticism of paperwork

Some SRLs had their paperwork criticised by judges. Jenny said, "I just read online how to do this [affidavit] and was trying to do the best I can but … I was criticised for submitting too much information". Tim was also criticised by a judge for listing every possible contravention in his contravention application. Tim told us, "I think that's the problem. Like if you look at court forms, and even a lot of the books … it doesn't really say those really sort of important, obvious things". At the other extreme, a judge criticised Emma's contravention application for omitting information, despite her following examples given on the form. Carol was blunt about how SRLs may be treated when their paperwork was not completed well, insisting that there is not enough support for SRLs:

> Many of them [judges] treat you like you've got to know your shit. If you put something on the wrong paper, you use the wrong form, they can dismiss your application and then because you get it wrong, they can give you costs.

One legal professional sympathised with the difficult position that judicial officers are placed in when SRL documents are incorrect:

> They've [judges] got one litigant represented legally who's got perfect documents and then they've got the self-represented person … whose documents are absolutely woeful. What do they do? You know, they do their best. (L12)

Rejection of documentation

The general interview sample (e.g. Fiona, Natasha, Karen and Megan) and our examination of court files (e.g. A-A-11, A-A-15, B-B-3 and C-B-37) revealed that a number of SRLs had their documentation rejected by the court due to errors in presentation, content or length,[29] or for omissions. Fiona's enforcement application was rejected because she did not attach the original orders.[30] In an observed case (B-B-3), the affidavit of the SRL respondent mother was rejected because it was not filed together with a Response form, Notice of Risk form or the required filing fee.

Natasha reported that she had received incorrect advice about which form to use for her appeal, which led to her documents being rejected "even though the court, themselves, gave it to me". When she submitted another form with assistance from Legal Aid, she received a letter from the FCA saying:

> "You've used the wrong form". You need to use the form that I originally had used. And then it was too late. They said, "No, you're outside your time frame to appeal this".

It is not only SRLs who struggle to identify the correct forms. Carol's matter was adjourned "because [her former partner's] lawyer filled out the wrong court form".

Our examination of the court files also revealed, however, that the court may accept documents despite errors (e.g. A-C-6, B-A-5, B-A-9, B-B-7, B-B-11 and C-A-2). In ICS-A, the SRL respondent mother filed an affidavit without a Response or Notice of Risk form. Counsel for the applicant father noted that this should have been rejected. He was unsure but thought the affidavit may have been accepted because there was a contravention on foot. In another observed case, an SRL applicant father (B-A-9) started proceedings with an initiating application, when he needed to commence enforcement proceedings in relation to the property. The judge was understanding, despite a busy list, and stood the matter down to allow the SRL to speak with the duty solicitor. The SRL, though frustrated, had the application amended that day.

Assistance with paperwork

We asked SRL interviewees how they learned to complete their paperwork. Several said they relied on documentation filed by their own lawyer (when they had one) or by the other party (where represented) as models. Karen downloaded the form off the court website and "used the dozen or so affidavits in the case so far to copy that format". Similarly, Lachlan copied subpoenas submitted by his former partner's legal team. Other SRLs admitted to relying on affidavits shared in closed social media groups, even though this raises concerns about the *Family Law Act 1975* (Cth) s 121 (see Chapter 5).

29 In interim proceedings in the FCCA, affidavits are limited to 10 pages and no more than five annexures unless the judge grants leave allowing a longer affidavit to be filed: FCCA, *Practice Direction 2 of 2017: Interim Family Law Proceedings (from 1 January 2018)*, 7 December 2017.

30 *Federal Circuit Court Rules 2001* (Cth) r 25B.02.

Many SRLs sought assistance from public or private lawyers at some point to prepare documentation (see Chapter 5). The SRL respondent mother in ICS-D explained the benefits of obtaining legal assistance with her affidavit:

> [The solicitor] showed me how to format it and put it in where the headings make sense … and … break it up so the judge can quickly go, "Okay, this part is in relation to the visits, this part is in relation to the family violence, this part is in relation to the history of the relationship".

Many legal professionals emphasised that legal help with completing documents could make a direct difference to the proceedings and outcomes (L12, L15 and L31). J1 simply said, "We really should have lawyers to assist people draft their affidavit". L13 advised that, for people with limited funds,

> it's much better to get the documents done correctly, I think. Because at the end of the day, the verbal submissions will only go so far, and the judge has to make sure what she's doing is based on what's in the actual court documents.

Documents and family violence matters

Whether and how evidence about family violence is presented to the court is important given that the court requires such evidence to be able to make orders that reflect risk in parenting matters or contributions in financial matters. Parties raise allegations about family violence in a number of ways, including the forms that notify the court about family violence, child abuse and risk issues; affidavits; and subpoenas. SRLs in our cohort experienced some generic issues when completing these documents, as well as issues specific to how well they recorded allegations of family violence. It should be noted at the outset that some women questioned the point of documenting the violence in any event:

> I documented everything and it got completely ignored, so I was happy that I was able to document it, but I didn't really see the point of it when they all ignored it. (Maxine)

Similarly, Lydia commented that her solicitor helped her put all allegations of family violence in the first Response and Notice of Risk "but then the court didn't take any notice of it".

Is family violence minimised or silenced in documentation?

Silencing and minimising by lawyers

Of great concern is the fact that some of the SRL women we interviewed (Angela, Carol, Grace, Jenny, Karen and Lydia) reported that their lawyers or other professionals advised them against including information about family violence. Grace was told, "Don't go there … My lawyer's advice has been that family law is about perception and don't give the perception of conflict". Karen, whose matter was being heard by the FCA, was told by the ICL in her case not to file a Notice of Risk as "it would not look good". She didn't file a Notice at that stage, but ended up filing one a few years later when the matter was back in court after final orders were made. From her own reading of family law cases, Lydia described a tension between needing to inform the court about the violence and being seen as obstructionist: "Like if you don't mention the violence then he's the perfect man. And if you do mention the violence then you're the problem". This echoes the findings of earlier Australian research and reports (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Laing, 2010; Roberts et al., 2015).

Some alleged victims of family violence in our study were also disappointed with the way their lawyers represented the violence perpetrated against them in their documents. Angela felt let down by her lawyer who omitted details of the violence she had experienced, including verbal abuse and her former partner locking doors in the house and hiding passports. Her solicitor told her, "Courts get bored with all the evidence". Jenny's lawyer told her, "No, you can't talk about that because that's emotional". As Jenny told us, "Unfortunately there is emotion when there's domestic violence because we live in fear". Carol felt that the violence in her affidavit

> was minimised and watered down and then I was constantly told the phrase, "This is nothing to do with the children … yeah that happened, that was when you were together, you're not together anymore, it's not relevant".

In documents drafted by self-represented litigants

Some SRLs did not detail all of the violence they experienced because, at the time of preparing their documents, they had not yet recognised the behaviour as family violence.

Danielle said:

> … and I'm embarrassed, you know. I have to admit to myself that I'm a victim of domestic violence. That took a long time. It wasn't until after meeting with [lawyer] … that I stepped out and really, the penny dropped … I couldn't figure out why I felt unsafe …

For some SRLs, the structural requirements of the forms, the length allowed, or the legal format made it difficult to document their experience of family violence and its associated risks. Kate said:

> … no I just didn't feel that that format was relevant enough … you know you get … literally I think there are six lines on [the Notice of Risk] … and in that context I just found it very difficult to … articulate in depth the complexity of my particular case anyway … I just felt like I had to pick the most … weighted of my concerns and it … felt like some of the other concerns were not even registered …

Carol pointed out that it is "easy" to provide evidence of physical violence through doctors' reports or photographs. It is more complicated with less "tangible" forms of violence, like psychological abuse:

> … it's so subtle. To be able to describe the big picture and expose the patterns of behaviours takes words. It takes lots of words. It takes lots of explanation and that takes lots of pages, and I know they want you to minimise because they will say to you that the judge won't read it if it's too long.

Notice of Risk form in the Federal Circuit Court of Australia and the Family Court of Australia equivalent

Both federal family law courts have a form that notifies the court of allegations about family violence, child abuse and neglect, and risk concerns. In the FCCA, this is a mandatory Notice of Risk form that must be filed with all initiating applications and responses, regardless of whether such issues arise in a matter.[31] In matters where risk is not an issue, the applicant and respondent tick the "No" box in response to each question. The FCA's equivalent is the Notice of Child Abuse, Family Violence or Risk of Family Violence. The FCA does not require this to be filed in every matter but it must be filed if risk is alleged in a matter.

Both forms are relatively simple, with a question and answer format. Judges and legal professionals generally considered these to be straightforward. For example, with regards to the Notice of Risk:

> I think that they're probably an easier form in some ways for people to fill out because you're asked quite specific questions, you know, and the questions are "Yes" and "No" and then you're asked to describe what you say is the family violence and what you say the risk is. (L6; similarly J6 and L1)

However, some professionals warned that SRLs can make mistakes or not appreciate the significance of the form and how it works to capture information and raise issues of risk:

> People have no idea how to do them … I find people who are self-represented don't get the value of that document and the fact that it triggers a section 67Z response [to a child welfare authority]. And that you can really add on to your affidavit about the violence and the risk the children are exposed to. (L3)

One judicial officer noted that some SRLs fail to mention the more serious risks that the form aims to pick up, instead including other alleged "risks":

> Like, they say, "The risk is the mother will damage my relationship with the child irreparably because she's withholding contact". And that's not the sort of risk we're looking at. (R2)

One judge warned us that what one party decides to document in a Notice of Risk form may lead to "tit-for-tat notices":

> Once you start making very serious allegations, you need to realise they raise the stakes for everybody in the case, not just the target of the allegation. And I think it's important to litigants to give them an opportunity to reflect on, "Is this something I actually really want to do?" (J11)

The warning implicit in this statement echoes the tensions between victims wanting to inform the court about their experience of family violence, and being viewed as the problem for doing so.

31 *Federal Circuit Court Rules 2001* (Cth) r 22A.02.

One support professional drew attention to SRLs who may be too scared to disclose family violence when they complete the Notice of Risk. They later find there is no other space or point in time during the court proceedings where they could raise violence issues, and so it is never discussed.

Two legal professionals cautioned that omissions or errors that SRLs make in this form can be open to exploitation by the other party or their lawyer:

> … when you've got a solicitor that's wised up to say, "Well you haven't raised this in your Notice of Risk. You're making all these allegations that aren't in your material". That family violence may have happened and I think that's why a lot of people get perplexed. (L26; similarly L13)

Consistent with other findings in this research in relation to quality of lawyering, legal professionals noted that some lawyers do not necessarily complete Notice of Risk forms thoroughly either: "Some lawyers don't fill them in correctly. So, that's just—that's a training issue, for lawyers and it's about people getting timely advice if they're doing materials themselves" (L20).

One FCCA judge pointed out that an SRLs' Notice of Risk form can sometimes be more informative than an affidavit as a "good indicator of perception" of risk held by either party, particularly about children:

> The applicant may not perceive that there are any issues of risk and then the respondent will file and the respondent will say there's a whole lot of issues of risk. So, even the fact of ticking the "No" box all the way through the Notice of Risk can teach me something. (J17)

However, other judges did not find these forms useful. One FCCA judge believed that any notices filed by SRLs are "very subjective, in terms of what they perceive to be a risk" and "often leave out a lot of relevant material":

> You have to read their material and, even then, sometimes you have to talk to them to sift out if anyone's at risk and, in particular, the child or children. Because they put it poorly, they don't know how to complete forms properly. (J4)

These mixed views reflect findings by Kaspiew, Carson, Dunstan, Qu, and colleagues (2015, p. 41) that 59 percent of judicial officers surveyed believed that the information SRLs provided in these forms did not help them determine whether there were risks to parents or children, while only 38 percent of judicial officers were of the view that it did assist them.

Affidavits

A party's affidavit is a critical document. It sets out a person's evidence, that is, the facts relied on to support a person's case before the court. Many SRLs fail to appreciate its critical importance:

> So, I tell them that in our courts … for most times, you don't get to speak much to the judge. It's based on the paperwork that you put in and so if your paperwork's not right, you're starting off on the wrong foot because you don't get another chance to put in and make that first impression. (L11)

Multiple affidavits may be filed over the course of litigation.[32] If the matter goes to a final hearing, each party will need to submit a consolidated affidavit.

Affidavits prepared by SRLs were described by judicial officers and legal professionals as too long or too short (J4 and J6), containing irrelevant material (J4 and ICS-D7) or omitting material (J17). Our examination of court files revealed common mistakes in SRL affidavits, including hearsay or other inadmissible forms of evidence,[33] opinions,[34] not using direct speech[35] and making submissions.[36] Furthermore, some SRLs failed to follow or were unaware of the required format (i.e., paragraphs, pagination and page limits).[37] Judicial officers

32 The FCCA requires both an applicant and respondent to file an affidavit at the beginning of a case. The FCA only requires parties to do so if they seek interim or procedural orders, when directed to do so by the court, and if the party has filed a Notice of Child Abuse, Family Violence or Risk of Family Violence: *Family Law Rules 2004* (Cth) r 2.04D.

33 E.g. affidavits filed in A-C-2, B-A-1, B-B-7, B-C-18 and C-A-43.

34 E.g. affidavits filed in A-C-1, A-C-7 and A-C-10.

35 E.g. affidavits filed in A-A-1, B-A-1, C-A-2, C-A-23, C-A-26, C-A-43 and A-A-1.

36 E.g. affidavits filed in B-A-1, B-C-18, C-A-2, C-A-23, C-A-43 and C-B-23.

37 E.g. affidavits filed in A-A-20, A-C-2, C-A-26, C-B-11 and C-B-28. For the FCCA rules around affidavit length and the number of annexures allowed in interim proceedings, see fn. 29 above.

and legal professionals agreed that affidavits are difficult to draft, and that some lawyers also draft poor ones, which court files confirmed.[38]

Documenting family violence in an affidavit

The account of family violence in the affidavit is critical to the case of an alleged victim (in conjunction with any other evidence that might be called on to support a victim's allegations). As L23 explained, the case of an alleged victim will depend on a "well-drafted affidavit with a full family violence history, well detailed", which will "make a big difference" to how the case progresses, and any orders made. J12 noted that when a "lawyer has gone to the trouble" to document the evidence sufficiently, "you can see what it [the family violence] is" (J12). Similarly, J14 said:

> If you prepare your affidavit in a way that the evidence is admissible and compelling, then it's going to be given weight … In terms of family violence, that's the biggest failing I see, it's the inability of self-represented litigants, or represented litigants to articulate the violence. To articulate the violence in a way that gives you some confidence that something really has gone on here.

Critically, most of the evidence of family violence needs to be in the written affidavit and not offered from the bar table, a distinction that is not clear to many SRLs (L13, L20 and L26). One judge (J12) emphasised the court's difficult position if family violence is insufficiently described in an affidavit: "You can't take it seriously unless the evidence is there. This is a court, it's an evidence-based process, it's not an allegation-based process". Legal professionals identified three major shortcomings in affidavits: a lack of specificity about family violence, omissions about the violence and inclusion of irrelevant content (J8, J10, L2, L3, L6 and L8).

Lack of specificity and omissions

Our examination of the court files found a range of quality in affidavits prepared by SRLs. Some were thorough, containing details about the family violence perpetrated, when it took place and the impact, if any.[39] Others included a mix of vague and specific allegations.[40] In some affidavits, SRLs provided only vague or sparse accounts of family violence.[41]

For example, in a matter in which both parties made allegations (C-A-19), the mother's initial affidavit did not mention family violence, despite reporting it in her Notice of Child Abuse, Family Violence and Risk form. The father's affidavit, which contained allegations, was not specific:

> For many years, I suffered violent attacks, physical and verbal abuse from [former partner], punching, biting, hitting, spitting, name calling, gestures, ridicule, comparamsams *[sic]*, berating, humiliation, intimmitation *[sic]*. I have no desire to relive this nightmare of domestic abuse so at this time I will refrain from the finer details due to the emotional damage this has caused.

In another matter, a poor quality affidavit prepared by an SRL father (applicant) was very brief and handwritten, and included the following limited information (B-B-11):

> I have grave concern for the welfare of my children. The mother is clearly suffering Mental Health Issues. Mother has shown signs of Anger & Violence … The living arrangements where my children are currently staying is Crowded, dangerous & unhealthy.

In another case, the SRL applicant woman made vague allegations about family violence. The research team considered that it would be insufficient to support her claim for the violence to be taken into account in any property settlement (A-A-1).[42]

Denials of family violence in affidavits were sometimes also vague or inconsistent with other documents on the file.[43] In one matter the SRL respondent father's affidavit read, under

38 E.g. affidavit filed in C-A-33, prepared by a lawyer for the mother, which was scant on detail about the family violence she had experienced in the relationship. The orders sought were also poorly drafted.

39 E.g. affidavit filed in A-A-24, A-A-32 and B-B-3. Similarly C-A-43 and A-C-20.

40 E.g. affidavit filed in A-A-21, A-A-25, A-B-22, A-C-21, B-A-7 and C-A-43.

41 E.g. affidavit filed in A-B-17, B-B-14, C-B-15, C-A-27 and C-A-30.

42 *In the Marriage of Kennon* (1997) 22 Fam LR 1 provides that family violence may be taken into account in determining contributions made to property where that family violence has had a significant impact on making contributions. This is "a relatively strict test" (ALRC, 2018b, para 3.112).

43 E.g. affidavit filed in A-A-11, B-A-5, C-A-38 and C-B-19.

the heading "family violence":

> I admit to doing wrongs by [Name], however I do not admit to strangling her as she has stated. An altercation happened between us & I believe my actions were miss interpreted *[sic]* by her. In my defence the situation around this altercation led to a not so nice event happening.

Affidavits that lack detail can be problematic in matters that proceed to a defended hearing and may have consequences for negotiations and settlement prior to a hearing. An opposing party's lawyer may well not object to an SRL's vague affidavit, to avoid having the whole affidavit ruled out by the judge and allowing the SRL to submit something better (J13).

From our court file examinations, it appeared that some SRLs had assistance in completing affidavits; this may have been explicit, or suggested by the use of legal terminology and the way the affidavit addressed the legislative factors.[44] In some cases it appeared that alleged victims of violence initially filed an affidavit as an SRL, detailing only generalised accounts of family violence, but then instructed a lawyer. Their subsequent affidavits were more specific (B-B-9). For example, in B-B-11, the respondent mother provided a combination of specific and vague accounts about the violence perpetrated by her former partner in her initial affidavit that she prepared as an SRL. A later affidavit, filed after she retained a lawyer, stated:

> I detail much of the family violence that took place during the relationship in my affidavit filed [date]. I filed that affidavit without the assistance of a solicitor and will elaborate on the family violence in a further affidavit if necessary.

Once again, consistent with findings in relation to quality and variability of lawyering in this report, some lawyers draft poor-quality affidavits. When asked to what extent affidavits contain material that is relevant and probative, one judge answered, "Very little, unfortunately. And I'm talking about the ones lawyers prepare, let alone the self-reps" (J15). Other judges were equally disdainful (see J9):

> Rarely are questions of family violence handled well … And I get very cross with the lawyers who produce these affidavits to say, "He was abusive to me" or "She was abusive to me", and "There was all this family violence". Well, you haven't told me what it is. What was the violence? (J12)

Inclusion of irrelevant content

A key problem raised by professionals is that SRLs often cannot identify information relevant to their case (J8, J10, L2, L3 and L6). Relevance in legal terms "is not easy to define" (Serisier, 2019, p. 152). It centres on whether the evidence presented relates, or is applicable, to the legal issues in contention. Relevant content assists the decision-maker to reach a decision in accordance with the legislation (J10). So in the context of a family breakdown, SRLs may find it difficult to separate the entire history of the relationship and its demise from matters relevant to property division or parenting. As a barrister representing the applicant father in ICS-A noted, the SRL respondent mother's affidavit

> didn't address the main issues in dispute, so even from her own perspective it probably wasn't … helpful. It was more just a way of getting some things off her chest.

Legal professionals noted that irrelevant content may centre on disparaging the other party (J10, L2 and L3).

The problem with including irrelevant content in an affidavit is that relevant content may not be presented, or not presented as thoroughly as it could be (e.g. as a result of FCCA rules that limit the length of affidavits).[45] It may mean that relevant content is obscured, requiring forensic effort by judges (or an ICL if appointed) to determine the issues in dispute (L6). Additionally, if an SRL omits information from an initial affidavit and raises it in a subsequent affidavit or in evidence before the court, this may become a target for cross-examination by the other party (particularly if they have legal representation):

> The common mode of cross-examination is, "Well, that's not in your affidavit, is it? … You say that you have put to the court all relevant matters and, you know, why isn't it in your affidavit". (L6)

44 For explicit references to assistance see A-A-1, A-B-21, C-A-40, C-B-11, C-B-16, C-B-22 and C-B-23. It was implicit in A-A-11, A-A-25, A-C-20, C-B-11, C-B-16 and C-B-25. It is, of course, possible that these SRLs completed this paperwork without assistance, particularly if they have had more lengthy engagement with the family law system. In the intensive case study, other SRLs confirmed that they received assistance (see ICS-C and ICS-D) and in one observed case the SRL was assisted by the duty solicitor who assisted in amending the documentation filed by the SRL (B-B-14).

45 See fn. 29.

Our examination of the court files confirmed the extent to which irrelevant content is contained in affidavits prepared by SRLs. While some of this irrelevant content generally went to discussions about the separation (e.g. A-A-20), or experiences as a child (e.g. A-C-1), or perceptions of disadvantage as an SRL (e.g. A-A-23 and A-C-10), other irrelevant content in material prepared by alleged perpetrators of violence was more idiosyncratic—for example, in C-B-11 the respondent father had annexed the book cover for #mentoo by Bettina Arndt, which the father asserted in his affidavit "supports my case". One alleged perpetrator (B-A-1) included in his affidavit direct attacks on the mother's solicitors. For example, he stated that: "I warned them, unless they stopped the gaslighting, I would return their abuse—in kind, openly". This content needs to be seen in the context of the overall litigation strategy and approach of this respondent father, which has included bringing a contravention against the mother, seeking the removal of two ICLs from the case and refusing a solicitor under the cross-examination scheme because he wishes to retain control of the conduct of his matter.

Subpoenas

The third key process through which evidence of family violence can be presented to the court is subpoenas. A subpoena is a court order made by a party to request that another person give evidence and/or produce documents.[46] Subpoenaed material is used to support a litigant's case or to test the opposing party's case. In family law, subpoenas provide evidence that is otherwise unavailable or unable to be presented (Serisier, 2019). They are valuable in producing police or medical records, for example, as evidence to the court of family violence and/or child abuse.

Either party to a family law proceeding, or an ICL, can request a subpoena. In the FCA, the registrar first needs to approve an SRL's request to issue a subpoena.[47] The court can, under s 69ZW of the *Family Law Act 1975* (Cth), order a state or territory agency (e.g. police or child welfare) to make documents available that might support family violence allegations. In practice, however, courts rarely do this, which can be problematic in cases involving SRLs, who rarely issue subpoenas themselves (Chisholm, 2009).

The current subpoena filing fee is $55 (an exemption is possible for financial hardship) and there may be conduct costs to be paid where the subpoena recipient incurs expenses (e.g. to attend court or copy documents). Professionals generally agreed that subpoenas are "really important evidence to have before the court in matters involving allegations of violence", but that the process and costs associated with them are challenging for SRLs (L27).

Hurdles in requesting and inspecting subpoenas

In our general interview sample, only a small number of SRLs had sought a subpoena (e.g. Carol, Fiona, Kate, Lydia and Megan), as had only 13 of 98 in the in-depth court files. This low number in the court files may be due to the stage of proceedings (subpoenas are often sought closer to a hearing), because the matter had settled prior to a hearing, or because SRLs were unaware of them. Our research identified a number of hurdles that SRLs may face in issuing or inspecting subpoenas.

The first challenge for an SRL is knowledge about subpoenas. Legal professionals interviewed acknowledged the difficulty of informing SRLs about subpoenas and the complex process involved in their execution (e.g. L16, L19, L23 and L27).

A consequence of SRLs not issuing subpoenas is the court being left without vital information. As L24 reflected, where a party does not gather all the evidence for their case, "to what extent can a judge ask for material or go fact-finding? You know, that's not our system".

Importantly, under the *Family Law Act 1975* (Cth) s 69ZW police records can only be accessed via subpoena. Thus, SRLs who are victims of family violence need to know that they can subpoena police records. They need to understand how to build evidence from police records (as well as any child protection, education or medical records) for their case and present it in court. The FLC has specifically highlighted the restriction of access to police records as a problem for victims:

> Where documents are produced under subpoena, they can only be tendered by a party to the proceedings. The

46 The rules covering subpoenas in the FCA are set out in *Family Law Rules 2004* (Cth) pt 15.3, and the rules governing subpoenas in the FCCA are set out in *Federal Circuit Court Rules 2001* (Cth) pt 15A.

47 *Family Law Rules 2004* (Cth) r 15.18.

> subpoena process is expensive, complicated and difficult to navigate for a victim of family violence, especially if they are unrepresented. (FLC, 2016, p. 56, references omitted; see also Harman, 2017)

For those SRLs in our study who did request subpoenas, several identified them as especially complex and difficult to execute, describing the process as "so time consuming" (Fiona) and "stressful" (Kate). The complexity of the process also means that mistakes are easily made. For example, Carol used an incorrect form which meant the recipient organisation was unable to action the subpoena:

> But then they told me which form to do it on. So I had to redo it all, go back to court, get the subpoenas sealed and re-serve them all. So it's like … you're going in blind.

There are other complications. Kate cautioned that some organisations "will more likely fight a subpoena". Lydia referenced the FCCA's limit of five subpoenas,[48] noting that while it is possible to apply for more, "the problem is that some of them [judges] say 'No'". We observed a lack of dedicated space at some circuit courts (reliant on space provided by the state court) for SRLs to inspect documentation (A-B). Additionally, litigants are restricted from photocopying documents returned under subpoena, which for Megan is "a huge issue":

> I'm looking at brilliant evidence from the doctors … it's there in black and white and I'm going, "I need photocopies of this as evidence". And while you can say it's 18 or, whatever, the number is on the box—when you go to … court to recall it, you don't recall it so well. If you'd handwritten it, you don't have the hours to sit down and write. You know, this was 27 pages worth of documents. I could say key points and whatever, but I needed that to be able to say, "Here at point 2 …"

Reliance on the independent children's lawyer to issue subpoenas

In some matters, particularly where both parties are self-representing, an ICL may be appointed who the court then relies on to seek all necessary subpoenas in the case (Kaspiew et al., 2014). Our examination of court files confirmed this practice. Of the 49 in-depth court files in which subpoenas were issued, this had been done by the party with legal representation and/or the ICL in 36 matters (i.e. not the SRL). In one third of these cases (12/36), subpoenas were only sought by the ICL. The reliance on ICLs to issue subpoenas creates issues. Some SRLs mistakenly believe it is the ICL's role to issue subpoenas at their request (Kaspiew et al., 2014). These SRLs may then expect that the ICL will "run the whole case" and seek all of the relevant subpoenas for the court (L10 and L27). L19 spelled out these tensions:

> … so, getting particular reports and affidavits, which potentially are not really consistent with the case that you're running but is something relevant to what one of the parties is running. And that's a bit of a case-by-case dilemma you have as an independent children's lawyer because it really is the parties' evidence to put before the court.

Confidential material and subpoenas

Another concern regarding subpoenaed material relates to the confidentiality of sensitive information. In sexual offence proceedings, counselling notes are protected from being subpoenaed and produced in trials in order to protect therapeutic relationships and ensure that victims of violence do not experience additional violations of trust (Jones, 2016). There is no such protection in family courts, although the subpoena documentation sets out processes for objection to the production of subpoenaed material. A solicitor from a women's legal service emphasised the need to consider the confidentiality or sensitivity of any subpoenaed material, and to establish processes for the inspection of that material in matters involving SRLs:

> We ask for a different process for the inspecting of subpoena materials in a matter. If there was confidential information in subpoena material, and often where that's the case, the court would order that the legal representative inspects first, rather than the party … We eventually persuaded the judge to facilitate a different process for access to the subpoena material in one matter where there was a self-represented litigant. (L23)

48 *Federal Circuit Court Rules 2001* (Cth) r 15A.05.

Conclusion

This chapter finds that SRLs, especially those with no or limited legal assistance, found preparing documentation challenging due to legal terminology, the quantity of documentation, the shift of paperwork to online systems and the complexity of the process. Their confidence, language and literacy skills, computer literacy and access to technology, knowledge of the law and access to legal assistance all influenced the quality of their paperwork.

Critically, an SRL's experience of family violence (as well as other intersecting disadvantages) greatly affected their capacity to complete paperwork. Many struggled to document the violence in a form and structure that the court could consider. Some alleged victims did not feel encouraged by lawyers to fully document family violence. Many SRLs did not appreciate the significance of capturing the violence and its impacts in relevant forms and affidavits, or by issuing subpoenas. These obstacles jeopardise the quality of the evidence that an SRL presents to the court, the information available to the judge and the ultimate outcome in the case.

The next chapter examines the services and supports available once SRLs are at court: general duty services, FASS and other court support. Some of these services, particularly FASS, assist in the completion of documentation. The difficulties documented in this chapter with completing documentation and evidencing family violence have critical flow-on effects to presentation in the courtroom (see Chapters 9 and 10) and the outcomes that are achieved by SRLs (Chapter 12).

CHAPTER 7

Services and supports available at court

> FASS … has made a huge difference because not only has it dramatically increased the availability of representation but it's the first thing that has ever recognised that there are needs beyond dealing with your court case that are connected with your court case. (J12)

There are a range of services available at federal family law courts to assist SRLs. The most longstanding of these are duty lawyer services, which have been found to provide great assistance to SRLs (VLA, 2015a; see also Coumarelos et al., 2012; Mussared, 2016). More recently, there has been innovation in the delivery of duty lawyer services in the family law system with the advent of FASS, a holistic service combining duty lawyer services with social supports for men and women. The key focus of FASS is SRLs in matters involving family violence. The FASS evaluation found that it has not only increased access to duty lawyers, but also assisted in meeting other needs SRLs may have through referrals to housing services, counselling, men's behaviour change programs and so on (Inside Policy, 2018). The availability of other support services at family law registries has been more limited—the notable exceptions were the Court Network in Victoria, and the Women's Family Law Support Service (WFLSS) in Sydney (Laing, 2011).[49] Studies have also noted that a number of SRLs attend court with family and friends who provide invaluable emotional support (Macfarlane, 2013; McKeever et al., 2018; Trinder et al., 2014), although some SRLs are reluctant to involve family and friends for a range of reasons (Macfarlane, 2013; McKeever et al., 2018; Toy-Cronin, 2015). Some SRLs may also rely on McKenzie Friends in the court room. The use of McKenzie Friends in Australia, however, has been limited (Hunter et al., 2002; Productivity Commission, 2014) and the literature presents mixed views about the assistance provided (see discussion in Chapter 2).

This chapter begins with an examination of the use of duty lawyer services by SRLs in this study. Many professionals, especially judges, identified these services as key in assisting SRLs, though SRLs reported mixed experiences, often due to a wide range of service delivery constraints. We then turn to a discussion of FASS. While few SRLs mentioned this service specifically (perhaps because it is relatively new), many of the professionals interviewed emphasised the key benefits of this service to SRLs in family violence matters. Finally, the chapter considers support for SRLs more generally (from family and friends, as well as from McKenzie Friends).

Duty lawyers

Duty lawyer services are available at many FCA and FCCA locations. Duty lawyers provide advice to people whose matters are listed in court that day and, depending on available resources, may also present the matter in court for the SRL, provide advice in forthcoming matters, assist with the completion of documents, assist in negotiations and explain proposed consent orders. Duty lawyer services are generally provided by the relevant state or territory LAC and, in some courts, a CLC might also provide duty lawyers. In a limited number of areas, university legal clinics (e.g. the Family Law Assistance Program, Monash University) are also available.

Some duty lawyer services operate as a standalone service, while others may be a component of a larger service such as FASS. Duty lawyers might specialise, assist target groups, or be structured in new ways (e.g. the Domestic Violence Unit [DVU] and the Early Intervention Unit [EIU] in the New South Wales LAC). SRLs interviewed rarely distinguished between a general duty lawyer and a duty lawyer who worked as part of FASS or other services.

Experiences with duty lawyers

Several SRLs accessed duty lawyers at some stage during the progress of their matter, sometimes on more than one occasion (Anna, Elizabeth, Hugh, Jenny, Justin, Kate and Kirsty). Overall SRLs reported positive experiences with duty lawyers and noted that they had been particularly helpful in assisting them on the day at court (Anna and Hugh).

Many of the professionals confirmed that duty lawyers made a positive difference not only for SRLs but also the court system more generally. Legal professionals drew attention to the face-to-face nature of these services which distinguishes them from other forms of assistance provided to SRLs (L16 and L30). As one judge put it, "Nothing beats having a body turn up with them [the SRL]—a lawyer" (J5).

49 Both of these other support services have recently had their funding cut: Court Network in early 2020, and the WFLSS in 2019. The WFLSS is now known as the Women's Court Support Service.

Judicial officers were particularly effusive about duty lawyers, with 15 of the 20 judges who commented in this area stating that duty lawyers made a positive difference. Judges commented that the benefits of duty lawyers were "unquantifiable" (J11) and "absolutely critical" (J6).

At many of the court sites, we observed judges refer SRLs to duty lawyers and stand the matter down for this purpose. At one circuit court (B-C), the judge asked SRLs to identify themselves at the commencement of a busy duty list and encouraged them to see the duty lawyer before their matter was mentioned. Judges identified the ability to send parties to see the duty lawyer as essential to quick dispute resolution (J13 and J14), especially in difficult matters (J4), or if SRLs were "vulnerable" within the court system (J13). While the "experience and quality" (J4) of duty lawyers can vary, the general sentiment was positive.

Despite this, several SRLs reported mixed experiences, noting the variable service provided (Kate and Kirsty), the limited time duty solicitors had available (Jenny, Justin and Kate), wanting more support than could be provided on the day (Elizabeth), that the duty lawyer at that location was only able to provide "limited" advice about property (Jenny), or that they were unable to access the duty service as a result of a conflict of interest (Bradley). For example, Elizabeth commented:

> The duty lawyer looked through what I had prepared and said, "Well you're incredibly organised, I'll take your response, what you want, to his lawyer" and she basically just kind of stepped out and said, "Look if you need me, let me know but I think you can handle this yourself", which was kind of helpful and it wasn't. Like I didn't know if I could handle it myself because I've never done this before. Like I've never been in court before.

Elizabeth managed well in negotiating interim orders that she could live with. She had experienced sporadic physical and sexual abuse during her relationship, as well as emotional abuse. While Elizabeth was extensively supported by the FASS women's support worker, she would have appreciated greater assistance from the duty lawyer.

Interviews with legal professionals, many of whom deliver duty lawyer services, provided context to these SRL experiences, particularly in terms of service limitations and the workload environment.

Constraints

Duty lawyer services varied across the registries we visited. Not only were the services provided by different organisations, there were differences in the number of lawyers available, the workload of the court, and how the court and other legal practitioners interacted with the duty lawyer. These factors independently, and in combination, influence duty lawyer services, which then means that the way in which services are offered, provided and experienced by SRLs varies across courts. We observed some duty lawyers only providing advice, while other duty lawyers did much more (e.g. appearing in court, assisting with document preparation and other matters, assisting in negotiations and explaining proposed consent orders). These variations, confirmed in the interviews with professionals, were often the result of resourcing and workload constraints. These are not necessarily criticisms of duty lawyer services but a critical reflection of the extent to which they can meet the needs of all SRLs.

Workload and time available

The key work performed by duty lawyers is on "duty list" days. The nature of duty lists varies between courts but they are generally very busy. One FASS duty lawyer described duty list days as "like a zoo … there's so many people and it's so noisy and it's so confusing" (L18).

The length of the court list and the number of duty lawyers available will impact on the time that duty lawyers have to assist each SRL. Jenny and Kate both commented on this aspect. L21 spoke about seeing 20–25 people on a given day at court. SRLs were numbered in terms of when they arrived at court and, at FASS locations which have a dedicated intake officer, triaged for urgency and additional vulnerabilities, such as being a victim of family violence (these factors may result in some matters being prioritised over others). Workload and the need to prioritise some matters may mean the duty lawyers cannot see or assist all SRLs who attend court. A FASS duty lawyer explained these tensions:

> One day in [name of court] last week … I think we saw 14 people in a day, and I think about six or seven of them were in court. So, there's two of us always from the EIU and there's usually only one person from the DVU. So, there's only three of us and if you're involved in something in court where you're trying to get hold of the court file, speak to the ICL, negotiate with the other side, you can easily be out for a few hours with the one person. (L9)

While many legal professionals said that judges refer SRLs to the duty lawyers and stand matters down until they had received advice, others noted that some judges may not allow sufficient time for the person to see a duty lawyer. L3 gave an example where the judge gave the SRL until 11:00 am to see the duty lawyer and return to court, but "by the time he sees me, and I fill out my form, we had like six minutes together".

Conflict of interest

At some locations, only one duty lawyer, or duty lawyers from the same organisation, are available. At these courts SRLs may be unable to be assisted as a result of a conflict of interest (where the other party has already used that service). Bradley encountered this problem when he tried to access the duty lawyer at court. Some legal professionals noted that enhancements such as FASS, which at some sites offers additional duty services provided by either separate units with the relevant LAC or by a CLC, means that there is more than one duty service at some courts. This has meant that at these locations a greater number of SRLs are able to be assisted and fewer SRLs are "conflicted out" (L3, L7, L8, L16 and L27). However, having more than one duty lawyer does not mean that conflicts of interest never arise, particularly where the legal services have operated for a long time and provide advice on a range of legal problems (L2).

In locations where there is only one duty lawyer service, conflict remains a central concern for SRLs, particularly those living in regional areas where the pool of private practitioners is also small. Most of the circuit courts and many courts outside larger metropolitan centres may have only one duty lawyer on site, or more than one duty lawyer but with all employed by the same organisation. We observed this at two regional circuit courts (A-B and B-C). The limited FASS coverage of regional areas and the need to address these gaps has been commented on in successive reports (ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Inside Policy, 2018).

Appearances in court

Duty lawyers varied in terms of whether they appeared in court on behalf of SRLs at the court sites we visited. This may be the result of variations in workload; as L33 explained, "representation is on a capacity basis". Duty lawyers interviewed reported that they generally do try to appear in court to assist SRLs (L6, L9 and L27). Such appearances, however, are generally limited to short matters and not hearings unless they were seeking an adjournment for the SRL (L6 and L27). One legal aid lawyer noted that appearing in court on behalf of an SRL was not "automatic" and may depend on a range of factors such as "their individual merit position, whether they're asking for something sensible or not" (L11). L16, a legal aid lawyer whose work focuses on family violence, took a more assertive position about appearing in court:

> I look at it … the opposite to ways that some other services look at it. I always look for, "Why wouldn't I be going in?" … Most of the clients that we see are extremely vulnerable, most of them have been victims of domestic violence … A lot of the time they're self-rep because they either haven't applied for legal aid, or they have but they've been refused for some reason. And they just don't understand the court process. So, I generally go in, most of the time. And usually I'm going in because they're likely to be getting a serve from a … judge. And I feel like I can at least be a bit of a buffer between the judge and my client, and try and get their story across in a manner that gets them a reasonable outcome at court that day.

Impact on the party with legal representation

SRL access to a duty lawyer may increase the time and costs for the other party and other professionals involved in a matter. For example, L10 described a matter in which they were the ICL; the SRL father wanted to see the duty lawyer at 10:00am "and didn't get in until after lunch. And I'm just sitting there waiting". What may have been a relatively short

matter if both parties were represented could entail a full day's court attendance, largely spent waiting. L32 found this frustrating, noting that while duty lawyers were "coming in to help" SRLs, this is "at the expense of the other party who is paying costs. And their costs end up more than what they would be if the other person was represented".

Ongoing representation

While some matters involving SRLs will resolve early in proceedings (often with the assistance of duty lawyers), a number will proceed to a hearing. In this context, a structural issue with the duty lawyer model (whether general or FASS) is that it is focused at the front end and there are limited mechanisms available to SRLs that provide ongoing legal support. As L23 pointed out:

> I think [websites, duty solicitors, FASS] can make a difference at a point in time, but whether they make a difference substantially over the life of a matter I don't think is adequate. So certainly having a duty solicitor at court on the day, whether it's the FASS duty solicitor or the usual duty solicitor, certainly that's fantastic to have that service available on the day, but it's not a solution for ongoing legal representation.

L24 questioned whether duty lawyers were essentially a service for the court, not a service for the SRL, particularly in terms of the longer term conduct of their matter:

> My own view is that [the] duty lawyer … it's just a service that serves the judges more than the clients. It helps their list get a bit better organised but if you're in a court that's basically an affidavit court, having a duty lawyer is not terribly helpful to your case. I mean, I think it's a useful service but I think it serves the court as much, if not more, than the client. Because the help you can get from a duty lawyer is pretty limited. So, you know, for directing traffic on the day it's helpful, and it can help people … deal with that anxiety on the day but … because it's not … part of an ongoing process, it's not necessarily super useful to clients.

The gap in longer term legal assistance is key for SRLs who are victims of family violence. While they may be able to obtain legal advice from a variety of services during the course of their litigation, the patchwork nature of this advice cannot replace the continuity of advice a lawyer with full knowledge and background can provide. Duty lawyer services, including FASS, are necessarily focused at the front end of matters and, as L4 and L5 noted, while FASS is a "good program" it is "not going to help in a final hearing". Complexity increases as matters continue to litigate, and SRLs find that their ability to tap into services, such as duty lawyers and CLCs, to obtain the advice that they need diminishes. Matters become too complex for one-off, short-duration advice, and it is more difficult for a lawyer to get across a matter to provide informed advice later in proceedings. The evaluation of FASS noted the need for an "'enhanced' FASS duty service to enable duty lawyers to assist vulnerable clients in the later stages of matters" (Inside Policy, 2018, p.5).

Family Advocacy and Support Service

FASS represents a significant innovation. It is funded by the federal government under the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010–2022* (Council of Australian Governments, 2011) and is operated by state and territory LACs. FASS is available in 23 locations across Australia, mostly in metropolitan centres (Inside Policy, 2018, pp. 69–70). FASS provides legal advice; assistance with court documents; some court appearances; referrals to specialist family violence, family support and other social services; and assistance finding a lawyer if required for an ongoing matter. FASS clients are likely to be SRLs vulnerable to family violence, those experiencing complex social issues or those with other legal matters in other jurisdictions (Inside Policy, 2018). Access to and eligibility for FASS does not depend on legal aid eligibility; rather, eligibility is centred on whether the person is an alleged victim or perpetrator of family violence and they "need legal assistance regarding a family law, child protection, or family violence matter" (ALRC, 2019, para 16.8).

The evaluation of FASS highlighted the role of its specialised duty lawyers in helping victims of family violence (Inside Policy, 2018; see also example in House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, pp. 145–147). This expert lawyering in the area of family violence is much needed to provide advice and information

to SRLs who are victims of family violence and who need to effectively put together the evidence in their matter (see Chapters 5 and 6).

The operation of FASS varies across Australia (ALRC, 2019; Inside Policy, 2018). FASS generally provides a duty lawyer service (in some areas more than one duty service) and support services for men and women. In some areas, FASS has an intake or triage worker to allocate work across the services that work together as FASS to avoid conflicts of interest. In our study, nine judicial officers said FASS was a positive innovation that made a difference to SRLs (J1, J2, J3, J7, J8, J9, J10, J14 and J15). One men's FASS support worker captured the essence of the program:

> The best outcomes have been when we've literally all just worked together, that's us, the lawyers and where mum is seeing [name of women's service] and I'm seeing the father. That's when we've had the best outcomes I suppose especially when we're actually working with risk. (O2)

The expanded nature of the Family Advocacy and Support Service's duty lawyer service

Unlike other duty services, FASS, because of its greater resourcing and its focus on family violence, has greater capacity to assist SRLs across several areas. For example, FASS lawyers reported providing greater assistance to SRLs in drafting documents (L18 and L19), particularly in urgent matters. As L18 explained:

> [We] see a lot of clients who are not presenting in court on the day, who are the ones that come in with issues around urgency. So, when a child has been either taken from or retained after a contact visit and there's no ongoing proceedings, we see a bit of a client group where that's happened and they come to us on an urgent basis, looking for urgent drafting for recovery orders … and airport watch lists and those sorts of things.

At one court site we observed the FASS duty lawyer assist an SRL applicant mother to amend her documentation so she would be able to seek orders on an undefended basis on the next court date if the father again failed to appear. The examination of the court file in this case revealed that the documentation originally completed by the SRL was limited, with a vague account of her experience of family violence, and that the orders she originally sought were not necessarily practicable. The FASS duty lawyer played a critical role in addressing these deficiencies (B-B-14).

FASS lawyers we interviewed also spoke about assisting in the filing of proceedings, particularly in urgent recovery matters, airport watch listings, urgent property matters where there may be a need to preserve property, and urgent spousal maintenance applications (L18 and L19; similarly O12).

In addition, in some locations, because of the way in which the relevant LAC has structured the provision of FASS, the lawyers may be able to provide advice across a wide range of legal areas related to family violence. As one women's support worker explained, FASS lawyers at her location are able to give advice across the "whole cross-section of stuff that can happen as a result of the family and domestic violence". For example, in New South Wales the LAC has established two separate units: the DVU and the EIU. The DVU was expanded to Family Court registries in 2017 (Coumarelos et al., 2018) and works across legal areas, assisting not only in family law matters but protection order proceedings, immigration issues, debt issues and other areas (Legal Aid NSW, n.d.a). The EIU is not specifically targeted to family violence but rather focuses more generally on family law matters "with a special focus on reaching disadvantaged communities who have difficulties accessing legal services" (Legal Aid NSW, n.d.b). Like all duty services (whether specialised or general) the focus of the EIU, as its name suggests, is on the early stages of a matter. These two New South Wales LAC services are firewalled from each other so that they can assist clients who would otherwise not be assisted by legal aid due to conflict issues (Forell & Cain, 2012). The capacity for FASS lawyers to give advice and assist across both state and federal areas of law has been identified as a "great advantage" for SRLs whose matters involve family violence (ALRC, 2019).

The inclusion of support services

Interviews with professionals emphasised the incorporation of support services with legal services as a key innovation of FASS and one critical to its success (J9, L7, L9, L18, L27 and O5). FASS support services not only provide support on the day at court but referrals to other services such as

counselling, housing, men's behaviour change programs, parenting programs, drug and alcohol services and mental health services where required (L9, L19, O2, O3, O11 and O12). L18 noted that the availability of these support services on the ground at court means that there may be greater take-up by people after the court event; this was identified as particularly beneficial for men who may be more reluctant to seek assistance (L27 and O11). Interestingly, a FASS lawyer commented that she found the

> training on the non-legal stuff to be most helpful because in the end we can read the legislation, we can see how the judges interpret the legislation, but it's all of the other stuff that can impact quite a lot on how we can assist a self-represented party. (L19)

Women's support service

Few SRLs reported on whether they were assisted by FASS; for many of the SRLs we interviewed this was because their case was dealt with prior to FASS, or FASS did not operate at the court they attended. Elizabeth, whose experience is detailed above, said she was supported all day at court by a FASS women's support worker who was "very helpful in kind of just stepping through what to expect". This worker sat with Elizabeth during negotiations with her former partner's lawyer and helped Elizabeth to understand that the lawyers were using "strategies [minimising her experience of family violence] to try and get at you".

We interviewed two women's FASS support workers (O5 and O12) who noted several benefits of support services to female SRLs (as well as women who are represented): assisting women to calm down if they are distressed or fearful so that they can listen to the advice provided by the duty lawyer and speak in court; assisting with safety plans (see Chapter 8); liaising with security; providing active, assisted referrals; and assisting with referrals for related legal problems such as debt issues or visa concerns. For example, during a final hearing where both parties were represented, the judge asked O5, a FASS support worker, to speak to the mother about the mother's change of her position regarding the child's residence. The mother was now saying that the child could live with the father which was a major shift in position and counter to the family violence evidence the mother had presented. The mother would not tell the judge why she had shifted, and her lawyer did not have this information. O5 worked with the mother and found out that the mother had received threats from her former partner's family regarding her safety and that of her extended family living overseas. O5 obtained the woman's agreement to tell her lawyer and in turn the court about what had been taking place. The judge made interim orders that addressed the mother's concerns.

Men's support service

The inclusion of a men's support service in FASS was consistently mentioned by professionals as a key innovation that had made a difference to men representing themselves and facing allegations of violence (e.g. J9, J12, L7, L27, O2, O3 and O11); as L11 said, "They fill a gap that is an aching hole". One of the FASS men's support workers explained his role:

> [I] support the men through the court process. It is advocacy so we do advocate for the men. This is the unique part of the role, especially when it's family violence so we're very careful … And the way we advocate for the men is to actually address the behaviour, getting outcomes … which are in the interests of the children and keep women safe as well. How I advocate for them is if I've got concerns about their behaviour, I can actually speak to one of the lawyers that "I think you need to have the men's behaviour change program, I think he needs the parenting program. I think those need to be included on the orders". (O2)

Another men's FASS worker noted that part of his role is explaining to men what family violence means, when some men continue to see family violence as limited to physical violence and do not recognise how other forms of their behaviour might be experienced as violence (O3).

Key benefits identified in the provision of a male support worker included the ability to "settle" or calm male SRLs who may be agitated or aggressive at court (see J9, L27 and O3) and provide on-the-spot referrals to men's behaviour change programs (L27 and O11). As a FASS duty lawyer explained:

> Recently I did see a self-represented litigant who has had allegations made against him that he's used violence. He was coming to me for advice following the release of judgment in his matter and he was very upset and quite elevated. And having the men's support worker available

> to assist that client, gave that client a sense that somebody who was situated at the court was listening to him and hearing him and he was able to de-escalate that situation really well … And also to assist men … with referrals to perpetrator programs or to assist them with social issues like housing, which is often an issue, if, for example, they have an AVO [apprehended violence order] excluding them from the home or are experiencing financial difficulties or need referrals to counselling. But, really, I found a huge positive reaction to having that male social worker at court from the male clients that I see. I think they find that really validating and also having somebody on the ground that we can simply walk that person over to the … support worker is much more effective so that they don't drop out. (L27)

Similarly, we observed a men's support worker de-escalating an issue at one court site (B-A). The SRL father had become increasingly frustrated because the court was unable to deal with his application due to errors he had made in his documentation. The judge referred the SRL to a duty lawyer; the men's support worker calmed the father such that he was able to speak with the duty lawyer without being abusive.

Some professionals identified the men's support service as useful to counteract perceptions that the court is biased against men—a perception that may be reinforced if only women's support services are in place (L7 and O3).

FASS men's support workers that we interviewed noted that judicial officers see their benefit and have made referrals to their service. For example, O11 noted that some judges have referred SRLs to him when a "single experts report [or Family Report] is about to be released … with the intention, of course, of having someone there to go over it with them". O11 noted that sometimes these reports contain "recommendations" the SRL may not want to hear "and being able to pace that process has been a very positive way of supporting people through court. Especially when they're self-represented" and do not have the support and advice provided by a lawyer at that time. Another men's FASS worker explained that this provision of support to some men after a difficult court event is important to ensure the safety of women and children, and also the safety of the man in terms of self-harm (O3).

Recent reports have recommended the expansion of FASS. An evaluation suggested extending FASS to regional areas, providing case work or case management services, providing a duty service at later stages, providing more than one duty service at each location to help avoid conflict, and expanding the men's support service (Inside Policy, 2018). The ALRC (2019) suggested expanding FASS to include capacity for case management and to locations that have a "demonstrated need" including rural and regional locations (para 16.21). It also suggested an expansion to local or magistrates courts exercising family law jurisdiction (ALRC, 2019).

When we conducted the fieldwork, the men's service at some of the court sites we visited was expanded (e.g. from one day a week to five days), and the government has also committed to funding a men's worker at every FASS location (Australian Government, 2019a).

Other support services at court

In contrast to local or magistrates courts, at the federal family courts, apart from FASS, there are few formal court supports. As noted in the introduction, Court Network in Victoria and the WLFSS NSW were exceptions. At the time of our field work, Court Network operated in two federal Family Court registries.[50] While not targeted at SRLs or family violence, most people who receive support from Court Network volunteers would fall in these categories (Neilson, 2020).

Our interviews with Court Network volunteers revealed that they provided court support inside and outside the courtroom, referred people to FASS and duty lawyer services, and provided explanations to SRLs about what had taken place in court and what they had to do next. The volunteers spoke about receiving training for dealing with both SRLs and people experiencing family violence—a combination that was far less common for other professional groups. Court Network conducted a "Support for unrepresented litigants" project and produced one of the few resources developed to assist SRLs to conduct a defended hearing in family law proceedings (Court Network, 2014).

50 In early 2020 Court Network's funding was cut, resulting in the service having to cease the support it provides in the federal family law courts.

The widespread availability of court support or advocacy services in the local and magistrates courts for protection order proceedings stands in marked contrast to the relative lack of such services in the federal family law courts. The lack of coverage of FASS in regional areas further exposes this gap.

Support from family and friends (and others)

Friends and family

Data from the general interview sample and intensive case study make clear that it is common for SRLs to be accompanied by at least one support person when they attend court. Generally, this support is provided by friends or family members (including new partners), though one men's support worker noted an increase in male SRLs being supported by members of men's rights groups (O11). Two legal professionals (L22 and L31) noted cultural differences in this context, such that an SRL might be accompanied by several supporters. In the case of Aboriginal and or Torres Strait Islander litigants, one professional told us that "people will come with their whole families" (L31).

Four SRLs were accompanied by a support person from an outside service (Elizabeth, Emma, Jason and Joanne). Not all SRLs found this support useful. For example, Emma felt that the worker who supported her "didn't have a clue" as she had never supported someone at court before. Not only was the worker inexperienced to support someone like Emma who had been "through such a harrowing experience", the worker left before the proceedings finished: "I was like, I can't believe you could possibly leave me. I howled in the foyer, was just crushed and destroyed by what was happening".

Those SRLs who attended court proceedings alone did so for a range of reasons including not having anyone who could go with them or not wanting anyone to be there. Others were concerned about being an imposition: for example, Maxine said, "Because it was so constant … you know, people couldn't take time off work or the emotional time … Yes, I thought it was something I'd fight by myself". Danielle was "embarrassed" about being a victim of family violence, while Jenny was concerned about the safety of others:

> I just didn't want other people to be around him because I thought if he goes off, I don't want anyone else injured … So I just thought if he's going to kill anyone, I'll be on my own and so he can't harm anyone else.

In contrast, reflecting on male SRLs who are alleged to have used violence, one men's FASS worker noted that if the man has an AVO against him they may find themselves distanced from social supports and commented that it was "quite rare for them to bring family along" (O11).

McKenzie Friends

A McKenzie Friend is a layperson who, with the other party's consent and court's permission, assists an SRL in court by undertaking tasks such as finding documents and taking notes. They may sit beside the SRL at the bar table and generally are not permitted to advocate on behalf of the SRL.

The majority of judicial officers said that McKenzie Friends were uncommon, and while they varied in their approaches, it was overall "quite rare" for them to allow this assistance (J8; similarly J1, J2, J4, J5, J6, J8, J9, J10, J12, J13, J14, J15, J16, J17, R2 and R3). This rarity was reinforced in our observation where we saw just two McKenzie Friends (A-C-10 and C-B-28). No SRLs said they were assisted by a McKenzie Friend, though Tim does assist others as a McKenzie Friend.

In most cases, McKenzie Friends were family or friends, though some judicial officers noted they had come across "professional McKenzie Friends" (J6)—that is, people who were "well known" in the courts, or had close connections with men's rights groups (J6, J9, J10 and R3), or were "well-known vexatious litigants" (J14). Most judicial officers said they kept a "tight rein" on what the McKenzie Friend could do in court (J16; similarly J15). Conversely, J8 adopted a "pragmatic approach" where they will let the McKenzie Friend speak if they were "able to communicate … issues, and to minimise the otherwise traumatic experience for the self-represented person".

Judicial responses to the usefulness of McKenzie Friends were mixed. Some were positive seeing this support as assisting the SRL to understand the system and to get to the issues

"quicker" (J8; similarly J6). In contrast, J10 found McKenzie Friends unhelpful and recounted a case where the McKenzie Friend, a person who had been "the subject of litigation in three states [and] reported decisions" and was a representative of a special interest group, tried to advocate for the SRL and was disruptive: "He [the McKenzie Friend] brought along the entire cheer squad one day and 12 hairy, beefy blokes turned up and at a given moment they all stood up together". The judge sent them all out of the courtroom. The connection between some McKenzie Friends and agenda-driven or political groups (such as men's rights groups) has also been noted as an issue in other jurisdictions (see Legal Services Consumer Panel, 2014; Trinder et al., 2014).

Conclusion

This chapter confirms that duty lawyer services are one of the most accessed and useful services provided to SRLs in family law proceedings. This was the overwhelming view of SRLs, legal professionals and judicial officers. However, the workload of courts and other resourcing constraints mean that duty lawyer services may not be able to meet all the needs of SRLs, particularly in rural and regional areas.

FASS represents a key innovation in the delivery of legal services in the family law system, echoing the findings of previous reports (ALRC, 2019; Inside Policy, 2018; Victoria Legal Aid, May 2017). The FASS focus on family violence and self-representation clearly targets areas of need within the system. Its holistic view of people using the family law system that incorporates legal and non-legal services was identified as important by the judicial officers and other professionals that we interviewed. The work of FASS male support workers was particularly emphasised by these various professionals as making a difference to the assistance provided to men who face allegations of family violence. In addition, the expanded nature of the work provided by FASS duty lawyers—in terms of favouring court appearances, assisting with documentation, and working across legal areas—was seen by legal professionals working on FASS to be making a difference to victims of family violence. However, FASS coverage is limited and many courts in rural and regional areas did not have access to this service.

A key concern raised in this chapter is the absence of legal services that are targeted at matters that continue to litigate. Duty lawyers and FASS, while they may give some advice to people attending for a hearing, are focused on the front end and on necessarily briefer court matters. Yet, several matters, for various reasons, are unable to be resolved early and require a court determination. As matters progress along this continuum, particularly those involving family violence, the complexity and costs of the matter increase. SRLs in this context find it difficult to access more detailed advice. This needs to be read in conjunction with the findings from Chapter 5, where a number of SRLs reported that their matters were too complex for the advice model provided by duty lawyers and CLCs.

In the next chapter, we turn to threats posed by perpetrators of family violence to former partners and others at court. We consider both availability and accessibility of safety measures available to SRLs when they come to court and the efficacy of those measures.

CHAPTER 8

Safety in the court precinct

> Safety is a right and a priority for all who attend and work at the courts. (FCA, 2019b)

Many victims of family violence fear that the violence and abuse that their partner subjected them to during and after their relationship will continue at court, or during their travel to and from court (All-Party Parliamentary Group on Domestic Violence, 2016; Coy et al., 2012; Neate, 2015). The fears victims have may be amplified if representing themselves or facing a self-represented perpetrator. In these circumstances, victims may have to deal directly with a perpetrator's abusive behaviour when negotiating in the court precinct (Hunter et al., 2020).

Violent perpetrators pose risks at court, not only to their former partners but also to people accompanying victims such as family, friends, lawyers, judges and other court staff (Trinder et al., 2014; see also Hunter et al., 2020; Barnett, 2020). Australian research has found that ICLs report "abuse and verbal threats from SRLs [as] not uncommon" (Kaye, 2019a, p. 157). Surveys conducted in the United States show that family lawyers face disproportionate threats and violence compared to other lawyers (Brown & MacAlister, 2006; Kelson, 2018; Laird, 2018). Lawyers have also recounted "stories of violent, aggressive and abusive litigants in person, including physical attacks on judges, lawyers, social workers and clients" (Trinder et al., 2014, p. 32; see also McKeever et al., 2018).

In this chapter, drawing on the interviews with SRLs in the general interview sample as well as our observations of the court facilities that we visited, we discuss the threats posed by perpetrators of family violence to their former partners and others in the court precinct and the measures available to increase safety. This chapter does not step inside the courtroom itself. Safety aspects inside the courtroom, such as alternative arrangements for presenting evidence and behaviours exhibited by alleged perpetrators inside the courtroom, are considered in Chapter 9.

Safety measures

Measures at the federal family law courts

To enhance safety, the FCCA and FCA offer victims of family violence a range of protective measures when coming and going from the court precinct and when in the court building. These may include safe rooms, separate entry and exit points, and security escorts (although availability varies across courts). Additionally, judges may change the court location (e.g. move a case to a metropolitan court with safe rooms, if none are available at the current court) or allow a litigant to remain in the courtroom long enough for the other party to leave.

The websites of the federal family law courts direct people with safety concerns to contact the courts to discuss possible safeguards (FCA, 2019b; FCCA, 2019b).[51] These webpages dedicated to the topic of "personal safety" emphasise that the courts "take family violence very seriously" and that court staff do not judge whether or not violence has occurred; rather, they want all clients to feel safe at court (FCA, 2019b; FCCA, 2019b). The websites recognise that "family violence affects everyone in a family, including children"; "family violence can occur before, during and after separation and it may affect the ability of people to make choices about their family law matter and to take part in court events"; and that "even if children do not directly witness the violence, they are often very aware of it" (FCA, 2019b; FCCA 2019b). Additionally, the courts have a "particular concern about the immediate and possible longer term adverse impacts on children who experience or witness family violence". Critically, they commit to the principle that "safety is a right and a priority for all who attend and work at the courts" (FCA 2019b; FCCA, 2019b).

While both courts' websites have dedicated pages about family violence, neither the Notice of Risk form for the FCCA nor the FCA's equivalent mentions the possibility of accessing

51 The courts have also produced a brochure (available from both the FCA and FCCA websites) which advises people with safety concerns to contact the court "at least five days" before their court event to discuss arrangements required. It has no information about what arrangements are possible or available, likely because measures vary across court buildings and locations: see http://www.federalcircuitcourt.gov.au/wps/wcm/connect/ca65dbb5-517a-46cc-85a1-82799c193e51/DLSAC_1219V1.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-ca65dbb5-517a-46cc-85a1-82799c193e51-n0O7zvH

safety measures.[52] Despite asking related questions about family violence and risk, neither form asks litigants about their safety concerns at court, nor do they provide access to further information about safety measures.

The Family Violence Law Help website[53] (see Chapter 5) advises about safety measures in the section "I have fears for my safety at court—what should I do?" (see the "Family Law" tab). This has information about safety plans for court and advises people to contact the court, their lawyer or FASS to make arrangements. It lists possible safety measures, subject to facilities being available.

Despite these efforts, there are challenges. Of concern, not all safety measures are available in every court building. The efficacy of measures depends on victims being aware of them and requesting them, and legal and other professionals at court implementing them as intended. Even where measures are in place, the fear or experience of intimidation and abuse within a court building may affect the capacity of victims who are SRLs to effectively conduct their case. We explore these issues below.

Varied availability at different court buildings

We observed cases in court buildings across different locations. Some newer metropolitan buildings had excellent safety measures, although these varied between courts. The older metropolitan courts and regional courts were far worse, not having been designed to deal with cases involving family violence. Some of these had no safe rooms, no separate entrances or exits, and only one waiting room for all litigants. Three courts we observed had one staircase and/or one lift to move between floors (A-B, B-B and B-C). The remaining court had several lifts, but all were located in the one area (C-B). Women's Legal Services Australia has observed that courts in regional, rural and remote areas have "very limited, if any" safety facilities available, which can leave family violence victims "in close proximity to alleged perpetrators" while waiting for their matters to be heard (2018, p. 19).

If a court does have a safe room, its location and size are important for access and privacy. At one court (B-B) we observed, a victim would have to walk the length of the public waiting area to access the safe room at the far end. L4 reported that, in some courts, an alleged victim would need to book the safe room beforehand; it is not necessarily available on request when a person turns up at court. This process assumes that SRLs are aware of the safe room and know how to request it.

In some court buildings (A-B, B-B, B-C and C-B), the waiting areas are small and claustrophobic. The listing practices and reductions in sittings in some circuit courts can further crowd waiting areas. We observed a duty list (B-C) where 75 matters were listed for 10:00 am; a judge's associate said that this was a small list compared to other circuits. Without a safe room, this would most likely position a victim in the line of sight of their abuser. A judge who sat in a regional circuit court told us:

> I don't think any of the courthouses that I sit in are particularly well equipped for people needing to hang around for a long period of time in the presence of, or in the close-ish proximity to their former partner, with whom they have a potentially dangerous relationship. (J17)

Some legal professionals interviewed emphasised the distinct lack of privacy within some court buildings, due to limited numbers of interview rooms, small waiting areas or safe rooms being filled with alleged victims (C-B). L30, who regularly works at court C-B, stated, "You will have up to a hundred people floating around that floor and you're just managing keeping the victims away from the perpetrators". In particular, circuit courts that use state court buildings often lack privacy. These spaces vary in their availability of safe rooms, number and availability of interview rooms (if they exist), soundproofing/noise, rooms for barristers (sometimes a single shared room), location of exits in courtrooms, and security to enter the building. Conditions become more cramped if state matters take priority over access to rooms when the FCCA is on circuit (L30).

A lack of space can increase risks in situations where litigants become aggressive. L30 described a matter involving family violence heard in a state court building used for the FCCA

52 We understand that the FCA and FCCA, in their current work on revising these forms, is addressing this gap.

53 https://familyviolencelaw.gov.au (accessed 23 April 2020).

circuit. The courtroom's close quarters made it "very hard to get out of it quickly at all". When the SRL father in the matter became "quite animated", L30 suggested to the security officer in the courtroom that he walk behind the bar table to remind the father of his presence:

> I mean, he [the security officer] doesn't have any powers of arrest, he can't even touch the guy. But at least he's got his uniform on, it might make him calm down a bit. And he said, "No, I'm not moving from my post because this is the way he can get to the judge, so I'm just sitting here".

Eventually, the security officer went to the police station and warned the police, "If we press the duress button, it's serious", because of his concern about what the father would do.

Contrast with local/magistrates courts

Regarding safety measures, research conducted in the United Kingdom has identified a "striking difference in facilities" between criminal and family courts (Coy et al., 2012, p. 43). Likewise, a number of the SRLs in our study (interviewed in the general and intensive case study samples) contrasted the magistrates courts with the family courts, noting the availability of safety options and victim support in the former. Angela received "absolutely no support" at the family court. Lydia was surprised by how "physically close" she was to her former partner in the Family Court and had expected to access the kinds of protections and support offered in the magistrates courts. L19, a FASS lawyer, summarised concerns for the FCA and FCCA, where victims of family violence

> will come into contact with the perpetrator of violence in the waiting room. We don't have safe rooms like they do in the DV courts. You just all wait outside. Inside the courtroom there is not really any mechanisms put in place to assist with that, so they could be standing up at the bar table with the other person who's saying probably quite hurtful things in the courtroom and then they have to hear all of that and then their matter's over. The court gets onto the next matter and they're just shooed out into the waiting room and probably don't know where to turn to next. And then all the safety issues, in terms of them getting home safely after being at court, and there not really being any mechanism to follow up.

This contrast is more striking in the regional circuit courts. For example, at A-B the state court building has safe rooms where protection orders and criminal proceedings are conducted but has no similar provision in the part of the building used by the FCCA. A woman in the intensive case study (ICS-B) noted this difference:

> When we had the DV [matter] here … there was a safe room where they took me. For this, you just walk up the stairs and hope that you don't walk straight into him.

Self-represented litigants and access to safety measures

Knowing about safety measures

A key benefit of an experienced family lawyer is that they know about the court's safety measures and how to request them; these are not necessarily known to SRLs (L6). A specialist family violence lawyer for Legal Aid observed that she often sees SRLs on their first return date at court "who don't have safety plans and should … They aren't aware of the fact that they can get a safety plan before coming to court" (L27). R1 also commented, "You know, all of those [safety] arrangements can be made [for victims] but we're as good as what we're told and therein lies the problem".

The onus is on victims to apply for a safety plan, which "assume[s] an empowered court user" (Sarre & Vernon, 2013, p. 137). This is not necessarily an SRL who is also a victim of family violence (Kaye, 2019b). We spoke to many SRLs who only became aware of safety measures after their matters commenced, and two SRLs were only made aware during our interview (Karen and Robyn).

Several female SRLs spoke about safe rooms. Lydia said no one told her safe rooms were available; she pointed out that there was no mention of one on the court website where she downloaded the Notice of Risk form. Hayley was "never once offered one [safe room]. I had to self-initiate on a couple of occasions". Jenny found out about the safe room when asking procedural questions about her matter through the live chat function (available on both Family Court websites and managed by the NEC). Fiona said she was granted access to a safe room and security guards for her and her daughter

at court, only after she sent multiple emails to the court explaining her fears.

Even when victims notified services about needing safety measures, this was not always sufficient to trigger action. Danielle said that each time she applied to speak to a duty lawyer, she ticked the yes box in response to the question "Do you feel unsafe in the court?" Yet, no one picked up on it or asked her about safety concerns. When Danielle was referred to a support worker to arrange access to the safe room, she waited for more than two hours without assistance and had to leave to collect her child from school. Danielle did eventually use the safe room once, after security assisted her to access it. She commented that organising the safe room on the day of court was "just as difficult" as trying to organise it beforehand. She reflected, "You feel like you're bothering them, you really do".

Two women who were initially unaware of safety options would not have asked about their availability even if they had known. For Fiona, this was despite experiencing horrific violence, including rape and physical violence:

> The whole thing is truly just so focused with what you've got to do in court and everything, your safety measures and everything aren't even thought about … And I didn't know about video link and all that because I just … I don't know, I guess it's something to do with being trampled on for so many years, I guess I felt I probably didn't need it because, do I deserve it?

Robyn also felt that the measures available at court would assist her in feeling safe:

> I didn't have a safety plan. I didn't know that that was something that existed. For me though, I guess, I just thought, look, there's enough protection around a courtroom and court building with cameras and security and stuff … I didn't feel particularly unsafe there but I certainly was.

One exception to this pattern of victims having to initiate safety measures was offered by Bradley, the only male interviewee to mention concern for his safety at court. He was contacted by the court before the hearing and offered access to the safe room as a protected person on an intervention order. He was glad of this offer as he was fearful of his former partner's new partner at court.

Most professionals agreed that SRL victims do not necessarily know about court safety measures and so they are not always used (e.g. L6). Despite Bradley's experience, a legal aid lawyer (L27) noted "there's no system in place" to contact litigants prior to their first return date to make arrangements. As discussed in Chapter 5, duty lawyers and FASS can inform SRLs about safety plans (L9 and L27); however, these services are generally contacted on or after the first court event.

Negative perceptions of or presumptions about victims

A very small number of SRLs perceived that court staff and legal and other professionals took negative views of requests to access safety measures. Maxine said a family consultant at court dismissed her safety concerns. Instead of taking her to a safe room as requested, she was led to the waiting room where her former partner was seated. When Maxine became "really agitated and upset", the family consultant "scoffed" at her and wrote negative comments about the incident in the Family Report. Maxine felt that using safety options, even asking for a security guard to leave court safely, would be held against her, for being "over-dramatic", so she stopped requesting these services. Security staff at one registry negatively appraised litigant reasons for accessing safety plans, telling us that "some people use it for their advantage. See it as a way to make the court think they are a victim". It is possible that court staff may have become jaded in relation to violence. When Jenny told court staff that she had a protection order and was "quite fearful about what he's going to do", she reported that they said, "Oh, join the club". Marie simply felt that, despite its claims, the FCA does not take victim safety seriously.

Experiences of safety in the court precinct and courtroom

Use of safety measures: Court observations

In the intensive case study, we made observations and spoke with legal and other professionals about the use of safety

measures in family law cases involving SRLs. We observed the following measures:

- general use of the safe room by SRLs and alleged victims who faced SRLs
- security screening on entering court buildings (although the nature of these varied across the court facilities)
- security officers escorting alleged victims to and from the courtroom (C-B).

Experience of safety measures: Self-represented litigant interviews

Regardless of whether or not they had safety plans, many female SRLs felt unsafe in the court precinct or when arriving or leaving (Anna, Danielle, Hayley, Jess and Robyn), and some experienced abusive behaviours at court (Angela, Anna, Danielle, Fiona, Jenny, Jess, Joanne, Karen and Katherine). Only one male SRL expressed concern about his safety at court (Bradley).

Many SRLs felt particularly vulnerable in common areas such as waiting rooms. Anna said her former partner would purposely "walk over and stand above me, just to intimidate". Fiona said her abuser would glare at her, "really angry", as she walked down the corridor. Joanne's former partner would "mouth absolute abuse" at her as she walked past the waiting areas to reach the safe room. Danielle described how her former partner trapped her in a court lift, refusing to let her leave or use the lift without him. After she forcibly pushed him out of the lift, he reported her "abuse" to security. She said that later, "we had a security guard sit between us in the court all afternoon".

Conversely, one male SRL (Samuel) sought to use the fact that he and his former partner sat near each other in the common waiting area as evidence for the judge that "obviously she's not in fear of me".

A woman respondent SRL in a parenting matter (ICS-D) described how her former partner once followed her in a car after a court event. She was forced to drive around until he stopped following her, in order to avoid him discovering her new address. Previously, when her former partner had representation, his lawyers would often assist by advising her to remain at court and directing him to leave the court building before her. Now that he was also self-represented, her level of fear and apprehension had increased as she would potentially need to "speak to him directly" at court. She already "had to serve documents to his one known address", which she found distressing.

Safeguards offered by legal and other professionals and court staff

Security staff have a mandated role to ensure the safety of people at court. Most contemporary Family Court buildings have airport-style security with baggage scanners and walk-through metal detectors; however, at one regional circuit court, we observed bags being manually checked by the security officer. These checks are necessary as two judges stated that security officers removed a "big collection" of weapons every day (J18 and J19). Legal and other professionals reported that security staff will escort people to courtrooms and to their vehicles, and can be stationed in the courtroom if needed (e.g. L3). Jenny praised the support that security provided her in the courtroom: "They made sure that there was always someone there and always in my eyesight too … which was really good … knowing they were there". One judge (J2) suggested it would be better if the "excellent" security guards "were actually empowered to take people out of the room". This judge added that if significantly concerned about safety, they would ensure there was a police officer, as well as a security guard, stationed in the courtroom.

Feeling safe and being safe?

Some SRLs reported that having a safety plan and access to a safe room did not make them feel safer at court. Joanne said when she was in the safe room, her former partner would repeatedly walk past and look in to intimidate her; security eventually had to tell him to stop. Jenny pointed out that the protection offered by security ends at the courthouse door: "They don't take you outside, just to the door". This gave her former partner an opportunity to say threatening things to her as he drove past.

Legal professionals also noted that having safety measures in place did not prevent intimidation taking place at court. L30 acknowledged that limited space at a particular court

(C-B) made it "really difficult for lawyers to keep their clients even just out of eye contact from the other party". Moreover, L16 explained that a woman's access to a safe room doesn't mean that "they won't see the perpetrator walking past the door … we just make do with the space we've got". One judge (J4) recognised that, regardless of measures put in place, for some women it simply is not safe to attend court at all. This judge cited the following example:

> The perpetrator was actually in jail on remand, but he sent his family along and we had him on video … So, I told the woman that she was not to come to court anymore because I perceived that he would kill her, and he'd get her killed by having her followed from court … She went into a safe house and then after that I said … he was too dangerous even for her to be seen coming into the building. (J4)

Experience of court staff and other professionals

Violent perpetrators can also pose risks to legal and judicial professionals, court staff and others. Legal professionals and judicial officers interviewed raised these concerns in cases where perpetrators represented themselves. One registrar (R2) noted that another registrar "had to sell her house and move because one of the self-reps broke in". One judge (J2) reported requiring a police officer to be in the courtroom in one case involving a violent SRL, explaining that it was "not for my protection", but rather for the safety of other people in the room.

A lawyer for a women's legal service acknowledged "safety issues for ourselves" when negotiating with alleged perpetrators at court: "They can be quite aggressive. And we've asked for security guards at the court to assist on occasions" (L23). This lawyer went on to explain that her service has had to institute strategies to manage the risks between court dates where they can receive "quite abusive" communication from opposing SRLs. Such strategies include insisting on appointments to deal with one SRL's constant calls and requiring all of their exchanges to be put in writing.

Perpetrators can also abuse their own lawyers. L12, who provides SRLs with an unbundled service to assist with document writing, admitted:

> My clients can be threatening towards me … I have to … say, "Look, if you're going to persist in that behaviour and be aggressive towards me, I'm not going to do these documents for you".

In one of the observed cases (C-B-9), a father had been abusive to his own lawyer, who then withdrew on the morning of the observation. The lawyer was reported as having a safety plan with the court and remained in a safe room until the matter was called. At the time we viewed the court file, several lawyers were on the record as having represented the father and there were three notices of withdrawal. In B-A-1, an SRL respondent father was recorded on the court file as having abused one of the three assigned ICLs, who then asked to be removed. The father had threatened the applicant's lawyers in his affidavit, sent abusive emails and lodged multiple complaints against professionals involved in the matter to their respective professional organisations.

Conclusion

While the potential for abuse and intimidation within the court precinct is a concern for all victims of family violence, this chapter finds that opportunities for violence increase when an alleged perpetrator and/or alleged victim represent themselves. In these circumstances, victims are without the assistance that can be provided by a lawyer to access a safety plan and to be a buffer between the victim and their former partner (if also self-represented) or their legal team. SRLs who are victims of family violence, and who continue to experience abuse and intimidation at court, have to factor in that this is the environment in which they have to present their case. The experience of ongoing behaviours at this location must impact their ability to do so effectively.

This chapter finds that the safety measures in the court precinct currently offered by the federal family courts are important safeguards against violence and abuse by perpetrators of family violence, but they vary widely. In many cases, SRLs, by the simple fact of the absence of legal representation, are unaware of what is available. The chapter confirmed the varied availability of safety measures across the court facilities used by the federal family law courts, and that in some instances these stand in marked contrast to what is

available in local or magistrates courts. Some victims of family violence will not be safe at court despite enacting all of the safety protocols available. For these people, judges can extend further measures of safety, such as allowing them to be absent from the court.

The next chapter moves inside the courtroom. It explores how SRLs perform in the courtroom, with a key part of that discussion focused on safety (e.g. whether and how alleged perpetrators' behaviours are addressed inside the courtroom and the availability of alternative means of giving evidence to enhance safety for victims).

CHAPTER 9

In the courtroom

> So what I didn't understand and what I see with other women in my position is that I don't have a legal background at all and so I just imagined it to be like *Law and Order* and I just thought we would get a date for our hearing and then I had pictured the cross-examination … but I had no idea around this process … this whole hearing—mentions, directions, hearing … (Katherine)

Research reveals that the capacity of SRLs to litigate their family law matter is impeded by their lack of legal knowledge and understanding of legal processes (ALRC, 1997; Tkacukova, 2016; Toy-Cronin, 2016; Trinder et al., 2014; see also Chapter 2). We also know from research that SRLs face challenges when presenting their case in the courtroom, including where to sit, when to stand, and when to speak; how to address the court, and what can and cannot be said; knowing and complying with the law and court rules; knowing and negotiating the rules of evidence; and advocacy more generally (McKeever et al., 2018; Toy-Cronin, 2015; Trinder et al., 2014). Our study confirmed these findings and found these challenges are exacerbated in cases involving allegations about family violence. The physical and psychological harms, emotional distress and trauma suffered by many victims as a result of family violence have been well documented in the literature (Barnett, 2020; Bishop & Bettinson, 2018; Hunter et al., 2020). Research shows that the ongoing nature of these harms manifest in anxiety, fear and stress, adversely affecting a victim's performance in court, particularly their ability to concentrate, speak and remain calm; and their credibility as a witness (Bishop & Bettinson, 2018; Hunter et al., 2020).

In this chapter we begin by examining two key issues that underpinned these difficulties and challenges in our study: misalignment of expectations and inadequate preparation for court events. In Australia's adversarial family law context, misalignment of expectations seems inevitable where responsibilities and obligations of parties, judges and legal professionals are traditionally and clearly demarcated (though generally unknown to those outside the law). While some SRLs are clearly well organised, many struggle to prepare for their court event and others do not or cannot prepare at all; some are disorganised, and others simply do not know what is required (see Chapters 5 and 6). We then turn to consider SRLs' performance in the courtroom, and the negative impact of ongoing trauma caused by family violence on SRLs' capacity to present their case.

Expectations

> I just had succumbed to not having any expectations. I certainly wasn't expecting to be successful. All I kept thinking of really was … to keep it going, if you know what I mean, so if I could just keep it in the court's eyes, that that was at least a strategy to keeping my kids safe. (Kate)

An area of unanimous agreement between SRLs, professionals and judicial officers we interviewed was that SRLs' expectations about family law processes and court events do not align with reality. This misalignment of expectations emerged on multiple levels. SRLs expect to be able to speak freely in the courtroom, to have their matter finalised at the first court event or at least quickly, that the orders they seek are reasonable within the legislative framework, that they will be respected and that they will achieve what they perceive as "justice". One legal professional noted that SRLs might also expect greater focus on family violence given that

> there is a lot of focus in the media and there's amendments to different legislation and pilots and policies that are being introduced to … recognise those issues and how they impact on parenting matters. (L19)

Robyn certainly expected that the long history of serious family violence in her marriage that she described in her court documents would be discussed in court on the first return date, but "it just wasn't". Consequently, she felt compelled to agree to parenting orders sought by her ex-partner that she felt were unsafe (see Chapter 12). Three lawyers interviewed suggested that SRLs may have unrealistic expectations about the family law system's response to family violence, particularly in the early stages of the process (L7, L3 and L19):

> They [SRLs] would have particular expectations of things happening quickly and I think, as we all know, that's not the case in the current climate of the court. So, that's a big hurdle, particularly for self-represented litigants who have used violence or have allegations of violence made against them might have particular expectations of outcomes at court that aren't realistic, particularly at

> [an] early stage where no findings of fact can be made, so they may not have that understanding of how risk is balanced. So, that's a big hurdle. (L7)

Professionals and judges commented that most SRLs lack experience in the legal system and hold "misconceptions about what the Family Court is and what happens. There's a lot of mythology and folklore and well-meaning friends and family may create certain expectations" (L29). J17 noted the impact of television as a "frame of reference" for SRLs' understanding of court process, as did other judges and professionals (J1, J13, J15, L6 and L18).

The family law system and the law are complex; even lawyers "stumble over the legislative pathway that the executive government created. It is really tricky" (R1). One experienced lawyer told us, "Case management processes are little bit opaque … and you don't always know yourself what to expect" (L23). Professionals and judges noted that legal advice helps to manage an SRL's expectations, and that duty lawyers are critical in this context (see Chapter 7). According to R1, "A good lawyer can really help set a client's expectations and understand what the court process is".

The first return date: The start of a lengthy process

A clear example of misalignment of expectations surrounds a matter's first return date—that is, the first court event. On this occasion the matter is listed, generally together with many other matters, before a judicial officer. Given the large number of matters in the list,[54] most are dealt with on a mention basis (briefly); whether matters proceed to a short hearing will depend on the court's capacity and issues of urgency. We observed many SRLs at that first court event appear confused about what was happening, what would happen, and what could be achieved. According to J17:

> [SRLs] have no idea that on the first court day a whole lot of nothing's going to happen. They have no idea that they are going to be in for the long haul, and that the process is going to take at least months, unless they resolve the matter. And they have no idea about any of the process or how it all works.

Several judicial officers expressed similar views (J4, J5, J8 and R3), noting that many SRLs appear to be under the impression that on that occasion, the matter will be heard (J8) and they will be afforded an opportunity to speak at length about their case (R3).

Further, SRLs might also expect something from family law proceedings that is not possible or part of the role of those proceedings. A number of the legal professionals commented about SRLs seeking what they perceived as "justice" (L21, L22 and L29) or some vindication that they had been "wronged" by the other party (L21 and L22). One judge bluntly explained that this was not their role:

> And [SRLs] come, "I want justice and I want what's fair". And I say, "Well, good luck with that. You've read the *Family Law Act*? My job is to make an order that is best for a child. My job is to give to each of you your entitlement to your property. And it may not be what you call justice." So, they have no idea. They've come here to clear their name … "I didn't assault my wife". I say, "That's not my job". "I'm a really good person". That's not my task, I don't want to hear about that. (J1)

Remarking on SRLs' expectations of how long matters will take, L27 emphasised that "a lot of people don't understand that it could take 18 months to 2 years to get through the court process". Even if an SRL expects that their matter may take some time, they may not have an accurate sense of what is "some time" in the family law system. For example, we observed an SRL mother (ICS-D) ask the judge whether the matter could be finalised that day on an undefended basis. The SRL father who was the applicant had failed to attend court and this was the fifth court appearance for this parenting matter. The mother asked: "Your Honour, would it be appropriate to seek final orders given how long [12 months] this has been going on?" The judge responded: "That's not long in this court …"

Assistance in the courtroom

The responsibilities and obligations of parties, legal professionals and judges are traditionally and clearly demarcated in the adversarial family law context. Parties are expected to run their own matter in court even if they are self-represented; the court does not determine or advise upon the appropriate

54 In the courts observed, duty lists tended to have 20–30 matters, though at one regional court we observed a duty list with over 70 matters.

application or response, the key issues, the evidence nor the orders sought. These are matters for parties. SRLs are expected to know and comply with the relevant law and rules and determine their own litigation strategy at each court event. Family law proceedings are premised on a model of legal representation, where each party has a lawyer and that lawyer, with their legal knowledge, runs the matter. Without legal representation and the necessary knowledge, we found many SRLs did not understand what was happening and/or what they should be doing. SRLs' needs for assistance in the courtroom, however, poses a dilemma for the court.

Judicial officers are constrained by their role as "passive arbiters" in adversarial legal proceedings regarding the extent to which they can assist SRLs (Moorhead, 2007). The law recognises that judicial officers may have to assist SRLs by explaining the process. The Full Court of the Family Court in *Re F: Litigants in Person Guidelines* (2001) FLC 93-072 developed guidelines which, while not exhaustive, aid judicial officers regarding the best way to ensure procedural fairness, explain procedural matters to the SRL, assist the SRL in taking witnesses' details, advise SRLs of rights to object to inadmissible evidence, and clarify submissions and applications that should be made.

Judicial obligations

One judge summarised judicial officers' obligations as "mak[ing] sure that they [SRLs] understand what's happening and what's going to happen" (J17). For J4, this means judicial officers have to "bend over backwards" to assist SRLs. The nature of the obligation is determined on a case-by-case basis and judicial practices vary. Two judges told us that they gave SRLs a hard copy of the *Re F Guidelines* (J18 and J19), though J13 said that in circumstances where many SRLs do not bring their own documents with them, "Giving them another piece of paper when you've just given them 50,000 pages, I don't think helps". More commonly, judges explained the process orally, often referred to as their "spiel" (J12).

Our observations echoed these interviews. Though length and detail varied, judicial officers provided an explanatory spiel in almost all matters that involved SRLs. They explained what was happening, the positions of the other side and the court, what would happen next (e.g. an expert report), orders made, and the applicable law or rules. For defended hearings, explanations tended to be lengthy and often continued during the proceedings, addressing technical aspects such as cross-examination, re-examination, affidavit evidence, relevance and hearsay. Frequently, judges provided practical assistance by reframing questions or occasionally asking questions of the witness directly.

It was also common for judges to draw SRLs' attention to relevant legislative provisions, occasionally giving the SRL a hard copy. For example, we observed a judge give an SRL mother a copy of an FCCA rule to help her to make an oral application for substituted service (A-C-8). The practice of directing SRLs to relevant legislation or giving them copies of provisions was noted by several legal professionals, one of whom queried whether it was useful:

> They will give them a bundle of the sections of the [*Family Law Act 1975* (Cth)], which goes straight over the top of the litigant's head, and everybody in the courtroom knows it will. But nevertheless, they get section 60CC and section 60DA and 65AA, and they never look at it again. (L30)

Many professionals commented positively on the quality of judicial assistance to SRLs. For example:

> [The judges are] amazing in this court, like blanket amazing. Like they'll take the time to explain it to them [SRLs], even though, you know you can tell they're getting frustrated if you're sitting in court, they'll really take the time, they'll explain it to them, they'll give an opportunity to see the duty lawyer if they want to. (L3)

However, not all SRLs found judges to be this helpful. For instance, Hayley found the judge in her matter very unhelpful. In her view, judges should tell SRLs when they are doing "something wrong": "You just so much get shut down and you get told, 'No, we're not talking about that'. But you never get explained why".

Information not advice

As discussed in Chapter 5, SRLs find the boundary between information and advice hard to navigate. While there is a considerable amount of information available in relation to procedural steps, it is much more difficult for SRLs to obtain

legal advice specific to their matter. These difficulties persist in the courtroom. Judicial officers can provide information about the process, but they cannot provide legal advice in relation to the way SRLs should litigate their matters. J4 noted:

> I give them a brief outline, I offer them copies of legislation, and I tell them at any time, I can give them procedural advice, but I can't give them legal advice. And I encourage them to go and see the duty lawyer here at the court.

Several judges said they found this boundary difficult to navigate: "A hard line to walk; a complex minefield" (J18; similarly J11, J14, J17 and J19). One judge commented that in providing information to SRLs "you often feel that you end up being their lawyer" which could be perceived by the other party as a breach of judicial impartiality:

> The Full Court's made clear that you have to explain things, and you have to do that. And it's very important … And that can create all sorts of negative perceptions by the represented party. Because the judges suddenly become aligned with the opponent. (J11)

Our observations indicated that judicial approaches to this boundary varied markedly. For example, we observed a parenting and property matter listed for mention following the release of a Child Inclusive Conference (CIC) memorandum (A-A-20). The memorandum recommended that the SRL father's time with the child be gradually increased and the judge suggested to the father that he make an oral application for interim parenting orders there and then. The father duly made submissions and the matter was listed for judgment two weeks hence. When interviewed, the SRL father said he thought the judge was "good" as they "directed me and assisted me in relation to what I needed to say". In contrast, we observed another matter where the judge declined to advise the SRLs as to how to progress the matter (A-C-2). There the SRL father had applied for a change in parenting orders which the SRL mother opposed. Dealing with two SRLs was a difficult task for the judge and it took considerable court time to work out the details of the application, the parties' positions and orders sought, and to translate the documentation filed into legal actions and concepts. Ultimately, after strategic judicial questioning, the judge found sufficient change in circumstances and ordered the matter be re-opened. Then the following exchange took place:

> [Judge:] What further orders do you want for the conduct of the matter?
>
> [SRL father:] Is it up to me at this stage?
>
> [Judge:] You and the mother come to court seeking orders. What orders do you seek now?
>
> [SRL father:] I want interim orders.
>
> [Judge:] I have made a decision to re-open. It would be unlikely to close on impossible that I would be hearing a change in orders today. Had you thought about that? Where the matter was going?
>
> [SRL father:] I'm not fully understanding what Your Honour is asking me—my apologies.
>
> [Judge:] I expect you coming to court to undertake some level of background work. This is the third time I've asked the question.
>
> [SRL father:] [Sighs.] [Obviously has no idea what judge means.]
>
> [Judge:] You need to do your homework beforehand … before you come to court you need to think about the matter. What is to be done. Not to come here and hope. I'm not here to conduct your trial.

The matter was stood down to enable the SRLs to think about the way forward.

Time-consuming

Not surprisingly, providing explanations to SRLs was often time-consuming. One judge (J12) told us:

> Even if it's just a procedural event … [explanation] probably takes me 20–25 minutes, because I do like to explain in detail because I'm conscious if one side's represented and the other's not, as lawyers we have our code, our way of communicating a lot of information, we want a Child Inclusive Conference, and ICL appointed et cetera. So, I explain all those to parties, what they're about, how ICLs do their job, what's coming … et cetera.

Two judges said they were mindful that the extent of time taken to assist SRLs could be frustrating as well as costly for

the represented party (J8 and J12). Nonetheless, J8 believed it was time well spent:

> Listen, I find the more time you invest at the front end of a matter with a self-represented litigant, the less time you're going to spend at the back end when, you know, potentially you've got days' worth of a hearing to undertake in court. So, it's an investment as well as being a philosophical commitment.

Complexity

In many if not most cases observed, explanations for SRLs addressed complex concepts that were difficult to explain quickly to people with no legal background. As one judge said to an SRL on day one of a trial: "I will explain the trial process to you at that time [when it starts]. I often wonder how useful it is but the Full Court says I have to" (A-A-21).

Some judges provided helpful explanations using examples to illustrate the operation of orders made and/or using straightforward language. For example, in ICS-A the judge clearly explained to the SRL mother why her proposal to supervise the father's time with the children was not workable: "But you don't get along in a big way". In another matter (B-B-11) the judge explained to the SRL father, in the context of the latter's proposal for time, that the child was "only little" and given that things have been a bit "tumultuous" for the child it might be best on an interim basis to "let things settle down a bit". However, we also observed explanations that were hard to understand. For example, in one hearing, the judge tried to help the SRL formulate her cross-examination questions.

> [Judge:] Surely you'd be putting to him those salient, relevant parts of … the most poignant and pertinent … otherwise your questions are perfunctory. Do you know what that means?
>
> [SRL mother:] No.
>
> [Judge:] Scratching the surface. I'm trying to help you but it's your cause. (A-A-15)

For a small number of matters, however, it was apparent that no matter how much explanation was provided by the judge, the SRL did not (or perhaps, would not) understand. For example:

> [SRL father:] Can you give me some advice about how I submit an application about the Family Report? How do I do it?
>
> [Judge:] I'm not giving you legal advice. Get some legal advice. See a lawyer.
>
> [SRL father:] Can I get a date for an interim hearing?
>
> [Judge:] No you can't [Mr X] … You are not understanding the process. I'm struggling. People often don't like reports. You give other evidence at the trial and cross-examine the Family Report writer. I can't keep ordering Family Reports until I get one everyone likes.
>
> [SRL father:] [Continues to talk about the report.]
>
> [Judge:] You can file an affidavit about the report without an application if you would feel more comfortable about it, but I can't do anything about it. If you would feel happier and [it would] make you feel heard, get it off your chest. I've suggested to you about a million times, get some legal advice. You are not understanding things. (C-B-36)

In most cases observed, judges spent little time testing SRLs' understanding of explanations provided. For example, in a child recovery case, after ordering that the children be returned to the mother and the parties attend a CIC, the judge said to the SRL father: "I suggest that you get some independent legal advice. You can be self-represented, it is your right. Do you understand all that has happened?" The father responded "Yes", and the judge moved on to the next matter (A-A-30). Such perfunctory checking was common even when circumstances suggested it was unlikely the SRL understood what had happened (e.g. C-B-15). While SRLs occasionally spoke up if they did not understand, it was more common that they acquiesced by verbal or non-verbal cues.

Pressure on self-represented litigants to get legal advice

Several judges said that they tried to persuade SRLs to get legal advice, particularly at the first court event. For example:

> When they first appear before me in the first return of the duty list, I try and explain to them that one of the major

> benefits of having a lawyer is the objective assessment and advice you get from a lawyer. I said, "You can't be objective about your own matters, particularly children". And I try and encourage them to apply for legal aid, or if they can, at least get legal advice before they proceed. Because often, the material they file is just a jumbled mess, and you've got to go through it and try and work out what are the relevant facts. And their behaviour in court is often affected by their emotions. And their anxiety, I mean, there's high anxiety levels in a lot of these people, because they find it confronting, coming to court. (J4)

We commonly observed judges encourage SRLs to get legal advice and SRLs told us they were similarly encouraged, if not pressured, to do so (Anna, Danielle, Emma and Kate). Emma said that the judge in her matter kept saying to her: "Get yourself a lawyer. Get yourself a lawyer". She would think, "Oh come on, what with?" This practice of encouraging parties to seek advice where advice cannot be accessed easily was frustrating and made SRLs feel like "unwelcome usurper[s]" (McKeever et al., 2018, p. 15; see also Toy-Cronin, 2015). Marie experienced significant pressure from the court:

> Yes, the first judge, [Name], must have said to me at least 30 times: "Have you got legal representation yet? Have you got legal representation yet? I strongly urge—urge—strongly advise you to get legal representation given the seriousness of what could happen." Blah, blah, blah. Right? They—they hate self-reppers with a passion.

Preparation

Each court event represents a step in the litigation for which parties should be prepared. Preparation includes complying with previous orders (such as filing and serving documents, completing drug testing or parenting/anger management courses), bringing copies of relevant documents (marked up and tagged as necessary) and creating a plan for the conduct of the matter (such as prepared submissions, trial questions or outline of orders sought).

Varied levels of preparation

Given the misalignment of expectations, it is perhaps unsurprising that most professionals and judges said SRLs vary markedly in terms of their preparation for court. J14 described this as follows:

> I've certainly had self-represented litigants who have done a very good job of representing themselves. They've obviously taken a very long time to understand what the court is going to be interested in and what it's not going to be interested in, and gone to a lot of trouble to try and organise their material in a logical fashion. Those people are more the exception than the rule, but they certainly exist out there. The other end of the spectrum of people who just have no preparation, who just come along for a trial, for example, they've done no preparation, they've not filed any material, they've filed no affidavits, they've not thought about the process, despite having been told how the process will operate. And they have just done nothing …

Many professionals and judges suggested that "the very prepared are in the minority" (O1). It was more common for SRLs to be poorly prepared, coming to court disorganised, without paper and pens or copies of documents (sometimes even without their own application; L4, L11). Many SRLs did not prepare submissions or case plans and took no notes: "They [SRLs] don't know if it's the second court date or the fifth court date, they don't know what they're there for" (L19; similarly J3, L10, L11, L26 and L32).

Our observations echoed these comments. Some SRLs were well prepared, attending court with all their documents often well organised and tabbed, apparently aware of the nature of the court event and ready to make submissions to support their position (e.g. A-A-33, A-A-11, C-A-26, C-B-40, ICS-D and ICS-J). Others, however, clearly were not. Importantly, it was not only SRLs who were unprepared; we also observed lawyers who appeared ill prepared for court events, and this lack of preparation was commented on by professional and judicial interviewees (J12 and L26).

We also observed SRLs who, though prepared, were "blindsided" because the court event did not unfold as expected. For example, in one matter, the SRL mother had come to court fully prepared for a contravention hearing in which she was the applicant (ICS-J). She believed that the father's ongoing behaviour in stopping the child seeing

her was a continuation of the abusive behaviour she had experienced. The judge, however, took the view that there was not much more the court could do to repair her relationship with the child, who was 17, and asked this SRL to address the court on why her application was not an abuse of process. The SRL mother was unprepared for this and lacked the legal knowledge and experience to make submissions. She told us: "You can never be prepared enough [for court] … nothing could have prepared me for what he [the judge] was asking today".

Factors affecting preparation

Some professionals suggested that applicants were more likely to be prepared than respondents (L2, L6, L22, L27 and O2). According to a duty lawyer, respondents usually "have no idea about what's going to happen"; consequently, they "don't know what they want, they don't know what they're here for. They don't know who the other party's lawyer is. If they've got a lawyer" (L2). According to O2, "They literally just come because they've got a court date".

An SRL's educational background was considered a significant factor in terms of preparedness (L6, L7, L8, O7 and O11). Joanne, who was highly educated, made a comparison with her former partner "turn[ing] up with all of his paperwork in a plastic bag. He's not a man with a lot of education", whereas she "just had my paperwork clearly in front of me".

A number of professional and judicial interviewees also talked about the impact of compounding disadvantages such as mental health issues (J1), lack of proficiency in English (J14, L8, L18 and L29) or homelessness (O5) on an SRL's capacity to prepare. For example, O5 described the impact of a client's homelessness:

> All of her files have been lost in one house; in each accommodation she keeps losing her files then piling up somewhere. And then she doesn't know where or whose house it is and all of that. And finally, she got all of this jumbled-up affidavit, not in order. Completely jumbled up.

Our observations confirmed the impact of compounding disadvantages on effective participation. Key among these was the experience of family violence (see below), as well as the disadvantage of being incarcerated (e.g. B-B-3), having a mental illness (e.g. B-C-13 and C-A-35) and having limited English language skills (B-B-8).

Self-represented litigants' performance in the courtroom

> Because we're not just self-represented, what I also am is a woman who's been through a violent relationship. (Emma)

> When you're thrown questions and when you get in there and your mind goes blank and you're um, um, um, um … (Jess)

Court layout, etiquette, rules and procedures, and public speaking are unfamiliar to most people. Trinder and colleagues (2014) drew on theatrical analogies to describe aspects of the conduct of proceedings framed by the model of legal representation: the scripted nature of the matters, the assumed roles and the turn-taking of the performance. In our study it was clear that for many SRLs, the script was unknown, and their performance required guidance as much as their ability to articulate the substance of their matter. While some SRLs were obviously well versed in court etiquette (e.g. B-B-2 and C-B-15), others simply did not know how to behave or what was expected of them (e.g. ICS-A, B-B-9 and C-B-28). Lawyers for the other party (B-C-3), the ICL, the judge's associate (e.g. C-B-32) or the judge (e.g. C-B-27) would sometimes assist SRLs with where to sit and when to stand. These issues were further complicated by different judicial approaches to formalities in matters in which SRLs appeared (A-5, J10, J12 and J16) that SRLs had to uncover themselves.

Mixed performances

The quality of SRL performances observed across a range of court events was mixed. Consistent with previous research, most SRLs fared much better in shorter, more procedural matters than the more complex defended hearings (Trinder et al., 2014). The variability of performances often appeared to be connected to expectations and preparedness: whether the SRL understood what the particular court event entailed, and whether the court event proceeded as they expected. Variability was also seen in terms of assistance or otherwise

from judges and lawyers (see above). In many cases SRLs were assisted by the duty lawyer prior to their matter being dealt with (e.g. B-B-8 and B-B-12), and in some instances the duty lawyer assisted in the presentation in court (e.g. B-B-14, B-C-22 and C-B-48).

In general, performance improved with preparation. For example, we observed a directions hearing where the SRL applicant mother was articulate, clearly prepared and confident when interjecting and answering questions. That this was the seventh court date in the litigation suggests the SRL knew what to expect (ICS-C). We observed other SRLs struggle when they were not prepared, when they had not complied with previous orders, or when they did not understand what was happening.

SRLs did not fare well in defended hearings. These court events are complex and technical. SRLs must deal with affidavit material, present their case and be cross-examined, re-examine themselves, introduce any subpoenaed material, cross-examine the other party and any witnesses, and make final submissions. Each step is governed by rules. As noted above, although we observed judges explain the process to SRLs, it was evident that understanding the concept of evidence, let alone mastering forensic skills such as cross-examination, were hurdles that most SRLs failed to overcome in defended hearings. As a result, most SRLs we observed struggled under the demands of a defended hearing (e.g. A-B-22, ICS-E, ICS-F, ICS-J, A-A-2, B-A-1, C-B-25, C-A-20 and C-A-46). This was the case even for SRLs who appeared to be well prepared (e.g. the SRL contravention applicant mother in ICS-J above) as well as those who were clearly unprepared with little idea of what they were doing (e.g. in A-A-15 where both parties were SRLs).

Speaking in court

Misalignment of expectations combined with lack of knowledge means that most SRLs are not properly prepared for their court event and they flounder. Moreover, SRLs struggle with speaking in court. Consistent with research, SRLs told us they felt uncomfortable in court, were nervous about answering questions from the judge, and simply did not know what to do (Angela, David and Jess), particularly early in their litigation (Hugh and Robyn; see McKeever et al., 2018; Toy-Cronin, 2015; Trinder et al., 2014). Most SRLs talked about their lack of confidence presenting their case: "Because no one was listening to me and because I felt like I was walking into a parallel universe … it was just too weird" (Tim). Lydia used to "throw up" before each court event. On the first return date of her matter, Robyn "didn't really know what I was and wasn't allowed to say or mention to the judge. His [her ex-partner's] barrister did pretty much all the talking".

Judicial constraints

Many SRLs interviewed expected to come to court, tell their story, explain what they wanted and have a judge listen to them. Samuel was impressed by the judge who "gave both of us an opportunity to speak … he was notably interested in what we both had to say. He asked questions. Didn't raise his voice". A number of SRLs, however, talked about judges who did not let them speak and would not listen to them (Anita, Hayley, John, Justin and Lachlan). For example:

> His barrister gets to say what she wants to say and then I'll raise—I'll get a chance at saying something and the magistrate [judge] talks all over me or the barrister steps in and I don't actually get to say anything. (Anita)

Several judges acknowledged that it was important for SRLs to "believe they've been heard" (J8, J14 and J16). However, judges also told us that they constrained SRLs if they were being rude, making inappropriate comments, or compromising their own position:

> Every now and then you get a good self-represented but most of the time most of your energy is spent trying to stop them, save them from themselves and stop being rude and stop talking over the top of me and listen to what I'm saying, and, no, this isn't a final order, this is an interim order … no, you can't do that, you can't issue subpoenas to her grandparents to find out their bank account numbers. (J3)

We observed judges stop SRLs speaking about failed negotiations (A-A-33; parties cannot enter evidence of settlement negotiations), stop SRLs from making submissions that relied on facts not on evidence (see ICS-E), and more generally stop SRLs from giving evidence from the bar table (C-B-8 and A-C-1). We also observed judges scold SRLs for interrupting and remind SRLs to wait their turn to speak.

Several SRLs raised their hand to speak but were mostly ignored until it was "their turn". Judicial officers also varied markedly in the extent to which they allowed SRLs to speak. As L32 said:

> It depends on the judge. So, I've seen … the full spectrum of judges being frustrated with self-represented litigants and giving them very little air time and very little time to speak. And then I've seen the other end of that they actually probably favour the self-represented litigants and allow them a little bit too much leeway, at the expense of those that are represented.

Judicial treatment of self-represented litigants

SRLs identified judicial demeanour and how the judge treated them in court as important. Those SRLs who were positive about their experiences described judges as "very understanding"; "very child-focused"; "very calm"; "kind"; "patient"; "no-nonsense attitude"; "as fair as he could be"; and "capable, considerate and respectful" (David, Fiona and Kate). Almost all SRLs, however, had negative experiences where judges were rude and condescending or berated, belittled and mocked them as they tried to present their case (Emma, Kate, Maxine and Samuel; see further below).

A common theme among SRLs was their perception that judges treated them badly because they were self-represented. Alison described this as "the retaliation of judges against self-represented litigants, they hate you. They absolutely hate you". Several SRLs said being self-represented meant that they were not believed, trusted or taken seriously (Hayden, Justin, Kate, Maxine and Samuel). According to Justin, "Because I didn't have legal representation, the judge dismissed me, I had no credibility. The judge was chopping my balls left, right, centre".

Our observations confirmed variation between judges in terms of demeanour and treatment of SRLs in the courtroom. Most judges were calm and courteous to all parties and appeared in firm control of the proceedings. While some adopted a business-like persona, others were more pleasant or approachable, smiling at and welcoming SRLs, and using more informal language. A few judges demonstrated empathy for more distressed SRLs. For instance, in one matter (A-A-15), the judge told the two SRLs: "Please actively listen. I understand you're stressed and nervous and you might not remember what you've been told". A number of judges demonstrated frustration, both verbally (e.g. sarcasm) and through non-verbal cues such as frowning at SRLs' interventions, sitting with head in hands while listening to evidence, shaking their head, watching the clock and sighing audibly. Two judges frequently berated SRLs (and lawyers), raised their voices and, on occasion, shouted at parties.

The range of judicial approaches to the conduct of proceedings was also noted by several professionals (L6, L11, L18, L21 and L26). According to L6, this variation

> makes it quite challenging for self-represented litigants, it also makes it challenging for the lawyers that might give those self-represented litigants some advice as they progress … It's very important that you find out who it is before because then you've got a better idea about how matters are likely to be dealt with.

According to J6, judges needed to learn how to manage SRLs appropriately:

> And some people who become judges … feel less comfortable in dealing with a litigant in person. But we can't have a system that just seeks to make the judge comfortable. They should learn to become more comfortable because the system is going to have more and more litigants in person and we have to know how to manage them better.

The impact of family violence

For several SRLs interviewed these challenges and difficulties were compounded by the impact of family violence (Carol, Fiona, Jenny, Kate, Katherine, Lydia, Marie, Maxine and Robyn).

Effects of trauma on presenting their case

SRLs described how the trauma caused by their experiences of family violence negatively impacted their performances in court. For example, Maxine, who suffered from PTSD as a result of the family violence she had experienced, described herself as "emotionally distraught" in court:

> I was reacting very emotional, like I'd be crying … I was just too emotional to think, and the judge would say something horrible and I'd start crying. And that gives

> a bad impression. It just doesn't help your case at all and it's also emotionally destroying as well.

The physical proximity of the alleged perpetrator in the courtroom exacerbated this traumatic impact, especially if both parties were SRLs and sitting at the bar table together (Fiona). Lydia found the close physical proximity "really, really hard". Although she knew "he's not going to jump up and hit me—yes, the front part of my brain knows that … the back part of my brain is like run, run!" Jenny pointed out that "it doesn't matter what's said. It doesn't matter how it's said":

> The fear of just being in the same room as somebody who wants to kill you overshadows everything … No one should have to go through this … and I know so many women especially have not been able to do it.

In their recent report investigating how the Family Court protects parents and children in private family law child cases involving domestic abuse in the United Kingdom, Hunter and colleagues (2020, p. 108) found that it was important for all participants in the process to be "trauma aware" . In the current study, this was clearly illustrated by one SRL, Robyn, who wanted to tell policymakers of the following:

> … the abuse that I've suffered, the extent of what I've been through. The leaving a really abusive marriage. Taking my children, leaving, trying to financially support myself and my kids on my own. The abuse, the history of that, and I know now that it's just going to, they say it's my allegations. It doesn't mean anything when it comes to these processes. There doesn't seem to have been any … consideration for the vulnerable state that I've been left in because of the relationship that I have left.

Violence and abuse in the courtroom

Several SRLs said they were subjected to violence and abuse by their former partners in the courtroom. SRLs recounted episodes where their former partner had shouted at them, glared at them across the bar table or expressed anger more generally. Angela described her former partner staring and shaking his finger at her during court. Katherine's former partner banged on the bar table, shouted and looked past the ICL sitting between them to stare at her. Coy and colleagues (2012) have described being stared at during court proceedings (experienced by Angela, Jenny and Katherine) as a "form of invasive surveillance that often amounted to harassment" (p. 42). One FASS women's support worker noted:

> They sit and they give each other looks and he knows how to intimidate her from there. He can still do that … That would still be impacting on them [victims], bringing up trauma. (O3)

As the ultimate authority in the courtroom, judicial officers can greatly influence the safety and wellbeing of victims and others. Jenny was pleased with the way one judge dealt with her former partner's abusive behaviour (both parties were self-represented). She said the judge "was very good at pulling him up", cutting him off when he was being abusive and telling him, "'I will not allow you to commit domestic violence in front of me'" or, "'I can see what you're doing, don't look at her'". Jenny compared this approach to another judge who would let her former partner rant without addressing "the fact that he's screaming, shouting, staring at me". Fiona also recounted an experience with a judge who allowed her former partner to shout during proceedings and gave him opportunities to be "very intimidating, getting angry, even with the judge, yelling, everything". Fiona did not understand why the courts put up with such abusive behaviour and found it "very hard to cope with". She believed the court would treat her differently if she behaved that way. Joanne's former partner also "blustered" angrily during the proceedings without consequences and she believed "angry women" would be treated differently.

We observed a number of abusive behaviours, including outbursts from an alleged perpetrator shouting/blaming the alleged victim (A-B-3, C-A-2 and C-A-3) and direct abuse of an alleged victim in the courtroom (C-A-2). We observed a very hostile SRL father allowed to "rant" at the court and his former partner without censure (C-B-9). The mother was represented and her lawyer sat between the parties at the bar table. At different points in the proceedings, the SRL yelled at his former partner: "You lying bitch"; "I'll fucken file for bankruptcy today. You'll see what real debts are"; "No fucken justice in this country". On several occasions when the judge was speaking, the SRL looked at his former partner and mouthed the words "fucken bitch". Before the matter ended, the father stormed out shouting and swearing, followed by security. The judge's associate later told us this

judge "let such men go" to demonstrate their personality. This notion of "seeing" the perpetrator is sometimes raised as an argument for removing the prohibitions on direct cross-examination by an SRL (see Chapter 10). However, it fails to recognise the devastating impact for victims who sit through proceedings where such abusive behaviour goes unchallenged (Carson et al., 2018).

Safety measures

Subject to availability at individual registries, courtroom safety measures offered by the family courts for victims of family violence might include separate courtrooms, audio visual link (AVL), screens, security presence, or staggered entry to and exit from the courtroom by the parties.

Most SRLs interviewed did not report having access to safety measures in the courtroom. Of those that did, three had a security guard in the courtroom during some of their court events (Danielle, Fiona and Jenny), and only one SRL, Marie, was offered special arrangements for her safe participation in the court event. She reported that "they did a video link" during her first family law trial when she and her former partner were in different courtrooms. Carol asked the court whether she could be in a separate courtroom because she did not want to be near her former partner: "He gets some sort of sick pleasure just being in my presence, he's a big huge, six–foot-two guy". Unfortunately, the court did not have appropriate facilities.

However, most SRLs were not aware that such arrangements could be made and so they did not ask. Both Katherine and Hayley felt that because they did not conform to the judge's idea of a victim of family violence, they were not offered safety options. For example, Hayley said:

> I think had I been emotional, had I been upset, had I been trembling, then I probably would have been offered more of those things you're talking about [AVL, screens] …

We did observe a variety of safety measures undertaken during court events in matters that involved allegations of family violence. These measures included:

- the court permitting an alleged victim to remain in the safe room while their lawyer (including a duty lawyer) mentioned the case in the court room (e.g. C-A-4), also noted as common judicial practice by several legal professionals (L1, L16 and L26)
- the presence of security officers in the courtroom or being called to attend while a matter was in progress (C-A and A-B). For example, at C-B-23, the judge's associate called for security to attend the courtroom during proceedings as the SRL respondent father became agitated, shouted aggressively at the judge and eventually stormed out
- an SRL being invited to remain in the courtroom until the other party had exited (C-B)
- the use of AVL between courtrooms in a defended hearing (C-A-20; see further discussion in Chapter 10).[55]

However, consistent with research (Coy et al., 2012; Hunter et al., 2020), we also observed matters where the court paid little regard to safety of victims of violence in the courtroom. For example, we observed a defended hearing which had a lengthy history spanning nearly 17 years (A-A-2). Both parties were self-represented and an ICL was involved; the SRL father was supported in court by his parents and the SRL mother was alone. The judge reserved the decision after completion of evidence and submissions, which visibly angered the father. After court was adjourned, the judge left the bench and the parties were left to pack up. The mother waited in the courtroom until the father and his parents had left. Review of the court file revealed that the SRL mother had detailed the "verbally aggressive and sometimes intimidating behaviours" of the SRL father and his parents during previous court events and in the court precinct. However, neither the judge, associate nor ICL considered how the parties would leave the court or precinct. We observed:

> [The mother] was clearly frightened, and it looked like [the father] was waiting outside. There was no reason for them to hang around. [The mother] told [the research team member] that this was common, that they would wait outside for her.

55 We did observe parties in separate courtrooms and the use of AVL in another defended matter, but that was because one of the parties was located in another jurisdiction (ICS-E).

Safeguards offered by legal and other professionals and court staff

Lawyers can provide a buffer against abusive behaviour and advocate for safety measures. For example, a victim may arrange to remain in a safe room or other location while their lawyer deals with the matter (L1, L16 and L26). L30 described a case where the applicant mother used safety measures in the court precinct but both parties had to sit in close proximity in the courtroom. After the respondent father displayed angry behaviour, the legal representatives agreed to not have both litigants in the courtroom at the same time. In the absence of a lawyer, however, it falls to other court actors, particularly the presiding judicial officer, to provide safeguards for victims.

FASS and other support services can also play a role in enhancing safety in the courtroom (see Chapter 7). O6, a court support worker, described positioning themselves in court to block sightlines between parties.

Judicial responses to victims of family violence

Research shows that judicial responses to victims of family violence in legal proceedings varies (Birchall & Choudary, 2018; Hunter et al., 2020). Studies have found that victims have felt "belittled, berated and demeaned" by judicial officers (Hunter et al., 2020, p. 113; see also Birchall & Choudary, 2018) and/or that their allegations of violence are minimized or not believed (Barnett, 2020). A small number of SRLs interviewed spoke about judges who responded sensitively and effectively to family violence by stopping abusive behaviour in the courtroom (see above). Katherine said some judges she had come across were "phenomenal" and "excellent" because they had an "academic understanding of what family violence is and what it constitutes":

> I have the impression they have been very well trained on this and are able to identify beyond bruises what family violence is … When my ex-partner is looking past the ICL and trying to stare at me, they'll call that behaviour out and they'll make him face forward … When he's banging on the table and shouting, they'll call that behaviour out and they'll say to him that you need to leave the court if you're not going to behave appropriately and they will explain to him in an assertive but also respectful manner that the behaviour you're exhibiting right now is family violence.

Several SRLs however, expressed concerns that judges had sought to minimise family violence or did not demonstrate adequate understanding of the issue (Carol, Emma, Fiona, Lydia and Marie). Carol said that when family violence was raised by her lawyer in the proceedings:

> The judge, literally, he was sitting up straight and then he leaned back to the back of his chair, looked up to the ceiling, almost completed an eye roll … and he said, "Ahh family violence, it's in all the newspapers, it's every single case". And you go, oh my god, this person who obviously does not have an understanding of how destructive family violence is [is] going to determine mine and my children's safety.

Emma described being humiliated by a judge in court, an experience she found "terrifying":

> As we're coming into court, [the judge] goes, "Oh this is Miss X, oh this is the one where [she] barricades the driveway to prevent her husband from coming", and the court erupted in laughter.

Emma told us she had blocked her driveway with her car "because he [her former partner] kept ignoring the [protection order] and the police wouldn't do anything". When she complained about this judge to the Attorney-General's Department and the Chief Justice "they have said I have to appeal".

Nor did SRLs find the court particularly sympathetic to the impact of trauma on their performance, particularly their evident distress. According to Jenny:

> It doesn't matter how scared you are, it doesn't matter if you are in trauma … I was told by the judge … because I broke down in court … this is not a therapy session, this is a court of law.

Lydia told us that the judge "yelled" at her for crying: "'Stop that crying right now or … I won't hear from you again' or something like that. Or 'I'll refuse to let you speak'". For this SRL, the most stressful part of her experience in court

> was that I had been so sick because of what he did to me that I knew I wasn't doing a good job and I didn't feel like it was fair. Nobody seemed to give a shit.

While legal and other professional interviewees were generally positive about judicial officers' approach to matters involving SRLs, this was not necessarily the case in terms of judicial management of family violence matters. For example:

> Some of them, I think, are better at dealing with family violence than others. I certainly have anecdotally heard some stories about judges not being particularly sensitive to self-represented victims … I have heard some stories about judges requiring victims to answer questions from the bar table, which may well have led to some safety issues. And saying, you know, things like, if they've been upset in the courtroom … not necessarily giving them a bit of time to compose themselves or being pretty cool with them being upset when they've been in the courtroom. So, I think that's partly where I see my role, as a FASS or DVU solicitor, is trying to stop that kind of direct conversation with victims, so that I can at least be that buffer between everybody. (L12)

Conclusion

This chapter finds general agreement between SRLs, professionals and judicial officers that SRLs' expectations of court events and court process do not align with the reality. SRLs do not understand how the process works, what can be realistically achieved or how long it will take. They expect to tell their story to the court and a decision to be made promptly. SRLs who are victims of family violence also expect to have the space to talk about that violence and perhaps its ongoing nature. This perceived lack of their own participation may influence SRLs' perceptions of the quality of the outcomes (see Chapter 12).

Misalignment of expectations and lack of legal knowledge, advocacy skills and legal advice (see Chapter 5), sometimes compounded by personal and circumstantial disadvantages, mean that SRLs vary markedly in their preparedness for and performance in court events. SRLs often do not know how to present their case in court; they need guidance but judicial officers are limited in the assistance they can provide. The boundaries between assisting SRLs and being perceived as biased, and between providing information and legal advice, are difficult to navigate. Perhaps to avoid some of these difficulties, we find that frequently, many judges encourage SRLs to get legal advice—which SRLs might perceive as a sign that they are unwelcome in the courtroom.

Our research reveals that family violence and resulting trauma impact negatively on SRLs' capacity to present their case in the courtroom. Again, judicial attempts to acknowledge or deal with this violence vary. Although there is a range of safety measures that can be invoked, it is a matter of concern that some SRLs are subjected to violence and abuse in the courtroom—violence and abuse that is not often recognised or acted upon by the court. It is perhaps not surprising that some SRLs feel that the courts minimise family violence or do not understand the dynamics of violence.

In the next chapter, we stay with SRLs in the courtroom and focus on one problematic aspect of advocacy in cases involving family violence: personal cross-examination undertaken by an SRL.

CHAPTER 10

Personal cross-examination: An advocacy case study

> 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. (Marie)

> But I mean, again, we don't know how the [Family Violence and Cross-Examination of Parties] Scheme will go. And I absolutely applaud what it wants to do. I think what it intends to do is fantastic. I just don't know how it's going to work yet, but we'll see. (L11)

The literature extensively documents the difficulties for victims of family violence who are cross-examined personally by the alleged perpetrator of that violence (or vice versa) in family law proceedings (e.g. Carson et al., 2018; Coy et al., 2012; FLC, 2016; Kaye et al., 2017; Loughman, 2016). Such personal cross-examination is stressful and traumatising for victims and unlikely to produce the high-quality evidence required by the court (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017). The federal government recently legislated to address this problem, automatically prohibiting personal cross-examination in certain cases and enabling the court, in its discretion, to prohibit such cross-examination in other family violence cases.[56] This is known as the Family Violence and Cross-Examination of Parties Scheme (the Scheme) and it commenced operation on 10 September 2019. While personal cross-examination is a particular issue in family violence cases, it sits within a context in which cross-examination is a challenging task for SRLs to undertake even in cases that do not involve violence (see McKeever et al., 2018; Tkacukova, 2016; Trinder et al., 2014), and even when cross-examination is conducted by a lawyer many victims find it to be a traumatic experience (Ellison, 2001; Kaye et al., 2017; see also Carol's story in Chapter 12).

This chapter commences with a discussion about the impact of personal cross-examination on victims of family violence drawing from the experiences of those SRLs we interviewed in the general interview sample. These SRLs were cross-examined or conducted cross-examination prior to the introduction of the Scheme. This discussion is important because it confirms the importance of the new Scheme, and reveals potential concerns for family violence cases that fall outside of its parameters (Kaye et al., 2017). The chapter then discusses the Scheme itself. While our research project was not designed to evaluate this Scheme, the fieldwork was in progress when the Scheme commenced so the project was uniquely placed to provide some insight into the early operation of the Scheme. The chapter details some early administrative issues, the positive aspects of the Scheme and concerns about its potential misuse. Section 102NC of the *Family Law Act 1975* (Cth) provides for a statutory review of the Scheme two years after it commences and our findings may inform that review.

Personal cross-examination before the Family Violence and Cross-Examination of Parties Scheme

The experience

Ten SRLs in the general interview sample had personally cross-examined their former partner and four were personally cross-examined by their former partner. They confirmed that this process is traumatic and stressful for victims. For Jenny it was "very traumatic"; Kate said she could not "even explain how traumatic" it was to cross-examine her former partner. Marie was traumatised by being cross-examined by her former partner and said that she "couldn't answer him. I was just so afraid of making him angry". Power imbalances within a former relationship can negatively impact cross-examination. Emma described this dynamic when cross-examining her former partner:

> I had a thousand questions … I could have asked him the exact things I needed. I could have just got every bit of information. But I couldn't do anything. I just looked at him and just thought … I thought that I had no right to ask him anything, I thought that I was wrong, that I was unfair and that I was being unreasonable … I thought I'm being, I need to be quiet, I need to sit down. And judges don't understand that the play between the relationship and the courtroom is very strong … I tried a couple of things, [the judge] asked them on my behalf but it was a just a fumbling mess.

56 *Family Law Act 1975* (Cth) pt XI, div 4 inserted by the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth).

We discuss "meeting the threshold" of the mandatory application of the Scheme below and note here that while Kate would have satisfied the mandatory application, it is unclear from our interviews whether Marie and Emma would have. While both had protection orders at some stage it is not clear whether they were interim orders or had expired when the family law hearing was conducted (in which case they may have been subject to a discretionary order).

Several professionals also reflected on the trauma caused to victims by the prospect of personal cross-examination, and its actuality (L2, L17, L20 and L27). L20 asked, "How can you cross-examine that perpetrator of the violence against you effectively in a family law case, when you can barely even talk to them?" L27 witnessed one victim being "physically ill in the witness box while she was being cross examined", noting that it is "incredibly re-traumatising". One lawyer recounted a trial where

> the woman who went through a terrible domestic violence relationship, who was courageous enough to inform police that she'd been raped, who was believed at trial, defended trial, and saw her ex-partner jailed, and now here she is sitting in the family law court, confronted with the possibility that he might be allowed to cross-examine her. (L17)

L2 also noted that personal cross-examination can be an avenue for legal systems abuse:

> They [SRL perpetrator] know they can ask them questions, they know they can challenge the victim and put them in a very difficult position and they just want to do that. They're not going to say "I'm going to perpetuate family violence" but they're just, you know that they're just doing this by putting more controls on the victim.

Not all victims were distressed by the experience; Joanne explained that being personally cross-examined by her former partner was not as traumatic as it could have been because of his ineptitude: "He's not very bright … nothing actually stuck and nothing that was really about the matter at hand …" Karen was pleased to have a voice in the proceedings at last:

> It is the first time I've had a voice in court even if his barrister kept jumping in and saying, "Oh, you can't ask that". Or even the judge saying, "That's not relevant to this". Putting him in a situation where he had to answer on the spot, an actual answer, instead of the abusive stonewalling that he uses his lawyer to do.

Relevant skills

All ten SRLs in the general interview sample who undertook cross-examination said that they found it difficult to formulate questions, to comply with the rules and format of cross-examination, and/or to manage their emotions when cross-examining. Bradley commented:

> I would have loved to have a lawyer to help me cross-examine because I missed out so many questions that I should have asked, and I didn't even know how to question.

In our intensive case study, we observed that most SRLs lacked the knowledge and skill to conduct cross-examination effectively, a finding echoed by judges, professionals and SRLs themselves. Judges and legal professionals acknowledged that cross-examination is a difficult legal task. For example, J10 commented, "It's a skill after all. It takes practice …"; J11 described is an an "art". While there is some guidance on how to conduct cross-examination in family law matters,[57] there is no obvious resource. SRLs accessed information from sources such as YouTube videos, television shows, and watching lawyers in court (e.g. David, Karen, Katherine, Samuel and the SRL respondent mother in ICS-D).

Several professionals spoke about SRLs' lack of knowledge, noting that many SRLs do not know how to use affidavit evidence in cross-examination and fail to appreciate that if they do not cross-examine a witness on something in that witness's affidavit, it is open to the court to infer that the statement was true (L6, L7 and L30). L30 said it was rare to have an SRL "with an affidavit in front of them and it's been underlined and highlighted. They just stand, they're lucky to have pen and paper".

In addition, many SRLs appeared to believe that their own questions or comments made after the witness answered the question amounted to evidence. J17 tried to advise SRLs

57 Some LACs provide useful resources: see for example http://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Going-to-the-family-law-courts/The-trial-or-hearing; https://www.legalaid.vic.gov.au/find-legal-answers/how-to-run-family-law-case

about this misconception at the start of cross-examination:

> [In] my litigant-in-person speech at the beginning of a final hearing … [I tell] them that they're not giving the evidence, that the evidence is coming from the witness in the witness box, not from the person asking the questions. So, I say, "So if you get an answer from the witness in the witness box and you don't like that answer, or you think that's answer's wrong, there's no use you looking at me and saying, 'That's not right, your Honour'. Because remember, you're not giving the evidence; they're giving the evidence".

Professionals reported that SRLs' questions tended to focus on irrelevant issues; for example, asking about the separation, rather than "testing the evidence in regards to parental responsibility and time" (O11). In this context, professionals noted that SRLs tended to make comments which were often insulting, rather than ask questions: "It's just about throwing all this mud about what's happened in the past from that parent" (L30; similarly O3).

Judicial adjustments and interventions

Judicial officers can draw on a range of measures to intervene in and/or assist in personal cross-examination. The *Family Law Act 1975* (Cth) s 102 provides 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". In addition the *Evidence Act 1995* (Cth) s 41 provides the court with powers to "disallow" "improper" questions in cross-examination. Judges also have the power under the *Family Law Act 1975* (Cth) s 102C to allow a witness to provide evidence via AVL. There are limits to the extent a judge can intervene in the conduct of cross-examination. Interventions challenge the traditional, passive role of a judge in adversarial legal proceedings (Moorhead, 2007) as well as the goal of a fair trial that enables a party to test the evidence against them and the other party to give their best evidence.

We found that many judges implemented practical strategies to assist SRLs to conduct cross-examination, ameliorate the negative experience of cross-examination by an SRL and assist the court in eliciting effective evidence in cases of alleged abuse. This included changing the order of cross-examination, judicial intervention in questioning and the use of alternative measures for giving evidence. These strategies remain available to judicial officers in cases that fall outside the Scheme's provisions. Given the tensions of a more active judicial role, we found marked variations in whether these strategies were employed between the courtrooms we visited.

Changing the order of cross-examination

Consistent with previous research (Kaye, 2019a), we found that changing the order of cross examination (e.g. allowing the ICL or the represented party to go first even if they were the respondent) was a common judicial strategy. This occurred in Katherine's case, where she felt fortunate that the ICL conducted the bulk of the cross-examination of her alleged abuser. Changing the order of cross-examination in this way serves two functions: 1) it can provide the SRL with an example of "how it is done"; and 2) if it is the ICL who conducts cross-examination first, they may cover most of the areas that the SRL wanted to address (J1 and J5). J17, however, explained that they will only change the order if the ICL agrees—this is important because research has found that some ICLs have concerns about cross-examining first, particularly in cases involving allegations of family violence (Kaye, 2019a).

J8 commented that in cases involving family violence allegations, changing the order of cross-examination may facilitate an earlier settlement:

> Now, for example, in a typical family violence case where the assertion is that the father was guilty of coercively controlling violence, it really doesn't help me for the mother, who's the applicant, to go first … where the issue is a forensic issue: "Was the family violence as asserted?" So you change the order. So, you put dad in the witness box first. And just see how it goes. Now, I do this in a very facilitative way. If dad's representatives object to it, then I won't do it.

Judicial intervention in cross-examination

We observed judicial intervention during SRLs' cross-examination, and it was a common practice among judges

interviewed. Many judges framed their intervention as useful to SRLs—for example, guiding SRLs to key issues they may have missed (J16; similarly J4).

Several judicial and professional interviewees talked about interventions to rephrase questions and reduce SRLs' use of comments and statements:

> And if it's relevant, then I'll try and rephrase it and give them some examples of how to put that properly. And I will also point to them things like they should refer to particular parts of an affidavit if they wanted to question about that or, if they're questioning a report writer, take them to the particular paragraph of the report and ask them, "Well if x, y, z, does that change your opinion?" (J7)

Judicial interviewees were aware that their intervention could be problematic if it suggests that "the judge is aligned with the self-represented person" (J9). Nonetheless: "You need to get the evidence out and it needs to be in a way that's not destructive for the witness and nor for the person asking questions" (J5).

Judicial intervention during an SRL's cross-examination can be an effective protective strategy and judges almost uniformly stated that they intervened in abusive cross-examination. For example, J16 said, "Obviously I pull up any inappropriate questions, derogatory remarks, those sorts of things". This was Fiona's experience: when her former partner became abusive during cross-examination "the judge was actually really good at pretty much squishing that straight away". Katherine commented that although the judge stopped her former partner's abusive questioning, she would have liked the judge to also call out the conduct as family violence. J13 said:

> I've actually stopped a whole cross-examination where I just said, "You've been warned three times, I'm not going to allow you to ask any more questions" because he was just bullying her in front of me, which I thought showed a remarkable lack of insight and supported what the experts said, which was that … his narcissistic traits were just overwhelming any rational approach that he should have to her or the children.

Legal professionals spoke about judges calling a halt to or adjourning the court temporarily during cross-examination to give victims some relief:

> The judges, by and large, are very good at controlling that. So if … the litigant in person is becoming harassing or bullying or abusive, they get pulled up, either through objections from counsel at the bar table or the judge just saying to them, "Can you just stop, and just reflect for a second on how this looks to me as the person trying to work out the best interests of the child, if you are just going to defame and abuse this person? … If you are unable to control your emotions in front of me in a courtroom, what are you going to do in front of the child when you've got unsupervised time?" (L30; similarly L18, L19)

Some judges talked about asking questions of the witness on behalf of the SRL:

> If they're difficult people or there's tension or certainly when there's been family violence … I'll say, "You tell me what you want to ask, and I'll ask the witness" … So, I do those kinds of things to do a bit of a circuit-breaker and also just so that it's clear, what's actually being asked. (J5)

However, one legal professional noted that victims may find this approach more traumatic because it may mean that the victim hears the question twice (L15).

Despite judges almost uniformly stating that they intervened in abusive cross-examination, several professionals reported that judges did not always intervene when they should, and some allowed "way out-of-line cross-examination" (L21). L5 cited a case where an SRL father cross-examined the mother for "half of the trial, it was unrelenting … on 20 different topics … It was a clear abuse of process … and the judge just let it happen". Carson and colleagues' (2018) large-scale study of direct cross-examination in family law matters found a high level of judicial intervention in around one third of cases where an alleged or substantiated perpetrator was undertaking direct cross-examination and low to moderate judicial intervention in the remainder of cases (pp. 46–49).

Alternative arrangements for giving evidence

Previous research has suggested that safeguards like AVL and/or screens are rarely used in family law courts (Carson et al., 2018; Kaspiew, Carson, Coulson, et al., 2015; Kaye,

2019b). Our findings echo this research. We observed only two hearings in which an AVL was used and in only one matter was this for protective reasons (the other case used AVL because one party lived in another jurisdiction). We did not observe any applications for alternative arrangements.

Jenny commented that victims "shouldn't be in the same room" as their abuser, but when interviewed, she "didn't know that [option] existed. That's news to me". Indeed, most SRLs we interviewed were unaware such arrangements were possible. Carol was the exception and had asked to be placed in a separate courtroom: "I don't want to be near him, because he gets some sort of sick pleasure just being in my presence". Unfortunately, the court did not have the facilities to accommodate her request. Marie was the only SRL interviewed who was offered special arrangements: AVL when she and her former partner were placed in different courtrooms.

Some professionals reported that they seldom observed such arrangements being used. For example, L6 said they had never seen AVL utilised for protective purposes, and L15 stated that there was "no uptake for that [using the measures]". One legal professional (L18) regretted not seeking alternative arrangements in a case where the father had been imprisoned as a result of violence he perpetrated against the mother. In this case the judge had directed the lawyer who was acting as the ICL to conduct the cross-examination on behalf of the father:

> I reflect back on that experience of like, you know, had I sort of been properly aware of how upset it [cross-examination by the alleged perpetrator] would have made her, then, you know, myself and her barrister, quite frankly, we could have made arrangements or tried to make arrangements to have her in a different room and do it by video and those sorts of things … It evolved and we kind of gained this understanding that she was completely petrified and, had I known that at the beginning, I would have done something quite different in the lead-up to that trial. (L18)

Four judges (J1, J3, J13 and J15) said they placed alleged perpetrators in separate courtrooms connected by AVL, so that the alleged victim remained in the main courtroom, with all its supports and processes. J3 noted that when one violent SRL was isolated in this manner, they still had to mute her audio when she started shouting down the video link.

L27, a Legal Aid lawyer, recounted a property case where they represented a woman who had been attacked by her husband; he was subsequently charged with attempted murder. While legal aid is not normally available for property matters, an exception was made in this case due to the case complexity and the vulnerability of the woman. Her former partner was self-represented and she faced the prospect of being personally cross-examined by him:

> Our judge was fabulous and was very in tune to the needs of family violence victims. So, [the judge] put in place really strict directions about how the trial would run … We had plans for there to be safety screens in court … [The woman indicated she wanted to be in the courtroom.] A lot of family violence victims will be sent to another courtroom to appear by AVL … some of them would prefer to actually be in court and have the perpetrator excluded from the room so that they feel some ownership. So, this was a client that wanted that ownership. So, we discussed ways … of how we could bring her ex-partner into the room to participate via AVL and for her not to be able to hear his voice or see his face.

However, several judges (J5, J7, J8, J10 and J12) noted that AVL or separate rooms are not necessarily available in every court, particularly in regional and circuit courts.

The Family Violence and Cross-Examination of Parties Scheme

The Scheme aims to balance the tensions between the harmful nature of personal cross-examination by SRLs in family law matters involving family violence and the legal requirements of a fair hearing. Section 102NA of the *Family Law Act 1975* (Cth) prohibits personal cross-examination by an alleged victim or an alleged perpetrator in certain circumstances, and for those family violence cases that fall outside these mandatory and discretionary circumstances, s 102NB of the Act seeks to ensure protective measures are in place. The Scheme applies to any hearing (interim or final) listed after 10 September 2019.

Our fieldwork was in progress when the Scheme commenced, and we observed several matters which raised the Scheme. A number of the professionals and judges also spoke about the operation of the Scheme. Some professionals (L19, L27, L32 and O11) and judges (J7, J12, J15 and J17) were positive about the Scheme's introduction while acknowledging that it was in its early stages.

> So, we're obviously yet to see exactly how that's going to have an effect because we're still in the very early stages but I think that's very exciting and the judges and litigants have taken that up with enthusiasm. (L27)

The triggering circumstances leading to mandatory application of the Scheme are conviction or charge with a violence offence to the other party, final protection orders made under state or territory legislation or an injunction for "personal protection of either party" from the other party.[58] The discretionary application of s 102NA is relevant if there are allegations of family violence but no legislated triggering circumstances. The court may make a discretionary ban on cross-examination on its own initiative, or on application by one of the parties or the ICL.[59] If personal cross-examination is prohibited on either a mandatory or discretionary basis, the cross-examination must be conducted by a legal practitioner on behalf of the SRL.[60] The SRL can instruct a private legal practitioner for this purpose or apply to the relevant state or territory LAC, which administers the Scheme, for legal representation. Access to the Scheme is not means- or merit-tested but the SRL may be required to contribute to costs. If the SRL who is subject to a prohibition does not secure legal representation as required under s 102NA, they will not be able to cross-examine the other party.

In the three jurisdictions we visited, LACs appear to have adopted similar approaches. Once the application is received by the relevant LAC, the LAC appoints a legal representative from a panel of solicitors eligible to carry out this work.

If cross-examination is not prohibited under s 102NA, but a matter nonetheless involves allegations of family violence, "the court must ensure that during the cross-examination there are appropriate protections for the party who is the alleged victim of the family violence" (s 102NB). The court may also "consider it appropriate to give a direction" that the cross-examination be conducted by AVL (s 102NB). L6 was hopeful that practice in this area will change:

> … all protections that have already been there, they're just under-utilised. So, I think that by making the court actually consider it will, I would think, well at least I hope, that there'll be more active engagement with the parties about which steps might be appropriate.

Meeting the threshold

L26 believed that the mandatory threshold for the Scheme "is quite high" and many cases involving allegations of family violence will not meet the criteria (see also Kaye et al., 2017). L19, on the other hand, thought that many matters will be eligible:

> … the circumstances that are set out in 102NA, they're really common in legal matters, so having a protection order, breaches, all of those things. You struggle to find one, especially with the clients we deal with, where those circumstances don't apply.

J3 considered that more orders would be made on a discretionary than mandatory basis because

> there's so many people that will never, for a number of reasons, make it to a police station or to the DV 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 domestic violence order. So, I think the government, if they understood that, could expect a lot [of discretionary orders] to be made.

Section 102NA "is silent as to the considerations that govern" the exercise of discretion (*Owen & Owen* [2020] FamCA 90, para 21). J11 believed that a "uniform interpretation" of the discretion "is a long way from now, it's all fairly embryonic". J10 had not yet been asked to make a discretionary order but

58 *Family Law Act 1975* (Cth) s 102NA(1)(c)(i)–(iii).

59 *Family Law Act 1975* (Cth) s 102NA(1)(c)(iv).

60 *Family Law Act 1975* (Cth) s 102NA(2).

thought they "would err on the side of caution" and make the order "if there's any suggestion that it would be appropriate". A number of professionals believed that judges were reading this provision "widely" (L27; similarly L19). Judges discussed the factors that would influence their exercise of discretion, including if there had been protection orders in the past but they have expired (J12), and where there is a "level of disparity in the relationship" (J16). J7 considered that judges should weigh the costs of the Scheme with the benefits when considering making discretionary orders, noting that judges had to be "quite careful about not making too many orders".

J13 provided an example where multiple factors, combined, necessitated the making of the order:

> 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] … not one but 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]. (J13)

We observed 10 matters in which the application of s 102NA was raised: in four cases the provision applied on a mandatory basis (A-C-14, B-A-1, B-C-26, C-B-19), in two cases the court made a discretionary order (A-B-17, C-B-23), in one case the court was yet to make a determination (C-A-37), in one case it was unclear whether the prohibition made was mandatory or discretionary (C-A-20), and in the remaining two cases the court found the provision did not apply (A-B-13, C-A-43). In deciding not to exercise discretion in C-A-43, the judge discussed the party's choice to be an SRL rather than the nature of the allegations of violence. This matter was a directions hearing where, in response to the judge's query about the issue, the ICL said that s 102NA "was not enlivened" on the affidavits. Neither party was asked for their view and the judge noted: "If it arises in the course of trial, it might not go ahead". Shortly after, the following exchange took place between the self-represented mother and the judge.

> [SRL mother:] Can I clarify one more thing? Do I have to cross-examine him? There are allegations of abuse. My understanding is that he needs to be represented because of that abuse.
>
> [Judge:] There is no AVO. No criminal charge, it's 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.

The court file revealed that the mother's documentation referred to a wide range of allegations. For example, her Notice of Risk alleged

> During May–Aug of 2015 as I tried to leave my marriage, my then husband … set traps each day and night to monitor what I was doing. He made fun of me and my family in front of the children and also began to include our eldest child in the mockery. He also controlled all of the money and as I grew more distant, the control got tighter. He asked for sex in return for money that was given to me for our family needs. He sexually assaulted me in August of 2015.

This case raises issues of consistency between judges as to which factors are considered and weighed when making a discretionary prohibition. It also raises the issue of accountability. It is difficult for an SRL to mount legal argument to challenge judicial discretion, particularly, as was the case here, by phone from an overseas jurisdiction.

Model for legal representation

According to some legal professionals and judges, the LACs in the three jurisdictions where we conducted fieldwork have administered a full representation model under the Scheme. Lawyers are funded to undertake full carriage of the matter—that is, funding is not limited to the conduct of cross-examination. One Legal Aid lawyer described how this model is intended to operate:

> They'll [SRL] be allocated a solicitor three months prior to the final hearing. So, essentially, if there are trial affidavits that need to be drafted or subpoenas that need to be issued, the expectation is they'll essentially pick up the matter and run it from start to finish. So, that will include, you know, essentially being at the hearing, instructing counsel at the hearing, conducting the full

> hearing and all of the preparation that's associated with it … There was a lot of discussion about, whether it should be a mouthpiece model where essentially the solicitor would be brought in just for the purposes of conducting the cross-examination, but essentially there were some concerns about how that model would work, so instead they went with the full representation model. (L6)

One lawyer in private practice thought the demands of a full representation model might be a disincentive for private practitioners to participate (L10).

Several lawyers and judges interviewed noted confusion in the early phase of implementation about whether legal representation under the Scheme was for full representation or whether it was limited to cross-examination (J13, J15, L21 and L30). For example, we observed a hearing in which cross-examination was prohibited under s 102NA (C-A-20). Both the mother and the ICL were represented by counsel; the applicant father had been an SRL and had been provided with a barrister under the Scheme. The hearing commenced with some confusion about the nature and extent of this barrister's retainer. After discussion with the parties and the ICL, the judge decided to change the order of the matter so that the mother respondent would first present her case. This meant the mother being cross-examined on the first day of the trial, instead of on day four as anticipated by the father's counsel under the Scheme. Extensive discussions followed between judge and counsel as to whether the barrister would continue to represent the father once the cross-examination of the mother was finished. The barrister believed he had a "limited retainer" to represent the father up to and including cross-examination of the mother and not for the entirety of the trial. Although the barrister continued to represent the father, the issue was not resolved during our observations, largely because the cross-examination of the mother took several days.

Though a full-representation model is obviously advantageous to SRLs and the court, some participants noted limitations. L30 and O11 reflected that, even if a lawyer is appointed for the last three months before the case reaches hearing, they will still lack thorough knowledge of the case and its background. SRLs may not always be able to select their own lawyer. An SRL interviewed in ICS-B was allocated solicitors under the Scheme who worked from a metropolitan centre hundreds of kilometres from the listed court, preventing him meeting his lawyers in person prior to the hearing.

Emerging issues

Some emerging issues could be characterised as teething or administrative problems that can be easily addressed, while others are more fundamental to the Scheme's viability.

Identifying matters

One teething problem we observed was the process for identifying matters where s 102NA applied. Generally, this would be done at call-overs[61] getting ready for hearing; however, during the early implementation period some matters were missed (often because the matter was underway before the Scheme commenced) or a party become self-represented close to the hearing. This resulted in cases listed for hearing being adjourned. As a result, one judge was concerned that the Scheme, a process "designed to empower victims of violence", may inadvertently disadvantage and "disempower" a victim because of the delay created when adjourning matters to put the Scheme in place (J8). Unfortunately, this cannot always be avoided.

In order to avoid adjournments and delays caused by SRLs turning up for trial in cases where the Scheme may apply, the Family Violence Committee of the FCA has sought to inform all parties and relevant legal professionals about the Scheme via letter, notifications on orders and a fact sheet circulated in courtrooms on the bar table: "So, we're trying to cover it as much as possible so that somebody couldn't rock up and say 'I didn't know' … But we'll see …" (J5; similarly J7). Nonetheless, we observed confusion and lack of awareness about the Scheme across all jurisdictions, in some cases leading to delays. One FASS lawyer said:

> Recently, there was a trial listed to start and I saw one of the parties who was self-represented on the first morning of the trial where it was fairly clear a banning order should have been made, but none of the other parties had identified this as an issue (nor raised it with the judge). I was able to assist the parties to identify this as an issue and get the banning order made and provide info about

61 A call-over is a brief court event where the court determines whether the parties are ready for trial on the scheduled date.

> ensuring the client could access Scheme funding. (L18 [email communication])

This example highlights a key concern with the Scheme: if it is not raised by the court or a legal representative then the onus may be on an SRL to be aware of the Scheme and to raise its relevance (discussed below).

Administrative issues

Our fieldwork revealed some confusion as to what steps the court had to take for the LAC to organise representation: did the court have to make an order even in a mandatory case, or just a notation on the court orders that the prohibition applied? How was this information to be conveyed to the SRL and to the respective LAC? Some judges spoke about this administrative confusion in their interviews (see J14) and we observed confusion in court about what was required in mandatory application cases (see B-C). L12 explained the difficulty for SRLs:

> Self-represented litigants are not even going to know about it [the Scheme] … So, I don't know where that sits with Legal Aid because on [the] Legal Aid website, it definitely says that a court order is required. But the courts seem to be making just a notation. I'm wondering whether they're doing that because there's been no finding of fact. So, how can they make an order that there has been family violence when there hasn't been a trial yet and there's been no finding of fact? (L12)

Funding

Funding for the Scheme is a continuing problem for the federal government. Shortly before the Scheme commenced it was clear that the number of SRLs who would qualify was underestimated, and that substantially more funding would be required to cover the shortfall.[62] J7 noted that before the Scheme it was "pretty rare" for an SRL accused of serious family violence to reach a final hearing:

> … because it becomes undefended by that stage. It's not uncommon that for some of these people, they're usually men, when they're really challenged, they'll withdraw … I think they're going to be so surprised by the numbers, simply because it's a fallacy, to look at, well what were the numbers before, what are the numbers now? Well, it didn't exist before!

Some professionals were certain that many matters would meet the threshold criteria:

> I don't know the figures but given the amount of family violence allegations and the amount of self-represented litigants, it almost seems like most matters will have that order made. Which is a lot. (L13)

A legal professional told us that she had heard that one state which has several courts was funded for only 22 matters for the first year of operation (L20). J3, who sits in that jurisdiction, said that they had warned Legal Aid, "There's a tsunami coming their way". Judicial interviewees reflected on how often they were making orders, noting numbers exceeded the Scheme's estimates (J3, J12, J15 and J17).

Study participants were concerned about the Scheme's burgeoning costs and viability (J5, J15 and L13). As J5 commented: "I cannot imagine how much money this is going to cost. It just bewilders me … I don't think the government's got the slightest idea". At the time of interview, at least two judges and one professional were concerned that the funding in their state had already run out (J12, J17 and L18). L19 pointed out that the consequences of inadequate funding would be adjournments and delays:

> The matters are being listed for trial and, come early 2020, these trials are going to be coming up. And they're either going to be adjourned or the court's going to try and run them without the cross-examination. Or the government's going to provide more funding between now and then … And it's going to be a huge drama if they're getting adjourned and also not really procedurally fair if they're proceeding without cross-examination …

The federal government recognised the shortfall in funding, announcing a further injection of funds into the Scheme ($2 million to LACs for 2019–20).[63]

62 Questions about the accuracy of the estimates on which the funding for the Scheme was based were raised at the time the Bill was debated in Parliament: see Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 2018, p. 8346 (Mark Dreyfus, Shadow Attorney-General).

63 See https://budget.gov.au/2019-20/content/myefo/download/08_Appendix_A.pdf (accessed 19 May 2020).

Onus on the self-represented litigant

The possible onus on SRLs to raise the question of s 102NA in discretionary cases is problematic. In ICS-B, both parties were SRLs and no mandatory triggering circumstances existed. The discretionary application was made by the ICL after seeing the nature of the communication between the parties. It is unlikely an order would have been made if an ICL had not been appointed.

Once SRLs are subject to mandatory or discretionary prohibition they must lodge the form with the relevant LAC or organise other legal representation. It is unclear whether all SRLs appreciate the consequences of not doing so. One judge explained:

> It's not enough that we make the order, of course, 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. (J10)

Although the form has been described as "not difficult" (L19), it may nonetheless be challenging for some SRLs. FASS and duty lawyer services can assist an SRL with this task (L11 and L27). The efficacy of this process relies on the SRL being informed about the steps that they need to take and being assisted to take them. We observed two matters where SRLs lacked information about the Scheme.

ICS-C was a matter in which the prohibition was mandatory as the SRL applicant mother had a protection order against the father. We observed this matter at a directions hearing in November 2019 and it was listed for hearing in early 2020. While the court file examined in December revealed that there was a notation about s 102NA, the SRL in her interview in November stated that she had no knowledge of the Scheme.

In C-B-23, the ICL raised the discretionary application of s 102NA. The judge explained to the SRL father the nature of the order requested by the ICL. However, before the judge formally made the order, the SRL respondent father became angry because he wanted the court to vacate the hearing date to allow for a new Family Report. The judge refused, noting the father could have made this request on previous occasions but had failed to attend court. The father said he did not know the court dates as he did not understand how to use the Courts Portal (see Chapter 5). The father stormed out of the courtroom and only after this did the judge make the s 102NA order. Inspection of the court file revealed that the hearing ended up being adjourned because the father attended without legal representation as he did not know about the Scheme. His inability to use the Portal likely compounded this lack of knowledge (similarly C-B-19).

Lack of SRL understanding of the Scheme was apparent in matter A-C-14 when the judge asked the SRL mother whether she had applied for funding under the Scheme (cross-examination had been prohibited at the previous court event). The mother replied, "I don't know what you mean about a Scheme". The judge attempted to explain, but then said, "This is not an information exercise. I have other jobs today". The father's lawyer then offered to liaise with the LAC. This intervention was in the interests of their client because the SRL's failure to lodge the form with Legal Aid would disrupt future proceedings. If a decision was made to adjourn proceedings, as was the case in C-B-23, the represented party is disadvantaged by delay and higher legal costs. On the other hand, any decision to proceed with the hearing and not allow the SRL to cross-examine the other party limits the SRL's access to justice.

Constraints for parties and the courts

The mandatory nature of the Scheme was an issue for some judges; one judge felt that they were better able to manage cross-examination in family violence cases prior to the introduction of the legislation (J13). Judicial interviewees also considered that not all SRLs (whether alleged victims or perpetrators) would want the ban to apply. J1 cited an example of 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". J13 recounted an unusual matter where the alleged victim wanted to cross-examine her former partner and became angry when the judge informed her that this was not allowed:

> Because if I did the matter on the papers, when she'd specifically said she wanted [to cross-examine], what

> would the appeal court do? It's lack of procedural fairness … it's put me in an impossible position … So, there was a mandatory exclusion and, truly, she came in fighting. She was ready to throw punches at me, at the barrister.

The full-representation model may be problematic for SRLs who want to control the conduct of their matter. We observed a case in which the SRL respondent father only wanted the lawyer to conduct the cross-examination (B-A-1). 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. As a consequence, he decided to forgo cross-examining his former partner.

Some judges reflected that the model would mean judges could not ascertain the full character of the SRL. J8 said that it would prevent them from seeing "perpetrators in action" when conducting direct cross-examination, which can be "quite powerful" in demonstrating their abusive behaviour. Similarly, J17 commented, "You lose that dynamic the moment you have a lawyer doing the cross-examination".

Potential misuse of the Scheme

Some of the professionals and judges expressed concern that some SRLs may take advantage of the Scheme to obtain free legal representation which is not means- or merit-tested (J7, J8, J9 and L26). Indeed, L30 described a case in which it appears likely that this occurred (similarly L19):

> Yes, it's been really funny. We had a matter which was part heard, and the father … he was the alleged perpetrator, he had privately funded counsel and solicitor, and as soon as he found out he could get a free gig through legal aid, he sacked them.

This risk of misuse was made explicit by the SRL respondent father who was the alleged perpetrator of violence in ICS-B who, when asked "What advice would you give someone who was representing themselves?" responded: "I would tell my friends … just accuse them of domestic violence and you'll get free legal representation [under s 102NA of the Act]".

One judge commented on a case where the SRL appeared to use the Scheme to seek further delays to the hearing while also obtaining free representation:

> 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 … It's a case where there is a family violence order, and mum is running, in fact, a Kennon-type claim.[64] 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. (J8)

Although financial contributions may be requested under the Scheme,[65] none of those interviewed had heard of a request for contributions to legal aid costs being made. Interviewees highlighted the stark contrasts of the Scheme with the very strict merit and means test under general legal aid funding and the common practice of LACs requesting contributions to the costs of ICLs (J5, L19). An SRL who had been represented under the Scheme (ICS-B) commented:

> And, unlike normal legal aid it is not needs-tested and even though the application form said that they might ask for something back, for a percentage, they never asked for any financial statement so how would they know who they can ask back money from and who not? 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.

J7 felt that the benefits outweighed the risk of a minority taking "advantage of the Scheme".

Positive outcomes

Several professionals, judges and SRLs recognised positive outcomes from the Scheme. Judges described how "incredibly grateful" SRLs and the other parties involved have been to learn the Scheme applied in their matter. J12 described an SRL's reaction:

> I had a bloke burst into tears last week, saying "Thank

64 *Kennon & Kennon* (1997) 22 Fam LR 1.

65 E.g. see http://www.legalaid.qld.gov.au/Get-legal-help/Our-services/Commonwealth-Family-Violence-Cross-Examination-of-Parties-Scheme (accessed 16 May 2020).

> God, because I've really wanted a lawyer and I just can't afford one". He was so grateful, and he wasn't the only bloke that's had that kind of reaction, but his was rather extreme and emotional. It actually made me very sad, I think, God, it's terrible. There isn't anywhere between dirt poor and really wealthy.

Matters may be more likely to settle once lawyers are appointed. This took place in ICS-B. J17 noted that they have hardly any SRLs at hearings now: "All of these matters which have been quite difficult with issues of violence, everybody is now represented and, because they're represented, they have useful conversations outside the court"—and as a result many are able to reach a settlement.

L8 also saw the Scheme as effective in preventing legal systems abuse:

> I did have one situation where the other party was self-represented, and it was adjourned to a contested hearing and it became apparent that he was very much looking forward to cross-examining his ex-partner … When I told him that he couldn't actually cross-examine at the contested hearing, his face fell and you could see that the whole point of him pushing this was that he wanted to grill her. And it was just, basically, systems abuse so … So, actually having that state Scheme has stopped the abuse of the system where people just want to be able to cross-examine the other party.

However, at least one SRL who had found it "horrendous … being cross-examined" by her ex-partner reflected that she did not think the Scheme would make any real difference given the way in which cross-examination, regardless of who conducts it, remains a traumatic experience (Marie).

Conclusion

This chapter confirms that personal cross-examination by SRLs in family law matters involving violence can be traumatic. Despite various protective measures being available to support alleged victims during cross examination, we found that not all judges initiated these actions and not all courts had available safety measures.

The research found that many professionals and judges believed that the introduction of the Family Violence and Cross-Examination Scheme would greatly benefit victims of family violence. However, it was also noted that the Scheme was based on underestimated numbers of eligible cases and federal funding has already had to be increased.

The research found uncertainty as to the factors that judges should consider when deciding whether to make a discretionary order for the prohibition on cross-examination to apply. At the time of the research, some judges appeared to be considering the uncertainty of federal funding for the Scheme as an issue when exercising their discretion, making commitment to continued funding even more essential. The research also found that SRLs need information about the Scheme if they are to apply to access the Scheme in discretionary cases and that they require better information about next steps once a prohibition is in place.

In the next chapter, we step out of the courtroom and explore SRLs' participation in negotiations.

CHAPTER 11

Negotiations outside the courtroom

> I think some [SRLs] are reasonable and come to court and you can have a reasonably okay conversation with them. And then I think you get other self-represented litigants who are not willing to negotiate at all … and I think, most matters, even if they are listed for a final hearing, most matters still settle before they proceed to a final hearing, even on the day of the hearing. So, I think that's got to indicate that even when you do have self-represented parties, that there's still some room to move and negotiate. (L16)

The family law system emphasises settlement (Hunter, 2008). The *Family Law Act 1975* (Cth) includes provisions that aim to avoid instigation of parenting proceedings by requiring parties to make a "genuine effort to resolve [their] dispute by family dispute resolution" (s 60I). For property matters, pre-action procedures, including attempts to resolve disputes, are mandatory in the Family Court.[66] Once litigation has commenced, settlement continues to be emphasised; very few cases are fully litigated and the system would not sustain trying all cases brought before it (Hunter, 2007; for data on the high settlement levels in family matters see ALRC, 2019, paras 3.31–3.33, 3.50–3.51).

Negotiations with a view to narrowing issues and reach settlement, then, are a normal and expected part of the family law process and can occur at all stages along the litigation timeline. Where parties are represented, their lawyers conduct negotiations acting on instructions; when an SRL is involved, they deal directly with the other party's legal team, or—if the other party is also an SRL—directly with that person. Previous research has found that many SRLs do not know they are expected to negotiate with the other party with a view to settlement (Hunter, 2002; Trinder et al., 2014); instead, they see themselves as coming to court to have "their case determined by a judge" (Toy-Cronin, 2015, p. 164). However, research has also shown that it is difficult for SRLs to participate in a "constructive dialogue" in negotiation (Emmerson & Platt, 2014, p. 520) when they do not understand the process or come unprepared.

Our research focused on negotiations that take place after litigation has commenced and occur on the day at court. Research by Kaspiew, Carson, Qu, and colleagues (2015) suggests that negotiations taking place after litigation has started are more likely to involve a background of allegations of family violence than matters resolved earlier. For SRLs who have experienced and continue to experience family violence, negotiations can be particularly problematic. These SRLs may be distressed and afraid of dealing with their former partner, even if that person is represented. Unlike other modes of dispute resolution, where there has been considerable discussion regarding their suitability in cases involving family violence, "there has been little corresponding concern with the appropriateness of lawyer-led settlement negotiations" that take place at court (Hunter, 2008, p. 176).

This chapter begins with the expectations and pressures on SRLs to negotiate in the family law system, whether or not the matter involves family violence. We then consider the skills and abilities of SRLs and legal representatives in negotiations and the need for participants to have knowledge of the law and its application to their case, adopt realistic positions, be open to compromise, and have good problem-solving and interpersonal skills.

Expectations

Consistent with previous research, the SRLs interviewed did not all know that they were expected to negotiate at all stages of the process. This is not surprising. There is no mention of negotiation in the family law process on the Family Court websites. Robyn described herself as "confused" and "quite bamboozled" by the process at the first return date of her matter:

> I knew I was going to be on my own, but just things like, I didn't know … you know when you go in and ask for the matter to be stood down so you can negotiate through the day. I didn't know how that … I guess it's unknown. It was a completely foreign environment.

Several professionals said that it was not unusual for SRLs to refuse to negotiate (L30, O9, O10 and O11). "Some of them [SRLs] are really dismissive [about engaging in negotiations]. They go 'thanks but no thanks'" (L30). SRLs may refuse as they do not appreciate that negotiation is an integral part of family law process or they may have received incorrect

66 *Family Law Rules 2004* (Cth) r 1.05; pt 1 sch 1.

advice from outside support services. For example, a support worker (O10) who works for a fathers' rights service told us that he advises SRLs, "If they [the other party's lawyer] try and approach you outside the court, tell them to go and jump on a bus, because they're not allowed to". SRLs might be intimidated by or suspicious of negotiation or not trust the lawyers involved. One men's support worker from FASS told us:

> I'd say it varies, but my experience has been … it doesn't go well at all. Often it may be a matter of they won't want to speak with the other party's legal representative, and maybe simply they're seeing that they're in cahoots together against them … If they're represented by themselves and the other party has representation, they don't have an understanding of what the legal representation is. They may see it as a teaming up against me, as opposed to a person whose role is to cross-represent. And mediate and resolve matters. So, there seems to be a skewed understanding of what that lawyer's job is. It's not to be against them, but to resolve. (O11)

The expectation of negotiation is particularly problematic in matters where both parties are self-represented. As O9 pointed out, there is no one to start the process, nor explain what it is about, and as a result "they won't communicate at all. They just won't respond to anything, won't follow any order, won't do anything".

J13 warned that because SRLs generally only have access to public waiting areas for discussion, the lack of safeguards means that "you get some really bad exchanges out there that even resulted in violence" (see Chapter 8). In the intensive case study, we observed matters involving two SRLs which had been stood down for negotiation. One judge told us that they would personally avoid sending SRLs out to negotiate with each other, but knew other judges did do this:

> I would never send two self-reps outside to go and settle something themselves. Never. Even without the family violence issue, but certainly never if there's that allegation. But I would send them off to their respective duty lawyers. Now that we've got two sets of duty lawyers [with FASS], that's made life good. But unfortunately, I think some of my colleagues have sent self-reps out to talk, and it becomes a disaster, so I would never do it. (J15)

Despite the expectation that parties will negotiate, some judicial interviewees noted that particularly complex cases cannot and should not settle through negotiation. J10 said:

> The one thing everybody tends to overlook is that the five percent of cases that run, run for a reason. And the reason is invariably that there is what I call a structural impossibility in the case. So, for example in property, say you've got a pool of 500 thousand but the parents will say they're owed 400 [thousand]. That case can't settle. You've got to work out whether that money's owed or not … Parenting, if mum thinks that father is a paedophile, it just can't settle. The issue has to be litigated. And in parenting cases these cases don't involve two reasonable people who just can't agree. By definition, at least one and possibly both, are going to have significant mental health issues. There will be violence. There will be denial and minimisation of the violence … These are terribly difficult cases.

Pressures to settle

In our intensive case study, we frequently observed judges stand matters down for parties to negotiate to narrow the issues in dispute, agree to interim orders or reach a final agreement. Most SRLs reinforced that this practice was common. Joanne said, "I always seem to be negotiating". A number of SRLs also reported they felt they had little choice on whether to negotiate and felt pressured by their own lawyer, the other party's lawyer or the judge (Emma, Jess, Lydia, Maxine, Marie and Natasha).

From judicial officers

Some of this pressure to negotiate is subtle. We observed judges congratulating litigants when they reached consent orders. Hunter (2018) noted that this sends a "strong message" not only to the parties who have reached an agreement, but to all other parties who might be sitting in court at the time, and "that this [agreement] was what the court hoped for and expected" (p. 181).

Other pressures are less subtle. Jess reported that "[judges] push to settle. Just get it out of my court room, I don't want to deal with this, get it out". Lydia, who reached a consent

order, described the pressure she felt to settle made her feel that she was "basically at gunpoint". She reported that the judge was frustrated, and quotes them saying to her and her former partner:

> I have read all the materials, why haven't you settled, why haven't you settled this yet? Why haven't you guys negotiated an outcome? I'm sick to death of people who won't negotiate. Get out there and negotiate or I'm just going to flip a coin.

As a result, she agreed to orders which meant that the child would spend five nights with the father and nine nights with her per fortnight. She did not consider this order safe given she had experienced physical violence, financial abuse, isolation, emotional abuse and controlling behaviours during the relationship, and that since separation the father had "grabbed [their son] by the back of his head and slammed his face into the kitchen table and gave him a bloody nose".

From lawyers

A small number of SRLs reported that they felt pressured to negotiate and consent to orders by their own lawyers. In some instances, this pressure was combined with the fact that they simply could not afford to pay for legal representation to continue. For example, Jess stated that she felt pressure from her barrister and the ICL to consent to orders that provided for the father to have increased overnight time with the children.

> I had a barrister represent me and the barrister pretty much pushed me very, very hard. There was an independent children's lawyer involved as well and I was pushed very, very hard to agree to all of this and pretty much told that if you don't, this is the financial cost. This is what it's going to cost you to keep pushing and the outcome's going to be he's going to have more time with the children. You're better off consenting now and giving in now because it's going to be better for the children in the long run. A lot of pressure to agree and I gave up.

Jess had experienced multiple forms of family violence during her relationship and after separation the father had used physical violence and sexually inappropriate behaviours against the children. Jess reported her concerns about the children to the police and the relevant children protection agency, however no further action was taken due to the lack of evidence. Jess stated that she would have preferred for the father's time to be supervised; while Jess managed to have included in the orders that the children were to sleep in separate beds from the father, she reflected that she was "just trying to protect them as much as I could knowing I couldn't control it".

Megan, Marie and Kate also reported pressure from their lawyers to agree to certain orders. Megan described signing consent orders "under duress". Kate stated that her Legal Aid lawyers "bullied" her into agreeing to an interim order with which she "completely didn't agree". As a result of this order she said her children were abused by their father "the very next day". When she told her lawyers that she wanted to stop the father's time with the children, they advised her she would be in breach of the orders and that they would no longer be able to represent her if she did so. Kate stopped the father's time with the children and she ceased instructing her Legal Aid team and, as a result, was prevented from applying for legal aid again for two years. Ultimately, Kate's parenting matter was judicially determined and the father's time was ordered to be professionally supervised.

Some SRLs described intense pressures to settle from the other side's lawyer. Robyn described her former partner's barrister trying to get her to agree to consent orders that the barrister had drafted:

> The barrister kept saying to me, "The judge is going home soon. The judge is going home soon. She's only here 'til four, you need to make a decision". So yes, we went back in there I just felt pressured under time … and we were only probably in front of the judge for about five minutes. I still don't fully understand [the consent orders].

In some cases, lawyers' behaviour towards SRLs might be described as bullying. While this description could be a matter of perspective, the extent to which SRLs and professionals used this descriptor suggests that it is prevalent in family courts. Both professional and SRL interviewees reported aggressive, inappropriate and, in some instances, unethical behaviour on the part of some lawyers during the course of negotiations (J10, L2, L8, O1, O5, Elizabeth, Jenny, Lydia, Marie and Robyn). J10 described the problem:

> If they're [SRLs] opposed to a bully, one of two things will tend to happen. They'll either essentially clam up and refuse to talk to them or they may be overborne somewhat. And that, I think, may apply particularly to female self-reps. You know, a confident, bullying lawyer, who, sort of, says, "Look we'll get this anyway", sort of thing. And I hate to say it but I suspect that does happen from time to time. It's professional misconduct of course but … there're a lot of different lawyers out there and some are better than others. So, I think self-reps would find it confronting and difficult.

Some non-legal professional interviewees provided negative assessments of some lawyers' behaviour during negotiations:

> In terms of the [SRL] … experience generally they feel actually quite hounded. They're asked to sign things without knowing what they're signing. That's where we [the FASS men's support workers] come in and say, "Read every single word and just what is doable or not doable? What is it that you don't agree with?" And usually with family violence we can explain [why particular orders have been proposed] and so on. (O2)

> They [lawyers are] very incredibly intimidating and force[ful] … "You have to sign here and now. Well this is your chance; you can agree, or you lose it". You know in front of her, they are very intimidating in front of women … I'm yet to see a lawyer from the other party, when a woman is self-representing, being kind to them. (O5, FASS women's support worker)

Legal professionals related stories of SRLs being "bullied" or "blackmailed" by the other party's lawyer. As a result, SRLs agreed to terms without necessarily understanding the consequences.

> And you hear different stories about mainly the conduct of some of them [lawyers] being a bit on the aggressive side and then the self-represented client coming to see us at duty lawyer and being quite shaken up by that. At that point sometimes they've already agreed to things that when you explain to them what it actually means they're like, "Oh no, I didn't actually mean that, I thought it meant this" … A lot of people just say they want to get in there and get out, but they don't necessarily understand that if they're signing something and it becomes an order that there can be quite serious consequences if they don't follow it. (L19)

SRLs echoed these findings. Many complained about the aggressive, bullying and rude behaviour of their former partners' lawyers. Carol described them as "schoolyard bullies"; for Katherine they were "abusive" and "intimidating", and had "shouted at" and "insulted" her. The lawyer in Karen's matter was "very bossy" and

> very rude, deceitful. Very denigrating … always telling me that I was an unfit parent … It was just accepted that I would give in to every one of their demands.

For Robyn, the other party's barrister was "awful" and "just bullied and intimidated me all day". She felt the focus was on what time the father would "spend … with his boys" whereas the family violence and risk to the children was not "considered at all" (see also discussion of Elizabeth in Chapter 7). This approach by the father's legal team minimised Robyn's experience of family violence, which reflects earlier findings that there is often a focus on "persuading [women] to cooperate, rather than on the father's behaviour or on women's and children's safety" (Barnett, 2014, p. 441).

Several SRLs described lawyers using their physicality to intimidate and bully SRLs. Lydia's former partner's lawyer shouted at her as she sat in the common waiting areas; he "was like two foot taller than me. And leaning over me and shouting in my face and nobody stopped him". She said she thought about "making a professional complaint" about the lawyer, but

> thought everybody who deals with family matters probably thinks the other side's lawyer is an arsehole. So I just thought I'm going to let it go and hope he dies in a fire one day.

Jenny described her former partner's barrister as "very aggressive and very abusive" during negotiations:

> I was in a safety room and … she said, "Come out here", and I said, "I won't be coming out there". I said, "Your client is the perpetrator and he's threatened my life on a number of occasions". She goes, "Oh, yeah, whatever"

> … And she said, "You will do this", and pointing at me and, you know, but pretty much … It was like a … you know, not far from my chest.

Later, court staff told Jenny that this lawyer was known as "the bulldog". Indeed, several SRLs reported that the lawyers they had to deal with had reputations for being aggressive and bullying. According to Danielle, her former partner's lawyer was "notorious in the industry for being a bully".

Several SRLs reported being afraid of their former partner's lawyer. Karen said she was "scared of his lawyer because she was known as the most aggressive, deceitful, dishonest lawyer in [name of location], and I was too scared to take her on". Elizabeth said her former partner's lawyer was

> really trying to intimidate me. He was basically gaslighting me, like what you believe is not true. What you have experienced in your home of family violence is not true … and was really putting pressure on.

Elizabeth reflected "about the power balance here, he is someone who knows the court system extremely well because that's his job. I don't because this isn't my job". Other SRLs reported that face-to-face bullying and threatening behaviour by lawyers extended to their correspondence via emails and letters (Grace, Kristy and Lydia).

Some legal professionals provided insight into how they might be perceived by SRLs. For example, L30 noted that simply being robed for court can, in and of itself, appear "confronting" and intimidating to an SRL; while this dress is meant to "anonymise" the barrister, in reality it may have a negative impact on SRLs. Other legal professionals talked about the adjustments they make in negotiations to try to relieve pressure and give SRLs time to consider proposals (this is discussed further in "Professionals' adjustments to practice" in Chapter 12).

Threats and pressures from the alleged perpetrator

It should be noted that, despite the pressures placed on SRLs by lawyers, SRLs whose ex-partners had also been SRLs at some time commented that they preferred dealing with a lawyer rather than their former partner (Fiona, John, Richard and the SRL mother in ICS-D). For example, Fiona found it was much easier negotiating with her former partner's lawyers than with him when he became self-represented because he was "still being very intimidating".

Karen described being forced to agree to orders because of threats made by her former partner in relation to her children. Her former partner "withheld our daughter for three weeks … to coerce me into signing" interim orders. Karen's lawyer at the time advised her not to seek a recovery order given the proximity to Christmas. Instead they advised her to agree to an interim order; otherwise, she would be unlikely to see her child for three months when the matter could next be listed. Karen "gave in to [her former partner] as [she] couldn't bear the thought" of not seeing her child. Shortly afterwards she "fired" her lawyer and said, "I wish I'd fired her [earlier] and ignored her [advice about the interim order] and gone ahead with … the recovery order and the contravention". Karen and her two children had experienced multiple forms of violence from her former partner (physical, verbal, emotional and financial, and property damage and threats).

Legal professionals also noted that some victims of family violence may agree to orders that are unsafe or unsatisfactory because that has been their mode of dealing with the perpetrator to "keep the peace", or they simply "give in" because they do not want to deal with the perpetrator anymore through the court process (e.g. L7, L20 and L22). L22 gave an example:

> I can think of one recently where she actually was self-represented and just said, "Well, I just agreed because I just do what he does because it's easier" … There was quite a history of family violence. I don't know if it was picked up because it wasn't so much physical family violence … I don't think it ever escalated to that point because she just always had that pattern of pandering to him and doing what he wanted and it was, you know, "Okay, whatever you want, that's what I'll do" and that continued on. And I can see that pattern continuing on with a lot of victims of family violence … A client sometimes will agree to things that perhaps they wouldn't [otherwise] because that cycle's still continuing.

A small number of SRLs in our study reported that they sought less in their property proceedings to avoid angering their former partners (Fiona and Kate). Fiona, who was self-represented throughout her property proceedings while her former partner had legal representation, said that she sought a smaller amount in her property and spousal maintenance proceedings because she "didn't want to make him [her former partner] too angry for a start". She "went a lot lower on what I was asking in the first place. So, I went really, really low … even though it was a [relationship of over 20 years]" and she might have been entitled to a greater share of the property (Fiona's attempts to enforce that order are discussed in Chapter 13). One lawyer (L32) commented that "in terms of property settlement, I think they [victims of violence] often end up with probably the lower end of their entitlement". Research has found that victims of family violence may avoid seeking a property settlement or seek less than their entitlement (Fehlberg & Millward, 2014; Sheehan & Smyth, 2000).

The fear of violence from the alleged perpetrator not only meant that women SRLs in our study agreed to orders that they were not happy with, it meant that in some instances they did not commence proceedings at all. This was the case for Joanne who feared further violence so much that she did not seek a property settlement:

> The whole fear of being killed by him was about finances, always. That's why I never went for property settlement. I never sought anything. I walked out with the kids and I think I upgraded the fridge and it's pretty much all I came out with.

Other pressures inherent through the process

Some victims might consent to orders because they have been worn down by the litigation strategy adopted by the alleged perpetrator. L29 (similarly L7) drew attention to the

> misuse of the court processes to elongate the process or make things particularly difficult and draw out that process for self-represented litigants [victims], purely with the intention of making them crack.

As noted above, the prospect of increasing costs also played into the pressure some women experienced from their own lawyers (e.g. Jess).

Independent children's lawyers and duty lawyers as buffers

We found that ICLs and duty lawyers could be useful buffers for SRLs during negotiations. J4, commenting on negotiations involving SRLs, noted, "With an ICL, it's good. Without an ICL and a duty lawyer, it's bad". One lawyer said that as an ICL, they used their role as a buffer to try and settle matters "because you know that they [SRLs] won't do as good a job for themselves" (L20).

One judge remarked that having an ICL involved can help to level the playing field between the SRL and the lawyer for the other party:

> And often when someone, one of the practitioners, is just stonewalling or trying to run a really hard, you know, "We're not taking any prisoners" type of case, the ICL will be the icebreaker and say, "Well, that's not going to work, we're not doing that, no", whereas, you know, the [SRLs] will be run over by the very aggressive litigating type. (J3)

Kaspiew and colleagues (2014) noted that bringing a child focus to proceedings and assisting in settlement is a major role for ICLs and that this can be important for SRLs. This point was echoed by professional interviewees. For example, L22 noted that ICLs are useful at getting SRLs "to see things from … the child's perception *[sic]*" and that SRLs may be more likely to "trust proposals" made by the ICL compared to the other party's lawyer. Another legal professional (L26) said having an ICL involved when the matter involves family violence can assist in "facilitating conversations [and] negotiations between the parties", where they effectively act "as an intermediary in terms of making that proposal". However, two SRLs complained about being bullied by ICLs during negotiations.

> The ICL's, like, modum *[sic]* operandi is to bully and intimidate. She once came over to me and thrust a document in [my] face and said: "You need to sign this …" She is, like—it's like bipolar. It's unbelievable. When she's one on one she threatens, she intimidates, and she tries to bully you into doing what she says. (Natasha; similarly Megan)

Many professionals talked about the courts' reliance on duty lawyers to assist with negotiations and explain proposed

consent orders to SRLs (e.g. L2, L7, L9, L10, L12, L27, L30, L31 and O2). The existence of FASS at some registries has expanded the availability of duty lawyer services and allowed more SRLs to be assisted in negotiations (see Chapter 7). According to L27, "If they [SRLs] have the benefit of a duty solicitor … we're often able to make a lot of headway at court". Duty lawyers might be asked to perform this function or have a person referred to them by the judicial officer, the ICL or the legal representative on the other side. SRLs might also ask the duty lawyer for assistance. Duty lawyers may be in a position of advising victims of family violence about the terms of any proposed parenting orders to enhance safety. For instance, L31 described how she advised women "about safety issues. So, a lot about around the changeover because the changeover can be a very unsafe time for women".

Self-represented litigant skills and abilities

SRLs vary markedly in their approach to the negotiation process, and in the knowledge and skills needed to participate effectively. As L32 said, "It is really hard to generalise … some people do it quite well and some people do it quite poorly". SRLs vary in whether they are open to negotiations, what they seek, their mental health, whether they have obtained advice prior to attending court, how well they understand the law and legal terms (especially for potential orders), and the distance between the positions of the parties (L7, L16, L18, L21, L24, L26, L30, L32 and O12).

Capacity and confidence

An SRL's emotional state may also impact their capacity to engage in negotiations effectively (L19, L21 and L25). One registrar (R1) said that SRLs' poor participation in negotiations may be a "reflection of their ability to function", rather than them just being difficult. Similarly, L21 reflected that when an SRL is involved:

> Everything is affected and everything is so much more charged. Everything takes longer … People are so emotional and traumatised that they … There's no capacity for them to negotiate because they just simply walk into court when the matter's being dealt with and all that pre-work that you can do while you're in the list, you can't do because, because well they're self-represented.

While some SRLs said they had felt confident in negotiations, most believed they lacked the necessary skills or felt intimidated by a perceived power imbalance. Jason felt particularly disadvantaged and described the prospect of negotiations as "frightening, frightening" across a number of dimensions; not only was he an SRL while his former partner had legal representation including counsel, he is dyslexic and described his former partner as "articulate … a professional. She really understands the system".

In the family law context, power imbalances can be created by family violence, the fact that only one party is represented, the quality of one legal team compared to another, whether the parties have equitable access to financial and other resources, and other compounding disadvantages experienced by one or both parties. L15, from a women's legal service, thought that "it will be enormously difficult for most of my clients to negotiate anything on an even footing". This solicitor identified knowledge gaps as generating power imbalances:

> Yes, and I think it can be very difficult where there's a power imbalance for people to come to consent orders. They also do it without disclosure … in property matters … Yes, I think it can be [unfair] and disadvantageous to some people.

Lack of legal knowledge

SRLs' lack of understanding of the law and legal process hinders effective negotiation. Most legal professionals interviewed appeared to be acutely aware of the challenges facing SRLs in negotiation processes in relation to lack of legal knowledge. For example, one CLC solicitor acknowledged:

> I think it's very difficult for a self-represented litigant to deal with either a barrister or solicitor on the other side. And whilst I think that our lawyers in this region are very professional, I've no doubt think that there … would potentially be problems with that [legal] knowledge imbalance. I don't think there'd be many self-represented litigants that would love to have a good argument with a lawyer, I think that that's quite difficult. (L24)

Emma described herself as "befuddled" trying to negotiate with her former partner's lawyer: "I just didn't have a clue what he was talking about most of the time". The barrister interviewed in ICS-A described the negotiations with the SRL as "difficult" because the SRL did not understand the legal issues and could not clearly communicate her position:

> They [the negotiations] were difficult, mostly because she [the SRL] was argumentative about their responses. She had a support person … [and the support person] was more forthcoming in relation to really what the issues were, with what was being proposed. So that was a great assistance because it allowed me to sort of distil to some extent what she really wanted as opposed to what she was saying she wanted. I don't think the two were the same things.

Professionals talked about difficulties SRLs faced when negotiating the terms of consent orders without knowing the standard terms. L31 said, "The language is very different when you're dealing with a lawyer because everyone knows what you're talking about and if there's an issue … People recognise if there's an issue". L32 said that lawyers need to take the lead in negotiations:

> … in terms of having a framework document that you want to try to use … that would be the end-point of the agreement, subject to changes during the negotiation process. You know, you never see a self-represented party turn up with draft orders that they put to you saying, "Let's work on this as the basis of the framework for mediation". So, you have to lead it a lot more. Yes, and control the process more. (L32)

In property disputes, effective negotiations depend on discovery or disclosure of the full financial position of both parties. However, this requirement to disclose is often not understood by SRLs. For instance, J10 said that "with self-reps, although you do try and remind them of the obligation to discover [documents], that doesn't compute". This view was echoed by professionals:

> A lot of self-represented litigants don't get things like financial disclosure in property-type matters. And just refuse to make certain material available … or just don't respond, which means you have to go to court. It forces your hand into court to get the financial disclosure, to get the advice to get a positive outcome for clients. (L24)

This was certainly the case in ICS-E, where the SRL failed to provide disclosure, leaving the represented party to seek the financial information via subpoena.

Some professionals felt that if SRLs do not understand what has happened in negotiations and they are not clear about the terms of settlement, they may renege on the agreement. One judge noted:

> Having conducted a few of them, you know, as a barrister for somebody and trying to negotiate with a self-represented litigant, they're very wary. They often don't understand what's happening. Quite a lot will often say "Yes, I agree", then go into court and say, "I didn't agree to that". Again, they can be overwhelmed, you know. (J16)

Unrealistic expectations

Consistent with research, SRLs and professionals said that some SRLs enter negotiations with unreasonable expectations of what they can achieve (Birnbaum & Bala, 2012). For example, Maxine said it was "really difficult" negotiating with her self-represented former partner:

> … because there wasn't anyone to sort of reason with him. There's no buffer, like you would usually get a lawyer to go, okay, you can do this, you can't do this, don't say this. And there was no one to sort of mediate between his kind of delusions and lies and reason with him.

David said that he almost wished his former partner had been legally represented because a lawyer "might find her some perspective". However, he thought this was "too optimistic … because her lawyer in her last battle was just an advocate for her stupidity, basically".

Several professional and judicial interviewees talked about SRLs lacking a "reality check" when they do not have legal representation. Lawyers can advise on whether what an SRL is seeking is reasonable and the risk of continuing with the litigation (Toy-Cronin, 2015). For some SRLs, their emotions or close connection to their case may cloud their ability to assess possible settlement options. According to J14, "the

ones that go to trial, often have self-represented litigants. And they're going to trial because their expectations are unrealistic". Without a reality check, many SRLs are not prepared to compromise. One judge noted:

> There's almost no hope of settling anything … Let's say 20 percent will try and settle something and 80 percent are … They don't trust the lawyer anyway but it's just impossible to try and … it's dangerous in a way. It's too hard to negotiate with them. Like there's no one else there, so you are … As a practitioner you're going to be accused of being overbearing … They don't negotiate very well. Time and time again I'm told by lawyers, "It's pointless trying to talk to them". (J3)

Lawyers' skills and abilities

Many lawyers negotiate effectively and appropriately with SRLs. However, some judicial and professional interviewees suggested that not all lawyers have the requisite skills to negotiate with SRLs, and the outcome of a negotiation involving an SRL was more a function of the lawyer's skills than the SRL's (J6, J9, J12, L17 and L26):

> There is a wild difference in quality of practitioners across the board, including independent children's lawyers, and as long as you have at least one genuinely good, ethical practitioner in the mix you'll mostly be fine. But if you happen to not have that, it's chaos. (L17)

While there are guides and training available to assist lawyers working with SRLs (e.g. Ellison, 2018; New South Wales Bar Association, 2011; Queensland Law Society, 2017), just over two thirds of the legal professionals (23/34) interviewed had not received dedicated training on working with SRLs, though some had received on-the-job training. Eight of the 11 legal professionals who had received some training about SRLs came from one jurisdiction, suggesting a particular practice environment. One judge pointed out: "Lawyers are not trained at law school how to deal with unrepresented litigants. Right? They're trained to deal with other lawyers" (J6).

Two judges noted that many lawyers simply do not like dealing with SRLs (J12) or are "squeamish" about it (J12). SRLs also reported that they felt that the lawyers did not want to deal with them. For example, Jess commented, "I found the attitude right through, whether it be me or my partner self-representing, the barristers were just, 'Uh, can't deal with you'".

J12 also talked about problems when the lawyer approaches the negotiation with the SRL with an aggressive or dictatorial attitude:

> [Lawyers] go and dictate to [SRLs], "Listen if you don't do this we're going back into the courtroom and this will happen". The self-represented litigant just arcs up and says "Well fuck you", and that's the end of the discussion.

Some lawyers for the other party will take advantage of an SRL's lack of knowledge and skills in negotiation. As Kate said: "Well for them, it's a win to find out that your opposition is unrepresented". This issue was raised by several judges and professionals, particularly when an SRL's capacity to negotiate might be reduced by their CALD background or mental health issues. According to L15, a duty lawyer with a CLC, "as a practitioner, you could take quite an advantage":

> And it's something I've seen, where we've sent off clients, it's been horrible. Where we sent off clients and said to them, "Listen, you're entitled to $90,000", for example, and they've come back to us and said, "I settled on consent orders for $15,000". And it's an unfair outcome, and it's a surprise to me that the judicial officer allowed it … And I do wonder how the other side has managed—that particular client does not speak English very well at all … unless you're speaking with an interpreter, she doesn't know. And the court doesn't provide them in the [FCCA], even when you ask, unless it's a hearing.

J15 suggested they might change their practice of encouraging negotiation when certain lawyers were involved, because of concerns that those lawyers might take unfair advantage of the SRL.

> Unfortunately, some of our lawyers take advantage of the self-represented litigants … And you're also factoring in whether somebody's a victim of family violence and if you've got this big buffoon of a barrister with a large voice, you don't really want to put them through that as well.

We observed judges attempting to assure SRLs that the lawyer they were sending them outside to negotiate with is

a "sensible, experienced lawyer" whom the SRL could trust not to take advantage of them (e.g. B-B-7).

Some SRLs reported positive experiences with lawyers (for example the SRL mother in ICS-D) and we observed positive exchanges at court (ICS-A). SRLs who had positive experiences generally found their dealings with their former partner's lawyers to be polite and professional. Jess said:

> I actually respect his barrister a lot. She was fair. She was, "Yes, I see what you're saying, I'll take it to him, there's no guarantee he's going to agree". And she'd come back and say, "Yes, I can't get him to agree. I know we need to get this over the line but we're going to have find another way" … I think she understood what her client was doing, and I think she understood the abuse and everything to do with that.

Conclusion

This chapter finds that while negotiation is central to the family law system, many SRLs come to court not expecting to negotiate. When they learn that negotiation is expected, many do not know what to do and are unprepared. Significantly, it is not only an SRL's lack of acumen that can hinder the effectiveness of negotiation and resolution; the competence of lawyers is a key factor and both lawyers and SRLs vary markedly in terms of their skills.

SRLs are placed under strong pressures to negotiate from all other players in the system. These pressures are exacerbated when family violence is an issue. SRLs in our study felt bullied by the other parties' lawyers. However, duty lawyers and ICLs were seen to have an important role in buffering negotiations—although, in a small number of cases, the ICLs were seen as part of the "bullying" culture.

In the next chapter we turn to a discussion of the outcomes achieved by SRLs, many of whom have reached a consent order, on an interim or final basis, through these negotiations.

CHAPTER 12

Outcomes and impacts

> I can see the need for legal representation. I don't think self-represented litigants do as well. (L10)
>
> No advantage at all [being self-represented]. It's a huge disadvantage. (J2)

Whether an SRL achieves less satisfactory outcomes than if they had been represented is difficult, if not impossible, to assess and is dependent upon multiple factors such as "the complexity of the court or tribunal processes, the nature of the subject matter of litigation" (Richardson et al., 2018, p. 54), the skills of the SRL and the merits of the case (Toy-Cronin, 2015; see also McKeever et al., 2018). One study in the United States did undertake such an assessment (Kernic, 2015). This study compared parenting outcomes achieved in cases involving family violence when the victim was unrepresented to those with legal aid or private representation. It found that legal representation, particularly by Legal Aid lawyers with expertise in family violence, made a significant difference in terms of protections, including denial of contact with the violent parent, being included in orders (Kernic, 2015, pp. 44–45).

Little is known about the outcomes achieved by SRLs through settlement negotiations (Richardson et al., 2012). The challenges are heightened for SRLs who are victims of family violence, where the literature documents considerable concern that such victims may settle for, or achieve, unsafe or less successful outcomes than if they had legal representation (see Birchall & Choudhry, 2018; Birnbaum et al., 2012; Chisholm, 2009; Loughman, 2016). There are particular concerns about consent orders reached in cases involving family violence due to power imbalances between the parties and the victim's fear of the perpetrator which may result in compromises or withdrawal in order to appease him (Hunter, 2008; see also House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

This chapter starts by exploring whether SRLs are advantaged or disadvantaged in their family law proceedings compared to represented litigants. This is followed by a discussion of the outcomes achieved by the SRLs we interviewed and their perceptions of that outcome. This discussion focuses on whether the outcomes achieved (whether by consent or judicial determination) addressed concerns about family violence and risk. The chapter then looks at professionals' best practice when finalising consent orders with SRLs and judicial scrutiny of consent orders.

It is important to recognise that any discussion of outcomes cannot be separated from the procedural challenges that have been documented in earlier chapters (see Chapters 6–11). Where SRLs have experienced difficulty completing forms, adequately documenting family violence, gathering sufficient evidence about family violence, participating in negotiations and presenting their case in court, these difficulties necessarily have a flow-on effect on the outcome achieved. However, it is also important to recognise that the risk of unsafe parenting orders or less satisfactory property orders is not only a possibility in cases involving SRLs, but may also result when a victim is legally represented. Finally, the chapter turns to consider the personal impact of being self-represented in cases involving family violence, and the impact that self-representation by parents may have on any children of the relationship.

Advantaged or disadvantaged

Many professionals considered that SRLs are disadvantaged in the family law system and that self-representation has a negative impact on outcomes (J2, J4, J12, L2, L7, L10, L16, L22, L23, L27, L31 and O1), and that as a result SRLs generally achieve "poorer outcomes" and less child-focused outcomes (L7, L16 and L32). According to L2, being an SRL is "just an inherent disadvantage from the start" and that disadvantage permeates every step of the process and "obviously affect[s] the outcome". L23 similarly emphasised this permeation:

> From the very beginning [being an SRL] has an impact on the quality of evidence that can be presented. If you fear cross-examination then you're more likely to settle before you have to face it. If you haven't been able to subpoena all the documents, or review them and identify what's useful evidence in your matter from the subpoena material you're not going to have that quality of evidence.

If any advantages were identified for SRLs, these tended to be confined to particular steps or processes rather than an overall position. For example, some professionals believed some judges gave SRLs leeway that would not be afforded to

a lawyer (L15, L16, L24, O5 and O9)—for example, allowing SRLs to give evidence from the bar table, allowing SRLs to discuss irrelevant content, reducing formality and allowing additional adjournments. However, when the entirety of the proceedings was considered, the overall assessment was one of disadvantage. As J12 explained:

> I don't think there's really any advantages for them. It's not our job to advantage someone because they're self-represented. I take a very hard line at final hearings that the rules of evidence are the rules of evidence. If you're self-represented and that means all of your evidence is out that's not my problem. And the disadvantages are probably quite a few. They just don't know what they're doing. It's like opening the bonnet of your car to fix your engine and having a spanner and a screwdriver. Those are two very dangerous things in your hands. Again, there are some very nuanced and very competent self-represented litigants, but they're noticeable because they standout whereas the vast majority just stumble through.

A small number of professionals emphasised that this general disadvantage is exacerbated when the other party has an experienced lawyer. One judge explained that this created a "fundamental structural inequality" that judges "manage as best we can" (J8). J13 described a case where the SRL mother alleged family violence and the father's lawyers "did a really good job of actually undermining" her evidence. J13 reflected that they had "seen that a couple of times where I've thought, "I wonder what it would have been like if you'd have been properly represented'".

The outcomes achieved by self-represented litigants in this study

At the time they were interviewed, 20 SRLs had finalised their initial matters, while for 17 the initial matter was ongoing.[67] For those whose initial matter was finalised, this did not necessarily mean the end of their litigation; a number were involved in subsequent legal proceedings such as appeals or contraventions (see Chapter 13). For the 20 who had obtained initial orders, 15 did so via consent orders and five by judicial determination; and at the time that order was made, eight had legal representation and 12 were self-represented.

Almost all interviewees who achieved final orders were dissatisfied with them. For those who reached consent orders with legal representation, it was often their dissatisfaction with the order and their lawyers' performance that led them to self-represent in subsequent proceedings (Carol, Karen, Lydia, Katherine and Tim). For others the dissatisfaction resulted not from the consent order itself, but rather that they had to enforce it (Fiona).

Notions of dissatisfaction are subjective. Previous research has indicated that matters resolved in the formal family law system tend to be complex; parties whose matters are resolved this way are less positive about the outcomes than those whose family law issues are resolved via other processes (Kaspiew, Carson, Dunstan, De Maio, et al., 2015). Additionally, parents who report family violence or safety concerns for themselves or their children have low levels of satisfaction with the family law system generally (Kaspiew, Carson, Dunstan, De Maio, et al., 2015) and are less likely to consider their property division as fair (Qu et al., 2014).

Our main concern is not to explore issues around dissatisfaction, but rather where and how SRLs identified the outcomes as unsafe and/or unsatisfactory in the context of their experience of family violence. It is important to recognise that factors influencing outcomes are multiple and complex. They include the orders sought by the parties; the orders that are consented to; whether sufficient evidence is presented to the court to support allegations about family violence and risk; and whether the lawyers, judges and other professionals involved adequately understand family violence. In some cases, all players, including the victim, might believe the orders reached address the risks, but subsequent events demonstrate otherwise.

Consent orders

Just over half of the SRLs in the general interview sample reached a consent order on either an interim or final basis (n=18). Most family law matters, including those that involve SRLs, settle without the need for a hearing (see Chapter 11). While for some litigants this is a strategic decision based on

67 This is more than 35 matters as some initial matters involved parenting and financial matters, part of which were finalised while the other parts were ongoing.

legal advice, or a rationalisation that compromise is necessary (J8), for others the pressures to settle increase under the circumstances of family violence and self-representation. Legal professionals interviewed noted that some SRLs who are victims of family violence agree to settle "on terms that are not fair or safe to get the case over with" (L23; similarly L6 and L22), to avoid direct cross-examination (L6 and L23) and to generally avoid a "trial without legal representation" (L22). A lawyer who works for a women's legal service discussed the pressure on victims of violence:

> I suppose everybody in litigation feels that to some extent because, you know, the alternative of going for a hearing is something that most people want to try to avoid. But I think for a lot of women they feel as though their family violence history hasn't been heard, and that is exacerbated by a pressure to settle on terms that they feel are not safe. (L23)

These concerns are heightened when the victim of family violence does not have the benefit of legal representation to assist with negotiations or provide advice about the proposed order, both in terms of what a court might be likely to approve and its workability. In this regard, some legal professionals emphasised that SRL victims may be unaware of the types of orders that they can seek, what appropriate orders for children at certain ages are, and the types of protective mechanisms that can be built into orders (L1, L2, L20 and L31).

Chapter 11 considered the pressures on SRLs to negotiate. While negotiations may be about a range of matters (e.g. narrowing issues in dispute), much of the negotiation process is directed to settlement on an interim or final basis in the form of consent orders. As is noted in that chapter, SRLs in our study reported feeling pressured through negotiations to consent to orders from multiple, often intersecting, sources. This included pressure from their own lawyers (Jess, Kate, Kristy and Marie), their former partners' lawyers (Carol, Elizabeth, Jenny, Karen, Katherine, Lydia, Marie and Robyn) and the judge (Emma, Jess and Lydia). Pressure to consent to orders was also created by the financial costs of continuing proceedings with legal representation (Alison and Jess), the time demands of the day at court (Robyn) and the trauma experienced to date through the court process (Carol). In addition, victims of family violence felt pressure to placate their former partner who may have threatened them (Karen); this meant that some women compromised and sought less than they were entitled to, for example in property settlement (Fiona and Kate), while others did not seek orders at all (Joanne).

Professionals' adjustments to practice

Some lawyers talked about the types of adjustments to practice that they make when finalising consent orders when there is an SRL on the other side. These examples of best practice included giving SRLs time to consider proposals and obtain legal advice, being transparent, providing explanations and keeping the terms simple (L23 and L26). A participant who worked for a legal service that assists women victims of violence said:

> If we've reached an agreement at court with another party who's a self-represented litigant, we're less likely to try and finalise that on the day. We're more likely to give them an opportunity to reach an agreement in principle and give them an opportunity to confirm it thereafter. Have the opportunity to get advice. (L23)

Clearly, SRLs need to understand proposed consent orders at court; however, several professionals noted the difficult balance between explanation and advice when they are representing the other party: you can explain the terms, but you cannot provide legal advice (L26; similarly ICS-A, L10 and L32). One legal professional said that their dealings with SRLs in negotiations varied according to nature of their role in the matter—that is, duty lawyer or ICL. Interestingly, this was the only professional interviewee who acknowledged room for improvement in their practice (L19):

> If you sit down and go through every order with a self-represented party it could potentially get into the realm of legal advice quite easily and we can't advise both parties; as an [ICL] we can't advise. So, I usually would give it to them to read and ask them to let me know if they've got any questions … I guess on reflection it's probably not the best practice to simply give something to someone to read and hope that they understand it because we often see the fallout of [that] when people have agreed to orders that they probably shouldn't have agreed to. So yes, on reflection maybe that is somewhere that I could improve personally.

Legal professionals were asked whether their approach varied when the matter involved family violence. For a few, the answer was no because most of their matters involved family violence. One lawyer in a more varied practice said it was important to draft simple and appropriate orders:

> I want the client to understand them and the other party to understand them, whether they've got a lawyer or not … I need them to be able to really understand quite clearly what it is that these orders give them, what they're required to do under the order. So, whether somebody's self-represented or not … It has to be simplified as much as possible and clear instead of, you know, 20 orders to do one thing because the idea is that when lawyers step out of these, you need it as a tool to be able to communicate, particularly if there is family violence, which means there's not going to be a lot of communication between them but it's very clear about what's going to happen and this can be a guide that will assist them, that it's a tool to avoid the potential for conflict. (L22)

Other legal practitioners (L3, L20 and L32) described the changes they made to their practice when family violence is involved, particularly around drafting orders.

> It's being mindful of not exposing children to ongoing violence. Not exposing women to positions where they're going to be put, potentially, back in harm's way … And it's about asking the right questions of those clients and reality-testing to ensure that what they're agreeing to, they actually do agree to. Because we're still looking at a *Family Law Act* that says we've got to look at orders that are less likely to lead to further proceedings. You don't want to have orders that mean these parties end up back in the court. (L20)

> The orders have to be appropriate for what's been alleged, and there has to have been an appropriate investigation, and you know that, is it appropriate that that contact takes place, for example. Do we know that? If this is still the first hearing, and she's alleged x, y, and z, and it's really horrible, and now she's just settling, is she bullied? Is she not telling me something, is something going on behind the scenes? … Well how about we err on the side of caution, and … not settle today, and we settle maybe later. (L3)

Judicial scrutiny of proposed consent orders

The court determines whether terms of settlement tendered by consent during a court event are made into orders. In parenting cases, each party or their legal representative must certify in an annexure or prescribed form (or, if the consent orders are sought to be made in court, by oral submissions) the details of child abuse and family violence and explain how the proposed order deals with these risks.[68] In relation to financial matters, the court is bound to have regard to the factors set out in the *Family Law Act 1975* (Cth) s 79(4) for married relationships, or s 90SM(4) for de facto relationships, to determine if the order is "just and equitable". We regularly observed lawyers in financial matters making submissions to this effect, although such submissions did not refer to family violence.

We observed numerous cases where judges made consent orders and saw judges congratulating litigants on reaching agreement (Chapter 11). However, we saw few cases where lawyers made oral submissions addressing risk in parenting matters. On most occasions, consent minutes were handed up; if a party was an SRL, the judge would confirm with them that they agreed to and understood the proposed orders. Cases where the court refused to make orders for safety reasons were exceptional. In one matter where the father was an SRL and the mother represented, the judge refused to make an order for ESPR due to the history of family violence and instead made an interim order for supervised time at a contact centre and ordered the appointment of an ICL and a CIC (A-C-6).

Many judicial officers emphasised that they did not simply "rubber-stamp" consent orders whether proposed by lawyers or by SRLs (J3, J6, J8, J12, J15, J18 and J19) and that they adopted a more rigorous approach to proposed consent orders in matters involving an SRL (J3, J5, J6, J8, J9, J10, J11, J12, J13, J15, J16, J18, J19, R1 and R3). J12 further explained that they would spend time ensuring that the proposed consent order was drafted in "accessible" language and that the SRL understood the terms of the order and the obligations the order placed on them.

68 *Federal Circuit Court Rules 2001* (Cth) r 13.04A; *Family Law Rules 2004* (Cth) r 10.15A. See also *Family Law Act 1975* (Cth) s 60CC(5).

Legal professionals noted that judicial officers do not accept all consent minutes that are handed up (L30), although others questioned how much scrutiny is possible in a busy duty list (L1). One legal professional gave an example of proposed consent orders that

> were struck down very heavily [by the judge] because of the nature of the [family violence] allegations. So, the judge wasn't satisfied that in light of the allegations that were made, that the matter could settle on what was proposed. (L26)

Two judges said they scrutinised proposed orders for terms that could provide an alleged perpetrator of violence with a continuing "hook into the life of the victim" (J3; similarly J18). J3 characterised such orders as "surveillance orders". J18 described a matter in which there had been a long history of family violence and substance abuse. The proposed consent order suggested the mother would monitor the father's drug use and decide whether he could see the child. The judge refused to rubber-stamp this order because it would require the mother to have an ongoing relationship with the perpetrator father. Instead, the father could demonstrate to the court that he was drug free. J3 talked about SRLs, "especially the controlling coercive … looking for opportunities" such as an order proposing that if one parent wants a babysitter, they must first ask the other parent if they can care for the children. J3 noted that this sounds "lovely when everybody's on the same wavelength" but it provides a "licence" for a perpetrator who is coercive and controlling to ask multiple questions about the other parent's life:

> That's what that order means: You can ask. Because they want to contravene you. Controlling coercive people want you back in court. So, they want the orders to be something that they know, "Yes, okay, because if she doesn't do that, I'm going to bring her back to court". They want to breach you because you're back in court. They'll get to see you again. (J3)

Some judges were more comfortable making consent orders involving SRLs when they knew the person had obtained advice from the duty lawyer (J5, J14 and J15). However, the workload and environment of duty lawyer services (see Chapter 7) raises some tensions in this assumption; while a duty lawyer can explain to an SRL the effect of the order and their obligations under the order, they are unable to advise them whether it is a sensible proposal in the full context of the matter (L11).

SRLs reported not necessarily understanding the orders they had agreed to. Anita agreed to consent orders on the third day of her hearing; the ICL gave her the terms to sign and said, "You've got to agree because [otherwise] you're going to lose your kids". No one referred Anita to see the duty lawyer to obtain advice, and Anita admitted that her "brain was already in chaos". In Robyn's matter, her former partner's barrister did all the talking when the interim consent minute was handed up to the judge. Robyn was disappointed in the lack of discussion about the agreement:

> The judge … said, "Do you understand that [a term in the proposed order]?" I said, "Not really", because I'd asked his barrister all day, about three times, "What does [that clause] mean for the children?" And she just didn't answer me again. At one point she said, "I'll have to clarify with my client", but she never came back to me and told me. The judge … asked me, "Do you think you will be able to sleep with these orders?" and I said, "No, I don't think I will". There was no other question asked … to be honest, I was completely bamboozled and I had no idea, I did not understand the process at all.

The interim order was made despite Robyn's lack of understanding and her expressed discomfort. The absence of any follow-up to Robyn's admission that she did not think she would be able to sleep is troubling. The combined effect of allegations about family violence (in this case including controlling behaviours, verbal abuse, psychological abuse, sexually coercive behaviours and financial abuse) and the absence of a legal representative to explain the order (or offer alternative orders that address the risk) powerfully illustrates the extent to which victims who are SRLs are particularly vulnerable when the other party has a skilled legal team and the process is unfamiliar.

There appears to be a disjointedness between some SRLs' experiences and the good practice described by the judicial officers interviewed. In any event, scrutiny of orders can

only effectively take place in cases in which the paperwork effectively establishes allegations of family violence and the connections to risk (see Chapter 6).

Knowledge and beliefs about outcomes

Family law litigation commences when an application for a parenting and/or financial order is made. The parties identify the issues and orders sought in the initiating application or in their response. The application and response shape the trajectory of the litigation and any orders that might be made. Lack of knowledge about family law orders and the range of feasible outcomes can influence whether the orders, particularly those made by consent, address safety concerns. Some legal professionals pointed out that SRL victims may be unaware of the types of protections that they can build into orders (L1, L2, L20 and L31):

> Sometimes women [SRLs who do not obtain legal advice] will agree to orders that they shouldn't. I see, particularly, young women who come in for advice, talking about horrendous family violence, allowing their children under one to spend equal time, week about with the other parent. Which is clearly not appropriate for children of that age. But they agree to it to make the other party happy, to stop the fighting or because they honestly believe that that's what a court's going to grant. And they have not had any advice. We see them sometimes and they've had these really inappropriate arrangements for months or even years and it's started to impact on the children because it's impacted on their attachment. And then they're coming to have advice because it's not working. And it's just so important that people get that advice early and that we have experienced practitioners giving that advice who have that level of understanding of the dynamics of family violence. (L20)

L31 explained that SRLs may not be aware of the "pitfalls" around changeover and "what's likely to go wrong" if safety is not addressed. An experienced family law lawyer, L31 explained that "we know … what will work … and where the problems are. Whereas if you're acting for yourself, you don't know that because you don't have the experience" (similarly L2). L1 noted that the fact that SRLs may fail to tie up "loose ends" or to consider all the practicalities of orders that "might be the reason for the contraventions later" (see Chapter 13).

Section 61DA(1) of the *Family Law Act 1975* (Cth) provides a rebuttable presumption that it is in the children's best interests for parents to have ESPR (this involves joint decision-making around major issues in the child's life; see s 65DAC). However, ss 61DA(2)–(4) provides that this presumption does not apply where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence and is rebuttable when not in the child's best interests. Although there is no presumption of shared time in the Act, s 65DAA does link the presumption of ESPR to the requirement to consider shared time and this appears to have created a "strong community perception" of such a presumption (ALRC, 2019, para 5.110; see also Rhoades et al., 2014; Smyth & Chisholm, 2017). AIFS found that in cases where a consent order was reached without litigation, 92 percent contained ESPR; if the matter commenced litigation but settled prior to a hearing, 94 percent of matters contained ESPR, whereas if the matter proceeded to trial, this order was made in only 40 percent of cases (Kaspiew, Carson, Qu, et al., 2015, p. 57).

Beliefs and misconceptions as to the law and what orders might be made influenced SRL's cases (Crowe et al., 2018). For example, female SRLs said they thought that the court was likely to order ESPR or they were advised not to apply for sole parental responsibility so they did not seek the more restrictive orders they preferred. Maxine, who had suffered severe physical violence including strangulation for which she was hospitalised, stated that she was not happy that her consent order, made when she was an SRL, contained an order for ESPR:

> I would have loved to have gone sole responsibility and just been able to keep my child safe, but they [unclear] said there's "no way, you can't do that. The judge will never agree to that" … Suck it up, basically.

Katherine would not agree to a proposed consent order because she felt that sole parental responsibility was in the best interests of her child given the violence, but she noted (reflecting the findings of AIFS research mentioned above) that "you're never going to get full parental responsibility until you've been to the contested hearing". For some female SRLs their decision not to seek more restrictive orders appeared to be shaped by how they thought they would be perceived within the family law system; that is, whether they would

be perceived as "no-contact" or "hostile" mothers (Rhoades, 2002; see also Barnett, 2020). As Maxine explained:

> It just seemed to be this really fine balance and you couldn't actually ask for what you wanted. You had to try and go, "Okay, the court won't do this and they won't do that". You can't know that unless you've got legal help. And it can turn the court against you if you go, "Okay, I want to get sole parental responsibility". Because they call you a "no-contact mum", I think, and you're done for in the courts, they just won't listen to anything you say. (Maxine; see also Joanne's case discussed below)

Lydia, who described that the pressure to settle to consent to orders made her feel that she was "basically at gunpoint" (see Chapter 11), also noted that she agreed to a 5:9 time split per fortnight with the father despite her safety concerns because she "recognised that that's sort of what they tend to do these days, in a lot of cases. So I realised it could have been worse".

Insufficient evidence to support the orders sought

Poor or unsafe outcomes may not only result from an SRL agreeing to certain orders, but may result from a hearing where there is a lack of evidence or poor quality evidence presented to the court. This is the critical connection between the work required in putting a case together (see Chapter 6) and presenting that evidence effectively and persuasively in court (see Chapters 9 and 10). The absence of this material makes it difficult for the judge to take account of allegations of family violence in the assessment of risk. As L24 succinctly stated, "The court can only make a decision based on the evidence you put". If affidavit material is poor, if subpoenas have not been issued and if witnesses including the Family Report writer and any expert witnesses are not cross-examined effectively, then "there's not going to be that evidence before the court" (L24). L19 made a similar comment and noted that this lack of evidence "means that an outcome might not be made … in the child's best interests because the evidence hasn't been put before the court" (see also L23, quoted earlier). The lawyers interviewed expanded on this relationship between evidence and outcomes that presents a hurdle for SRLs in terms of the nature of the outcomes that they achieve after a hearing:

> … where the evidentiary material is very thin because a self-rep might not know what they are supposed to do and what can be done to build up their case. And to put relevant material before the court, that can definitely have a detrimental impact on the outcome and the decisions that are made and reached by the judge at the end. (L29; similarly L19)

L15 also noted that the failure of some SRLs to focus on relevant issues may adversely impact outcomes in family violence cases if the SRL has failed to address legal requirements:

> I think that it's a real shame for our judicial system, especially when there's allegations of family violence or child abuse, that people are coming to court and representing themselves … Sometimes people can be quite misconstrued in their actions, and they're not their own best advocate … especially where there's traumatised people, you can do so much more to present the evidence for the judicial officer about where the matter's at, and what the concerns are, and what the issues are. As opposed to what a client might think is an important issue, may not be the same as what we know to be important to the judicial officer. And so, they do end up … with really quite appalling outcomes, because they just haven't had their case presented in a proper manner.

Furthermore, if an SRL receives an expert's report or a Family Report that is adverse to their case they are unlikely to possess the skills to adequately challenge that evidence in cross-examination, which could be influential in the outcome (L23).

Poor-quality lawyering

Discussing whether SRLs receive a poorer outcome than they would have if represented assumes that lawyers do a better job. This is clearly not always the case. Our interviews with SRLs and professionals revealed the variable quality of lawyering, and that some lawyers are deficient in identifying and adducing evidence of family violence. Emphasis was placed on the need for "competent" lawyers; when litigants have an incompetent lawyer "they're probably better off being self-represented" (J13).

In a small number of cases SRLs decided to represent themselves because of the poor performance of their lawyers and the poor outcomes they had achieved on an interim or final basis (Carol, Kate, Katherine and Tim). Carol presented one of the starkest accounts of lawyering that failed to protect her, being subjected to harassing behaviour in the courtroom from her former partner's lawyer. Initially, both parties had legal representation and the matter went to a final hearing. Carol was critical of what she perceived as her legal team's lack of preparation for trial. Her team's failure to intervene in Carol's cross-examination—that she felt was abusive—was a turning point:

> What he [former partner] did on the second day of the trial, is got his barrister to demand to see the revenge porn photos he used in his crime against me. My barrister barely said a word. The judge was almost entertained by the whole thing. His whole entourage went to get up and view the photos and they took my computer … And then he said, "We want to see the photos". At this point you would expect your [own] barrister to jump up and say "No" [but they did not object].

This was traumatic for Carol. She recounted how she was unable to sleep that night and that her driving thought was that she had to "get the fuck out of this court":

> So what I did is I said "I'll just consent to … 100 percent [of] my abusive ex's proposed orders". Just to get out of that courtroom, not knowing that when you consent to orders you can't change them. You can't appeal anything and you can't change them. I was never ever told that vital piece of information …
>
> So I walked in on the third day [of the hearing] and I just signed stuff and I didn't even really read, I was told to "read it" and "sign here, sign here". I was looking at the orders and there were words on paper that I didn't understand what they were saying because I was under so much stress, I didn't … All I knew is I was unsafe, and I had to get out of that courtroom and it was only when I started making inquiries in the following week. Yes, just ringing the local free community legal centres and stuff, "What do I do? This just happened". And they've gone, "Oh my God, didn't anyone tell you that you've signed consent orders now, unless there is significant change and it meets this standard, you can't change anything".

The consent orders Carol signed provided for ESPR and for the children to spend time with their father five nights a fortnight and for half of the school holidays. She noted that the orders allowed the father to attend the children's school:

> So that's one of his biggest stalking methods, he'll come to the school even when it's not his time with the children. Yet he won't be at the school when events are on his time. So that's one of his greatest tools to stalk and harass. He'll often video-record me [in breach of his intervention order].

Asked how she felt about her consent order:

> Angry. Disgusted. I don't have a life. I'm constantly battling various forms of harassment, stalking and abuse. It's not shared parenting. You can't share-parent with an abuser. Because I didn't specifically get orders for him to share medical or dental costs, he pays for nothing. He does pay his child support, but that's minimal … He refuses to pay any medical or dental. He overrides my parenting decisions. He can do what he wants which just means he finds, he uses his access to the children via the parenting orders as his way of infiltrating my life even though he should be out of my life. I haven't re-partnered because I don't dare, anyone in my life is going to get stalked by this man.

Carol has since represented herself in contravention proceedings that her former partner brought against her. She has not yet sought to vary or change the orders that she consented to as she has received advice about needing a significant change in circumstances (see Chapter 13).

Katherine also started out with legal representation while her former partner was self-represented. She has a 10-year intervention order against her former partner which he has breached. Katherine considered that the emotional spectacle that her former partner was able to display in the courtroom because he was an SRL shifted the approach of the court and resulted in unsafe interim orders being made:

> [Former partner] stood up and cried in the court and as soon as the tears were seen, the whole dynamic of this court case shifted and changed. And the fact that there was documentation that detailed how abusive and aggressive and violent [he was] and that there were was a Family

> Report and all of this just went out of the window and I had no voice and orders were made that put us at risk.

While Katherine's lawyer argued that changeover (i.e. when the child moves from one parent to spend time with the other) should take place at a safe venue, such as inside a police station, Katherine's former partner successfully argued that the inside of a police station was not a suitable environment for the child. An interim order was made for changeover to take place outside the police station. As a result, contact changeover gave him the opportunity to be abusive towards her. Katherine felt that having a lawyer prevented her from having a voice in the proceedings, and because she had not experienced physical violence her lawyer appeared to find it difficult to package together the pattern of behaviour as amounting to family violence. The making of this interim order was when Katherine decided to represent herself:

> So following that … I started to self-represent and it took me three months to get the handover order changed so that we were safe. So we endured another three months of abuse on the footpath [outside the] police station. And then it took me about another six weeks until the other application was heard to get the other orders that were inappropriate for us, and all because he just stood up and went "I love my daughter" … he didn't even give any evidence … He was habitually withholding her and causing conflict but that little show [in court] and a whole set of orders were made on it that counteracted what the police [and the Family Report] were recommending.

Katherine reported that when she succeeded in changing the interim order to have the changeover occur inside the police station, a new judge noted that the earlier interim order "clearly … [wasn't] a good order for this couple". Katherine still experiences abuse even with the new changeover arrangements.

Katherine's case illustrates how orders that provide for time and communication with an abusive non-residential parent can facilitate the continuation of abuse (Kaye et al., 2003). To reduce opportunities for abuse, Katherine's interim order required the parties to communicate via a handover book that accompanies the child and in which the parents can note any particular needs or events that they need to draw the other parent's attention to. Even this measure has become a tool for abuse: "He will insult me", "talk about the court hearings" or say "what he thinks about me" in the handover book. Katherine's matter was ongoing at the time of the interview; she was seeking sole parental responsibility with the father's time with the child supervised until he "gets the treatment that he needs so that he behaves appropriately with" the child.

Achieving safer orders over time

Several SRLs experienced the making of orders not as a "one-off" event, but rather an ongoing process during which their or the other party's representation status often varied (e.g. Katherine and SRL respondent mother in ICS-D; see also discussion of lack of finality in Chapter 13). Joanne's case illustrates this lengthy process of achieving safer parenting orders. She commenced proceedings seeking an urgent recovery order for the return of her children. She participated in a Legal Aid conference in which the parties reached an agreement that was submitted to the court as a consent order. At this time Joanne thought it might be possible to work with her former partner around the care of the children, despite the long history of violence. This was not the case and Joanne instituted legal proceedings to ensure safer orders. Her former partner represented himself throughout these proceedings and personally cross-examined her in the final hearing. Joanne said she was happy with her legal representation and felt that they understood family violence and appreciated the risks in her case. Indeed, her barrister suggested that "maybe there's an argument we can make here to just go for nothing [no contact]" but Joanne was worried about the repercussions of doing so:

> The worry was for me, if I do go for nothing, if I say, "No, I don't want him to have any contact", you don't know. My general feeling of Family Court is that judges don't like that [going for no time with the other parent] and it could go against me and the kids. So I didn't want to risk that. So I said supervision.

The final orders required that the father's time with the children be professionally supervised, initially at a contact centre many kilometres from Joanne's house, at considerable time and financial expense to her. This correlates with other research suggesting that post-separation, mothers are expected

to carry out significant labour to maintain contact (Laing, 2010; Rathus, 2010; Tolmie et al., 2010). However, the contact centre refused to supervise him after a couple of visits due to his "behaviour and aggression and violence". Another centre did not "even complete the intake interview with him" because "they were too fearful for my safety, the kids, the staff safety". Since then the father has had no contact with the children, although Joanne is concerned he might make further applications. This process of moving towards safer orders took approximately seven years. Joanne explained: "So progressively as that violence increased during separation in that post-separation period, I would have to go back and tighten up and self-protect really".

Impact of being self-represented

Being self-represented also has potential personal impacts for the SRL and their children (All-Party Parliamentary Group on Domestic Violence, 2016; Citizens Advice, 2016; Dewar et al., 2000; Hunter et al., 2002; Knowlton et al., 2016; Lee & Tkacukova, 2017; McKeever et al., 2018; Ministry of Justice New Zealand, 2015; Toy-Cronin, 2015; Trinder et al., 2014). For some victims of family violence, it was difficult to isolate the impact of self-representation from the impact of the violence on their lives; indeed, for some victims experiencing continuing litigation these were part of the same experience. This is captured by Carol:

> It's ruined my life. It's destroyed my life. It's taken over my life. I don't even have a life. I don't have a life, this is not living. In my victim impact statement [in criminal proceedings against her former partner] I said, "I should be free now to thrive, but I'm struggling to survive".

Personal impact

SRLs described a variety of personal impacts as a result of representing themselves, including mental health impacts, impacts on time and workload, being unavailable as a parent, and financial costs including lost income. These had a profound effect on Kate. She was an SRL for most of the parenting matter that involved allegations of child sexual abuse and IPV. This matter went to a final hearing, in which she directly cross-examined her former partner and his family:

> The biggest takeaway from all of this is that because this is a matter between the father and the children, I have been pushed aside in this entire proceeding and I have pretty much just been collateral damage. So, the court does not give a rat's arse about how I feel, what mental damage had been inflicted on me. They keep saying that they, they're doing what's in the best interest for the children in terms of the relationship between them and their father.
>
> But what essentially has happened is, the children have lost their mother. So, this process has taken me from being what was, you know, a traditionally intimate personal relationship with my children to I'm now just robotic and numb and the children have actually lost their mother due to the system, due to the process and due to the time that it's taken to drag this out.

Many SRLs described the impact of self-representation on their time and financial situation. Some spoke of it as a "full-time job" (Fiona; similarly Angela and Lachlan). For Jess it was something that occupied her mind and prevented her from sleeping: "My mind will be running through potential outcomes and arguments and don't forget this, don't forget that, I must remember to say this, and it just churns" (similarly Carol).

Many SRLs had expended a large amount of money on legal fees before becoming an SRL (see Chapter 4) or to support themselves as an SRL. Others lost income as a result of the time they needed to devote to preparing and conducting their case (Lachlan and Tim). This impacted their children as less money was available to the household (Fiona; similarly O7).

Victims of family violence struggled to separate out the mental health impacts arising from self-representation from those caused by their experience of violence. A number spoke about self-representation as creating anxiety and stress and generally impacting their mental health (Angela, Anita, Hayley, Hugh, Jess, Joanne and Natasha). For Maxine, the negative impact was connected to the court not believing her allegations about family violence. Five years after her case was finalised, she reflected:

> Even now it's upsetting. I feel so powerless. I just feel like there's all this rhetoric in the media and in the courts about how we're dealing with family violence and everything's much better and, you know, we're taking family violence

> seriously. But then you go into the court and they're like, "No, never happened; you're lying, you're making it up. There's something wrong with you. We're going to take your child away". It's just devastating.

Hayden found it difficult as a male victim of family violence to be heard. He had to work harder to have his experience recognised given the "public discourse" on the gendered nature of family violence:

> There's actually a significant minority of family violence that's perpetrated by women but that's systematically downplayed and pretty much denied by everyone and therefore there's … when you do have a female perpetrator, it's much harder for their victims to get sort of legal protection and assistance.

Others described how they were no longer the same person—that this experience had changed them "for the worse" (David; see also Kate quoted above).

The issue of legal systems abuse when the SRL is the alleged perpetrator is raised across multiple chapters in this report. A small number of women spoke about the impact of such abuse (Katherine and Marie). As noted in Chapter 10, while the judge in Katherine's case prevented the father from asking certain questions in his personal cross-examination of her, she complained that the judge did not "address … the fact that there was family violence being played out in the court … the impact on me and my family was almost irrelevant". Marie describes the legal systems abuse as worse than what her former partner did to her, which included rape, because it has meant that she had "no faith in the law at all anymore" to protect her and her children.

Katherine noted that pursuing further study at the same time as she was litigating helped her to cope:

> It was a way of just being able to block out the noise [from the family law matter] and I think that had I not had that [my study], I don't know how well I would've coped.

While Tim nominated negative impacts of being an SRL, in the end it was "empowering" as he succeeded in changing the initial order to provide him with medical decision-making in relation to the children.

Impact on children

SRLs and professionals nominated several impacts that self-representation by one or both parents may have on children beyond the making of unsafe or unsatisfactory orders. Key among these was that time spent on preparing the case, and worrying about the case, diverted the SRL from the task of parenting. As L6 explained, all this work and time means that they are "potentially … not available for their children" (similarly L2). Justin explained the impact on his children as follows:

> It certainly affected [my children], because, you know, they're cross that I couldn't spend more time with them earlier on, but because the court process takes so long and it's so costly, you know, I pretty much used up all the future savings for their education.

A small number of SRLs indicated that self-representing meant they were unable to be the parent they would have liked to be (see Angela's and Kate's comments above). As Natasha explained:

> It absolutely and utterly consumes you … it's all you think about. I—I feel I'm only now just coming out of it where I can, you know, really focus on actually being a parent. You know, focus on my job. Focus on, you know, making our lives better where I'm not consistently consumed by: what do I have to do next? Like, what's the next step? How do I fight this …?

Several SRLs spoke about the emotional or mental health impact on their children (Anita, Fiona, Joanne, Katherine and Megan). This can be difficult to disentangle from the experience of violence in the household and after separation. Maxine, whose case settled four years prior to the interview, described the impact on her son, who is now 10 years old:

> He's still very, very anxious … he's just not performing well at school. He's, sort of, grown up with me being kind of periodically really upset because I'm in court and so he seemed to be … Those really formative years, he was getting [cared for by my mother or someone else] … he'd be sent there while I'd be in court. And then I'd be a mess and I'd come home and then [spend] weeks and weeks preparing.

Jenny acknowledged that she found it impossible for her children not to be aware when she was going to court and of the impact it had on her:

> So, they knew what was going on and they knew what would happen in regards to me and my emotional state, which I feel very guilty about, you know, because I was not … I was a mess and then I'd come back [from court] crying. (Jenny; similarly Jess and Robyn)

While there is concern that children have become involved in the litigation when parents have legal representation, there is arguably "much more risk that children might be inappropriately involved [when parents are SRLs] because if you're represented, maybe you've got a lawyer to bounce things off, or to vent to" (L13). Anita commented in her interview that her former partner talks to their child about the orders. L3 also spoke about concerns with children being brought to court by SRLs because they do not have the money to pay for alternative care arrangements:

> Sometimes with self-represented litigants, money is the big problem, and … if money is a problem, they're not going to have child care? The kids come to court, which is really inappropriate. But you know, we don't have facilities here to take care of them. I've seen children in the safety room. (L3; similarly L13)

While there are mixed research findings about whether matters that involve SRLs are quicker to resolve or take much longer (see Chapter 2; Trinder, 2015), there are cases involving SRLs that are involved in litigation (initial orders and subsequent proceedings) over a very long period. For example, in ICS-E the parties had been litigating for more than five years and the child is now 10, and in ICS-F the parties had been litigating for 17 years, almost all of the life of the child. Some professionals expressed concern about how long matters involving SRLs continue without resolution and that children's lives are tied up in this process.

Conclusion

This chapter explores the outcomes that SRLs in our study achieved, whether by consent or judicial determination. Overwhelmingly participants in our study (SRLs and professionals) felt that SRLs were disadvantaged in a system premised on a model of legal representation. SRLs whose matter was finalised at the time of the interview were dissatisfied with the outcomes in terms of safety and fairness of property division. In many cases, outcomes were achieved via consent orders that SRLs described as being the product of institutional pressures or encouragement to settle, bullying, fear or the need to placate the alleged perpetrator (see Chapter 11).

The chapter discusses some examples of good practice by lawyers who adjust their practice when finalising consent orders with SRLs, including in cases of family violence.

A clear dissonance appears between what judicial officers describe as their practice scrutinising consent orders, and what SRLs (particularly women victims of violence) expressed about the consent orders reached in their matters. This may be a product of the non-representative sampling strategy for both judicial officers and SRLs. It may also be very much intertwined with the lack of evidence available or presented on the documentation at the time that a consent order is proposed—to what extent can "scrutiny" take place if evidence is wanting? Scrutiny of orders can only effectively take place in cases in which the paperwork effectively establishes allegations of family violence and the connections to risk (see Chapter 6). We note earlier work by the FLC (2016, p. 11) which found "a lack of information" available about consent orders in matters involving family violence, including about the "effectiveness" of the court rules around oral and/or written submission in these matters. Our findings confirm the need for further research in this area.

For those whose matters were judicially determined, being an SRL permeated all aspects of their matter, particularly in terms of evidence, which in family violence cases had potentially negative consequences in terms of whether there was sufficient evidence for the court to assess risk.

Negative impacts were not only seen in terms of the outcomes achieved but in the personal impact the experience of being self-represented had on the person and their children. For victims of family violence this experience had profoundly negative consequences. For some victims of family violence who are representing themselves, attaining safer orders was achieved over a lengthy process of litigation.

In the next chapter we turn to the ongoing nature of family law proceedings for some litigants. The lack of finality for some SRLs is connected to the unsatisfactory outcomes that they achieved in the first instance and the need to try to make the orders safer. For others it is connected to the lack of understanding about the orders and the obligations they imposed, and for yet others it may represent a misuse of legal proceedings to further intimidate victims of family violence.

CHAPTER 13

Lack of finality of orders

> Outcomes aren't as satisfactory [in matters involving SRLs]. And we see them coming back time and time again … They settle because they feel they need to or have to. They're not happy, they haven't had it explained to them properly. They feel pressured into it. Within six months the same issues are still there. They might have escalated. And so they come back. (J16)

For a number of family law litigants (with and without legal representation) the initial finalisation of their matter does not signify the end of proceedings. Instead they may be involved in further proceedings to secure compliance with, or workability of, orders; appeals from orders; applications to change final parenting orders;[69] and other additional proceedings (see Kaspiew, Carson, Qu, et al., 2015). While the data are unclear as to whether SRLs are more likely to continue to litigate compared to those who are represented (see Chapter 2), there is some suggestion that SRLs may be more likely to be "repeat players" (Cashmore & Parkinson, 2011; contra in the United Kingdom Trinder et al., 2014), and to be involved in certain types of proceedings, such as contraventions (Rhoades et al., 1999). This may be associated with a lack of understanding of the terms of the order and the obligations created (ALRC, 2019) and, in cases involving family violence, may be a means for the perpetrator to continue their harassment and abuse of the victim by continually dragging them back to court (Rhoades, 2002; Rhoades et al., 1999; see also ALRC, 2019, para 10.26).

This chapter commences with a discussion of the multiple reasons that might lead to ongoing litigation for SRLs generally and particularly for matters involving family violence. For victims of family violence who were representing themselves, the ongoing nature of litigation was identified as connected to the failure to adequately address safety concerns in the first instance and/or misuse of legal proceedings by the perpetrator to harass them. The chapter then explores in more detail the types of ongoing litigation that were evident in this study: contraventions of parenting orders, enforcement of property orders, applications to vary or change final parenting orders, and appeals.

69 Such applications are based on the rule *In the Marriage of Rice and Asplund* (1978) 6 Fam LR 570 and require a "material change in circumstances" since the original order was made and that the change is in the best interests of the child.

Self-represented litigants and the motivation or context for ongoing litigation

Previous chapters have pointed to particular issues and challenges faced by SRLs that may impact on, or lead to, the continuation of litigation. For some victims of family violence who are representing themselves, or facing an SRL, the continuation of litigation may be connected to the fact that the original order (whether reached by consent or judicial determination) did not adequately address their concerns about risk. This failure to address risk may have been the result of experiencing pressure to consent to orders (Chapters 11 and 12) and/or the limited or inadequate evidence presented to the court about family violence (Chapter 6). For other SRLs the continuation of litigation may be connected to the fact that they did not understand the terms of the order made and the obligations it placed on them; this may result from their difficulties in obtaining timely and targeted legal advice and information (see Chapter 5), particularly after the order was made.

Lack of understanding of orders

Orders may be breached, or a contravention application brought, because one or both parties bound by the orders do not understand the terms. It may also be the case that some orders are poorly drafted or lack clarity which impedes compliance (e.g. A-A-33). In one of the observed cases (C-B-40), the respondent father who had always self-represented clearly needed advice about his obligations under the interim parenting order. Protection orders were in place protecting the mother and the children, and the father had been convicted of criminal offences in relation to one child. The interim order specified that the father was not to have contact with the children. The mother's contravention application centred on incidents that took place at a sporting match and the father's defence was that the child had approached him. The father told the registrar that he did not know what to do in those circumstances:

> [Registrar:] Do you understand the orders? It's no contact.
>
> [SRL father:] If my son runs up to me, how can I turn him away?

> [Registrar:] I can't give you legal advice. If you take that approach you will be in contravention. It's a serious order. If you don't understand your obligations … [Reads out the order which imposes serious restraints on the father's behaviour.]
>
> [SRL father:] [Clearly frustrated] I didn't communicate, I didn't approach, not removing, not contacting. What do I do if he runs up to me? Do I have to move overseas?
>
> [Registrar:] The duty solicitor will have to explain it to you.

This case illustrates that SRLs need advice and explanations about their responsibilities and obligations in relation to parenting orders. It is not known if the father had sought advice from a duty lawyer, but referral to duty lawyers to explain orders is not uncommon and was observed in other contravention hearings (e.g. A-A-33 and C-A-21). We agree with the ALRC's (2019) recent discussion about compliance with orders and the need to focus on prevention at first instance. The ALRC (2019) recommends that after a hearing in which orders are made, the parties should be required to "meet with a Family Consultant to assist their understanding of the final parenting orders" (p. 341). We suggest that this needs to be expanded to include consent orders involving SRLs. The ALRC (2019) further recommends that the *Family Law Act 1975* (Cth) be amended to provide that when making any order the court should consider whether to include an order "requiring the parties to see a Family Consultant for the purposes of receiving post-order case management" (p. 343). These measures would go some way to assist SRLs who are unclear about the terms of the order.

Family violence and the misuse of proceedings may also be factors that intersect with misunderstandings about the terms of the order. For example, in another observed case (B-A-1) the SRL father (the respondent in the substantive parenting proceeding) brought a contravention application against the mother for failing to facilitate telephone time with the children; however, it became clear that he misunderstood the terms of the interim order and the time period in which it applied. The contravention was dismissed because the alleged behaviour took place outside the time that the interim order was in force. This contravention application needs to be seen in the wider context of the father's litigation strategy. The strategy included multiple applications, suggesting that this is not only an example of an SRL misunderstanding the terms of the order, but an example of legal systems abuse by an SRL who is an alleged perpetrator of family violence. His applications included seeking the dismissal of ICLs and seeking restraints on the mother's lawyers. In this case, the mother alleged IPV by the father. She had an intervention order against the father and, at the time of the observation, he was facing a large number of breach charges.

Enforceability?

Another key issue is whether the orders agreed to by the parties are capable of enforcement. Unenforceable orders may be more likely if no lawyers advised SRLs about the terms and practicality of the orders. L1 and L16 emphasised the role that lawyers play, whether as representatives on the record or as duty lawyers, in advising people about the practicality of orders and resultant issues around enforceability of orders. As L16 explained, "If there are two lawyers involved … the orders are … going to be more enforceable, more practicable, and better orders for the kids".

However, as discussed in Chapter 6, legal representatives can also draft poorly. Poor drafting by lawyers was explicit in a contravention hearing we observed (C-A-21). The original orders, drafted by the father's former lawyer (the father was self-represented in the contravention application), were variously described by the judge as "bizarre", "ridiculous", "crazy" and "tortured". The judge found some of the contraventions had been established and then spent considerable time amending the orders under the *Family Law Act 1975* (Cth) s 70BNBA.

Vexatious litigants or a more complex experience?

Our study, like others, recognises the diversity among SRLs in terms of motivation, skills, capacity and case complexity. The literature regularly describes the obsessive, difficult and vexatious type of SRL, who has a "popular and powerful place in the legal imagination" (Moorhead & Sefton, 2005, p. 79; see also Bryant, 2006).

Whether a person is characterised as a vexatious, serial or obsessive litigant depends on perspective and should not be assessed on the basis of multiple proceedings alone. McKeever and colleagues (2018), studying SRLs in Northern Ireland, did not observe any litigants they would consider vexatious: "From our perspective, we saw a reasonable descent into rage and frustration, resulting in unjustifiable and unreasonable behaviour" which others might have categorised as vexatious (p. 75). Campbell and Macfarlane (2019, p. 14) suggest that there may sometimes be a "conflation of genuinely vexatious and abusive litigants, and those SRLs who are simply confused and overwhelmed".

We came across examples in our study of SRLs that the other party sought to declare vexatious. For example, Tim stated that his former partner's lawyer considered applying to have him declared vexatious after he pursued an appeal from the original order and a contravention, both of which were unsuccessful. The lawyer did not proceed with the application and Tim subsequently brought a successful application to vary the original order. In one of the intensive case studies (ICS-E) the parties had been litigating for more than five years over parenting and property. The female SRL respondent, who had had eight different lawyers before representing herself, was described by the father's barrister as having brought "a multiplicity of applications with no prospect of success". These included multiple appeals (many of which were abandoned) and multiple applications in a case and, during the current property matter, she had indicated that she intended to appeal. This SRL had been subject to an unsuccessful application to declare her vexatious. The father's barrister commented that this multitude of actions had been "a never-ending nightmare" for the father in terms of costs, time and additional stress.

However, for other SRLs in our study, the ongoing nature of their litigation was far more complex than simply being considered vexatious.[70] Additional proceedings were interlinked with the experience of family violence as a victim and as a perpetrator. Some victims who were SRLs continued to bring proceedings because they felt that the risk to the children had been inadequately considered at first instance (e.g. Maxine and Megan). Sometimes these additional proceedings were misdirected and lacked merit in a legal sense (e.g. Marie, Megan and ICS-J).

Other SRLs in our study faced continuing litigation from the other party (who may or may not have had legal representation) which they experienced as a continuation of the family violence that they had experienced in their relationship. This experience is documented in earlier research that emphasised how "court processes can be used, and certainly experienced, as a form of abuse" (Kaye et al., 2003, p. 104; see also Fitch & Easteal, 2017). In matters involving family violence, the capacity for the parties and particularly SRLs to communicate or negotiate any change in parenting orders may be impossible, drawing them back into litigation in the form of contraventions or applications to vary orders about matters that might, to an outsider, appear trivial.

The fact of multiple proceedings, then, does not on its own mean that an SRL is a "serial", "obsessive" or "vexatious" litigant. There are potentially multiple intersecting reasons that might lead to further litigation by an SRL, particularly in cases involving family violence. These need to be recognised and addressed in different ways.

Contravention proceedings

Contravention proceedings are usually concerned about compliance with parenting orders rather than property matters where an applicant would usually be more interested in enforcement (Fehlberg et al., 2015; see also ALRC, 2019).

Contravention proceedings for parenting matters are dealt with under pt VII, div 13A of the *Family Law Act 1975* (Cth). This division sets out a regime of escalating penalties for lack of compliance with parenting orders when a person does not have a reasonable excuse for non-compliance (s 70NAE). Remedies range from compensation for lost time with child(ren) and compensation for wasted expenses, to community service orders, and imprisonment for serious breaches. This regime of increasing penalties makes contraventions a serious step in litigation. During the observations we saw judicial

70 "Vexatious proceedings" are defined in the *Family Law Act 1975* (Cth) s 102Q as including proceedings that are an abuse of process or instituted to "harass, annoy, to cause delay or detriment, or for another wrongful purpose" or without reasonable ground, or conducted in such a manner as to "harass or annoy, cause delay or detriment, or achieve another wrongful purpose".

officers emphasise to SRLs and the other party the serious nature of contravention proceedings (e.g. C-B-8, C-B-40), the significant powers of the court (e.g. C-A-23) and how contravention proceedings are different to the parenting proceedings (e.g. C-B-8).

To apply for a contravention, the applicant must complete the prescribed form and supporting affidavit that sets out the facts of the alleged contravention and file these documents together with a copy of the order that the person alleges has been breached.[71] The respondent does not need to file any response or affidavit. Like other family law proceedings, SRLs found the contravention process difficult and a number made errors in the process (e.g. Emma, Tim and C-A-44).

Eleven of the SRLs we interviewed were involved in contravention applications as an applicant or respondent. Seven of the female SRLs faced contravention applications (Anita, Carol, Karen, Kate, Katherine, Marie and Megan), with three being respondents in multiple contravention applications (Karen, Katherine and Marie). None of the male SRLs interviewed had been a respondent in a contravention application. One male (Tim) and four female SRLs (Emma, Jess, Katherine and Marie) brought contravention applications, or were in the process of doing so, against their former partner.

Other SRLs noted that while their orders had not been complied with by the other party, they had not brought formal proceedings for contravention for various reasons including that they decided it was not the best strategy to bring about compliance (David, Hayley, Katherine and Richard). For example, Hayley explained that she did not pursue such proceedings because "I wanted to be able to solve what the problem was, not for a punishment to be imparted".

Seventeen of the 243 observed matters involved SRLs in a contravention application either as a standalone matter or with the substantive application. Nine of these 17 matters were listed for hearing (although not all necessarily proceeded on the day) and eight were listed for mention or directions at the time of the observation. Fourteen of the contravention matters had a background of family violence, largely IPV. Almost all of the contravention applications concerned parenting (there was one exception and this case did not involve family violence [B-B-17]).

Six of the 10 fully triangulated matters in the intensive case studies involved contraventions. Half of these families had been litigating for a long period of time: in ICS-J since 2013, in ICS-F since 2014 and in ICS-K since 2015. Two cases concerned a child who was nearly 18 and was refusing to spend time with the non-residential parent (in one matter the mother and in the other the father). In one of these, ICS-F, the court file revealed that the father had brought six to eight contraventions against the mother for withholding the child. The child had refused to spend time with the father as a result of the verbal abuse she experienced when in his care. All of these contravention applications were dismissed. In the other, ICS-J, the mother alleged that the child refused to spend time with her because the child had been "alienated" by the father. The judge dismissed this SRL's application as an "abuse of process" given the length of time the parties had been involved in litigation and the age of the child.

Experience of being subject to a contravention application

As noted above, seven women in the general interview sample faced contravention applications (Anita, Carol, Karen, Kate, Katherine, Marie and Megan), often on more than one occasion. In five cases, the alleged contravention concerned the failure of the mother to facilitate the father's time (in person or by telephone) with the children (Anita, Carol, Kate, Marie and Megan). In some of these cases the SRL mothers explained that they had stopped time as a result of their concerns about the father's capacity to care for the children. This included risks arising from the father's alleged abusive behaviour or neglect of the child(ren) when they were in his care (Anita, Marie and Megan), or because professional supervisors refused to supervise the father's time with the child(ren) (Kate).

For example, Kate had withheld her children from spending professionally supervised time with the father because the father had been "causing professional supervisors absolute grief, to the point where they refused to work with him anymore. So, I [withheld] … the children". As a result, the father filed a contravention application. The hearing was set

71 *Federal Circuit Court Rules 2001* (Cth) r 25B.02; *Family Law Rules 2004* (Cth) r 21.02.

for a date when Kate was overseas for work. She explained in her interview that she tried to communicate with the court about her unavailability and offered to appear electronically; it is unclear whether this communication was received by the court or actioned. Kate did not attend court, and "was arrested coming back into the country". It is not possible to state, without further information, that the situation would have been different for Kate if she had a lawyer. At the very least, a lawyer would have advised her about the seriousness of contravention proceedings and the need to attend court. This contravention proceeding was ongoing at the time of the interview. Kate's allegations centred on sexual abuse of the children and IPV. The father was legally represented and had not only brought this contravention, but an appeal against the final orders for supervised time, and an application to vary the original order to change the professional supervision to supervision by a relative.

Karen's case was different. In her case the three contraventions she has faced concerned allegations that she had breached the non-denigration clause contained in her parenting order by speaking out about family violence. As Karen explained, one of the contraventions was linked to her statements on social media about being a victim of family violence: "He's claiming I've contravened the orders by publicly identifying on Facebook as having been a victim of domestic violence". This contravention was established. What upset Karen was that she has long spoken out about family violence, but that the judge did not appear to "care":

> I've been putting identical stuff on Facebook longer than I have even known my ex. I've been sharing posts like that during our entire marriage, our entire engagement and for years before I even met—knew him. Because I use social media as a platform to speak out against domestic violence.

Rather than her posts representing part of her social activism, they were viewed as a breach of the order. Karen was also found to have contravened the non-denigration clause on two occasions when she had spoken to a family member and to a friend "in private … asking for their support about the abuse".

In Katherine's case it was unclear what the contraventions she faced concerned, but all three were not established because her former partner did not attend court to pursue the application.

Contraventions as a continuation of abuse

Three of the women who faced a contravention (Karen, Katherine and Megan) identified the pursuit of those proceedings as legal systems abuse and a continuation of the family violence they experienced. For example, Karen (discussed above) considered that the contravention was a means of silencing her about her experience and Megan saw the contravention brought by her former partner as strategic, or a "manoeuvre". Katherine said the court knew her former partner was "using the system to be abusive … because he had filed three contraventions against me and [the] judge … had struck all three of those out". Katherine had experienced multiple forms of violence from her former partner, particularly controlling violence, verbal abuse, denigration and threats. Katherine also had a 10-year protection order against him that he had breached. In the original family law proceedings, he was self-represented. Katherine was legally represented, but ended up as an SRL when she ran out of funds partly because her lawyers responded "point by point" to her former partner's numerous lengthy affidavits "that say absolutely nothing". She identified the contravention applications as part of his ongoing abuse and control, and felt that the court recognised that the multiple contravention applications were abusive, though the pattern of abuse was never discussed or made explicit in court. Katherine was one of the SRLs for whom legal systems abuse spanned multiple proceedings and jurisdictions. At the time of interview, Katherine was seeking a vexatious proceedings order in relation to her former partner in the Magistrates Court due to his unsuccessful applications for protection orders against her. He had also threatened defamation proceedings in the County Court. As Katherine pointed out:

> If I win [the vexatious litigant application], I've only won it in the Magistrates Court, and so this lack of holistic system thinking around family violence, that doesn't look at the whole and so I have to deal with each part of that system individually. That's probably the hardest part to deal with.

Self-represented litigants making contravention applications

As noted, five SRLs in the general interview sample were in the process of bringing, or had brought, a contravention application (Emma, Jess, Katherine, Marie and Tim). As was the case for SRLs who faced contraventions, the contraventions brought by SRLs concerned varied behaviours:

- For both Jess and Marie their contravention proceedings concerned the father's behaviour towards the children in terms of neglect (in Marie's case the failure of the father to administer medicine and apply sunscreen) or ongoing abusive behaviour (Jess). Marie's contravention application was still progressing at the time of the interview, while Jess had resolved her application by consent with the ICL and the father's legal representative at court on the day. She explained that she has a "right of reinstatement" and that this has had "strategic value" for her as the father has behaved since she lodged this contravention.
- Katherine (who had faced three contraventions discussed above) brought a contravention application based on abusive Facebook posts breaching the interim orders for non-denigration. The court had granted her leave to withdraw the application and made an order at her request for reportable counselling for the parties.
- Tim (who had also brought an unsuccessful appeal, and a successful application to change final orders) brought a contravention against his former partner because she "just refused to return all the school clothes all the time". He felt that the court he attended "hates contraventions and I always advise everybody now after this, never go for a contravention". The court emphasised to Tim that "a contravention application is the most serious matter that the court can hear because of the criminal nature of sanctions" and he thought the matter was dismissed because the court was not interested "unless it's a very flagrant breach … of the orders". Despite being unsuccessful, Tim stated that after that his former partner "behaved … so, you know, even if I wasn't successful, there was essentially a rebalancing of power … there needed to be compliance with the orders and to a certain degree" it was successful on that front.

Enforcement proceedings

Two SRLs interviewed were involved in enforcement proceedings in relation to property matters (Fiona and Jenny). These are complex proceedings and the FCCA website cautions that "the law on enforcement of orders is complicated. You should get legal advice before starting any proceedings to enforce a court order". Different sections of the *Family Law Act 1975* (Cth) set out provisions relating to the enforcement of different types of financial and property orders; procedural rules are contained in the *Family Law Rules 2004* (Cth) ch 20 and the *Federal Circuit Court Rules 2001* (Cth) pt 25B.

Like the SRL victims who faced contravention proceedings, Fiona and Jenny, who pursued enforcement of their financial orders, characterised the failure to comply with the order as a continuation of the violence they had experienced. Other research has detailed similar disappointment on the part of SRLs when they realise that court orders are not self-executing (Toy-Cronin, 2015).

Fiona represented herself in her property and spousal maintenance application against her former partner, who was represented at that time. Although these initial proceedings were finalised by consent, her former partner did not comply with the orders. At the time of the interview, Fiona was pursuing enforcement of the spousal maintenance order. The failure to pay the spousal maintenance had significant financial implications for Fiona and her adult children:

> [The spousal maintenance was] to help the children and myself move on. And that was to cover rent for those three years so that we could, you know, get financially more secure. But as, yeah, that didn't happen. So, yeah, we, sort of, found ourselves quite nearly homeless again on many occasions.

Fiona describes her former partner's non-compliance with the orders as "systemic abuse pretty much right through that court system, where he still has delayed and delayed everything that he can". Fiona experienced many acts of violence during her relationship including rape, physical violence including strangulation, financial abuse, emotional abuse and controlling behaviours. When she left the relationship with the children,

her former partner kept tracking her down, requiring her to move again. Fiona undertook multiple technical steps to initiate the enforcement proceeding including obtaining subpoenas to ascertain her former partner's current address and applying for a "seizure warrant for the enforcement for the seizure and sale of property". She noted that applying for this warrant was "extremely complex and a nightmare, absolute nightmare". She clearly did well in the paperwork and oral presentation as a lawyer came up to her afterwards and said, "I'm so impressed", and told Fiona how she's "never had to do a warrant for seizure of property" and would not know how to do it. Fiona reflected that she had "learnt a lot which is great, but as the kids and I say, I shouldn't have had to".

Applications to vary orders

While family law orders seek to provide finality and stability, this is not always possible: "In family life nothing stands still" (Fehlberg et al., 2015, p. 301). Family law orders, whether made by consent or after judicial determination, may require some adjustment and flexibility as children grow older, needs change, or new circumstances emerge, including those related to risk. Some families may be able to negotiate these changes themselves; other families require litigation. For a court to revisit family law orders, the applicant must establish a "material change" in the circumstances of the case, and that it is warranted in the child's best interests. This is known as the rule in *Rice & Asplund*,[72] and while it is "commonly understood as requiring a significant change of circumstances, the case law presents a more nuanced test" (ALRC, 2019, para 11.50). As the ALRC (2019, para 11.51) recently noted, "the approach of the current case law is likely to cause confusion" for SRLs.

Four SRLs interviewed were involved in applications that raised a Rice & Asplund argument: two men (David and Tim) and two women (Anita and Megan). Three of these SRLs actually used the case name "Rice & Asplund" (Anita, Megan and Tim) when discussing the proceedings to vary orders, which, perhaps, suggests lengthy engagement with the legal system, or at the very least knowledge gained over time and/or through legal advice. Tim paid a private lawyer for advice so that he would know what he could do next in relation to reopening the allocation of shared parental responsibility:

> I went down and paid for one hour with a lawyer in the city and he suggested the Rice & Asplund … I Googled it up and by then I could sort of read the judgments and I could understand it. Googling was basically how you learnt everything.

One of the triangulated case studies involved a *Rice & Asplund* test (ICS-I), however, in contrast to the example of Tim described above, the SRL applicant father in this case appeared to be completely unaware of the need to satisfy this threshold test. When asked by the judge whether he had heard of *Rice & Asplund* the father said "it has been mentioned to me today". The fact that this test is only articulated through the case law represents a real challenge for SRLs. We note that the ALRC (2019, para 11.52) drew attention to this as an important issue for SRLs and recommended that "the threshold for a rehearing be clear on the face of the legislation".

Anita had obtained consent orders in 2015 (halfway through the final hearing) which provided for the father to have significant time with the children. In 2018 the father brought a contravention application against her for withholding one of the children from spending time with him as a result of her concerns connected to the child's serious mental health issues. At the same time the contravention was brought against her, Anita lodged a new initiating application to vary the orders. The judge, however, said that Anita

> didn't have enough evidence there and I wouldn't be able to reach the threshold, the Rice & Asplund, whatever that thing is. That I wouldn't be able to get there and … [the judge] wasn't very nice. [The judge] said if I was going to push with that, she would award costs to the husband and she would look at passing me back to [the judge] who had been in our proceedings in the first place and I might lose my children.

Anita felt that the judge did not listen to her or read the new psychological reports that she had in relation to her child's behaviour and mental health status.

Tim successfully applied to vary orders. In his case, his former partner alleged that he had abused and neglected the

72 *In the Marriage of Rice and Asplund* (1978) 6 Fam LR 570.

children (there were no allegations regarding IPV) regarding appropriate medical treatment of the children (which the parents disagreed about). Tim sought to vary the final family law orders (made following a hearing) to provide him with parental responsibility for medical decision-making. It had only been after the completion of the hearing at first instance (in which both parties were represented) that Tim obtained expert evidence regarding the children's medical needs and lodged a new application in which he sought to argue that there was a "material change" in circumstances. This was the first time Tim acted as an SRL (he did so again in a contravention hearing). The Rice & Asplund argument did not end up running and the parties agreed to vary the orders that had provided shared parental responsibility to give Tim sole parental responsibility for medical decisions.

Appeals

After the court has reached a decision, it can be appealed against by either party by lodging a Notice of Appeal within 28 days of the day of the order unless leave is granted for an extension. The higher rate of self-representation in appeal matters (FCA, 2019a, p. 35) suggests that it is not only people who represented themselves at first instance who are lodging appeals, but also those who were represented but are unhappy with the decision and decide to represent themselves on appeal.

Like other court applications, there are multiple procedural requirements that must be complied with to commence an appeal, as well as the substantive question of the basis of the appeal. It is not sufficient to appeal simply because a person does not agree with the initial decision—there must be grounds for an appeal: either the original judge "applied a wrong principle of law", "made a finding of fact or facts on an important issue which could not be supported by the evidence", or "exercised his or her discretion to arrive at a decision that was clearly wrong" (FCA, 2014). The great difficulty for appeals of parenting orders is that they are "essentially appeals from the exercise of discretion, with all the difficulty that that involves" (Fehlberg et al., 2015, p. 303). It is not enough to show that another judge might have decided the matter differently but rather it must be shown that the "decision is so clearly unreasonable or unjust that it can be inferred that discretion has miscarried" (Fehlberg et al., 2015, p. 303).

While an SRL does not incur any expenses in terms of legal representation in an appeal by virtue of their self-representation, there are other costs and expenses that may make such a step prohibitive. The filing fee for an appeal, at the time of writing, is $1380. It is possible to be exempt from this payment in circumstances of financial hardship; any filing fee paid, however, is not refunded if the appeal is withdrawn or abandoned. There is also a cost to obtain the transcript of proceedings for which there is no exemption or reduction. Megan, who ended up abandoning her appeal, emphasised the range of other costs (money and time) that made it impossible for her to proceed:

> Well, I couldn't, I just physically couldn't. I wrote them a letter saying I'm now homeless, I can't do much more, I'm sorry [explains living situation at that time] … But yes, so there was just nowhere to go and I … You need to be able to have a printer; you need to have money to be able to go to … I don't have a computer. I'd have to borrow a computer. You go to some of the libraries, it actually costs to hop on the Internet, it's not free. It costs to print. There is no provisions anywhere to be able to get, as a self-represented person, to be able to get these.

Another financial disincentive in lodging an appeal is that a person who is unsuccessful in their appeal may find themselves ordered to pay the other party's costs.

Lodging an appeal involves considerable work that can be difficult for SRLs to complete in the manner required. In earlier research on SRLs in appellate family law matters, Hunter and colleagues (2002b, p. 106) suggested that the procedural complexity of the appeals process was an "intentional policy" of the court to "prevent appeals being viewed as simply a rehearing of the matters dealt with at first instance", instead "imposing rules that direct parties to produce documents which focus on allowable appeal issues with clarity and precision" with strict deadlines. Karen, who was considering lodging an appeal, describes this complexity:

> I need to prepare an appeal. And I've downloaded the appeal documents from the Family Court website. I've gone through all their stuff online. I've checked out, like,

> different [law] firms have advice on what to put in an appeal. What you can appeal and what you can't appeal. And I've got no idea. I've got none. I look at the form and I know what I have to say and my mum could, probably, help me word it but I don't know how to answer the form.

The small number of SRLs in our research involved in appeals tended to be involved in more than one type of ongoing litigation (Tim brought an appeal, contravention and Rice & Asplund application; Megan faced a contravention proceeding and brought an appeal and a Rice & Asplund application; Kate not only faced a contravention but also faced an appeal and a Rice & Asplund application; and Marie brought and faced contravention proceedings and she also lodged an appeal). This may suggest that at least some of the SRLs who appeal may represent a cohort that is deeply enmeshed in legal battles (Smyth & Moloney, 2017). We did not observe any appellate cases, nor did we interview any judges of the Full Court of the Family Court—the appellate court for family law matters. As noted in Chapter 3, this is a gap in our research; it is an area that requires further investigation as appeals raise different issues for SRLs and may attract a different cohort of SRLs.

Who lodged appeals?

Four women SRLs interviewed lodged appeals against final orders in their matter (Alison, Marie, Megan and Natasha). All but one (Alison) were unsuccessful, out of time or abandoned. One male SRL had been involved in an unsuccessful appeal while represented (Tim), and he became self-represented after that appeal, initiating a successful Rice & Asplund (mentioned above).

Alison was the only SRL who reported that her appeal was successful. While she completed the paperwork herself, she instructed a barrister to conduct the matter in court.

Three SRLs interviewed were considering whether to lodge an appeal (Bradley, Hayley and Karen). As mentioned above Karen was contemplating an appeal against her contravention for denigrating her former partner in breach of the parenting order. Part of her appeal is also focused on her belief that the judge should have offered her some understanding or leeway in the trial because she was an SRL, rather than treating her as if she was "the equivalent of [a] lawyer" just because she was "smart and appeared to know what [she was] doing".

It is not possible to draw any conclusions from the small number of SRLs who lodged appeals. This requires further research, particularly whether, and to what extent, the appeal focuses on issues relating to the family violence evidence presented to the court and the considerations of risk. For some SRLs involved in appeals there was also a sense of desperation that was combined with a feeling that the allegations of family violence had not been listened to, and as a result they proceeded to use every available legal avenue to challenge decisions on multiple fronts that were sometimes misconceived (in a legal sense).

Who faced an appeal?

Kate was the respondent in an appeal lodged by her former partner who was legally represented; as mentioned earlier, Kate also had a contravention brought against her. Under the original order, the children lived with Kate and time with the father was to be professionally supervised. These orders were based on allegations Kate presented to the court concerning IPV (including financial abuse, control, threats and psychological abuse) and child sexual abuse. The appeal by the father was ultimately dismissed. However, Kate's former partner subsequently lodged an application to change the supervision from professional to being conducted by a relative. This application was successful, which Kate saw as an example of judicial variability:

> There is always one rogue judge isn't there? … I've had probably 16 judges look at my case; all agree that it's, you know, that the guy shouldn't be near my children. But you always find one that's out of the box and this one a couple a weeks ago said, "Sure why not? Let's let his sister supervise". So, she's signed an undertaking, I think she breached it on the first try, which was great. So, I'm, sort of, sitting here today wondering what it's all been about really, at the end of the day.

Conclusion

This chapter finds that for a number of SRLs in this study, obtaining a final order is not the end of their engagement with

the family courts. Fourteen (14/35) of the SRLs we interviewed were involved in some type of ongoing proceeding, with six of these SRLs involved in multiple types of ongoing proceedings. For most SRLs the ongoing litigation concerned contravention of parenting orders; nine of the SRLs we interviewed were facing or bringing contravention proceedings. However, they were also involved in enforcement of property orders (2), applications to change parenting orders (5) and appeals (6). For some SRLs it is only in these subsequent legal proceedings that they start to represent themselves, often because they were dissatisfied with the performance of their lawyers in the original proceedings.

Almost all of the SRLs who were involved in these ongoing proceedings were women; half of the women we interviewed were involved in subsequent proceedings (12/24) while only two men were (2/11). For those women who faced ongoing proceedings, a number characterised these continuing actions as a continuation of the abuse and harassment they had experienced in the relationship. For those women who brought additional proceedings, this was often a result of the fact that they did not think the original parenting order adequately addressed risk, or the problems with neglect of children and instances of abuse continued.

Of the 243 matters that we observed as part of the intensive case study sample, 17 involved contravention proceedings. Significantly, the research found that the vast majority of these contravention proceedings had a background of family violence (14/17).

This chapter finds that the reasons or motivations for ongoing litigation are multiple. Some reasons are inextricably linked to the challenges faced by SRLs generally in terms of understanding the terms of the order made and the obligations imposed; other reasons are closely connected to allegations about family violence and how well they were documented in the original proceedings, and whether the original order addressed risk. The findings of this chapter also echo findings from previous research about the way in which ongoing legal proceedings may be a means for continuing abuse and harassment by perpetrators of violence. While some SRLs might be viewed as vexatious, the mix of family violence suggests that the lack of finality is more complex.

ANROWS recently funded research on "Compliance with and enforcement of family law parenting orders", to be conducted by AIFS.[73] This research is much needed, and we recommend a consideration of the involvement of SRLs in that research.

73 See https://www.anrows.org.au/project/compliance-with-and-enforcement-of-family-law-parenting-orders/

CHAPTER 14

Concluding discussion and ways forward

> … it's complex and so whatever the solution is, it's going to be complex, not simple. It'll have to be multidisciplinary, and it'll have to be properly funded. (L17)

Our research explores the intersection of self-representation in matters involving family violence from different perspectives and multiple data sources. It addresses the need voiced by the FLC for research that facilitates an "understanding of the extent, experience and dynamics of self-representation in family law matters involving families with complex needs including matters where there are family violence and mental health issues" (FLC, 2016, p. 11).

SRLs are a regular feature of the family law system due to the high cost of legal representation, the limited availability of legal aid, dissatisfaction with lawyers and, in a small number of cases, choice. Our study shows that there are significant numbers of SRLs in the family law system and that the majority of the cases in which they are involved include allegations about family violence.

In terms of SRLs generally, we confirmed earlier research in terms of who SRLs are, their reasons for being self-represented, and the difficulties and challenges they face in terms of preparing, managing and conducting their family law case.

We found that when an SRL is a victim of family violence, this added a complex layer to self-representation. This experience framed and shaped the issues that were the subject of the litigation, and the environment in which the parties were litigating. A number of victims of violence who represented themselves not only continued to experience violence after separation, but this also took place in the court precinct: it was manifested in the courtroom and the nature of the litigation was often experienced as legal systems abuse. Without the buffer of a lawyer, SRLs faced this violence directly. Victims who were SRLs generally struggled to adequately document their experience of family violence in their affidavits, and experienced considerable pressure to settle for unsafe or unsatisfactory outcomes. For a number of SRLs in our research the litigation had still not ended.

We found that when an SRL was an alleged perpetrator, the court system could be used as a tool to continue abuse. This took the form of numerous applications in multiple jurisdictions, prolonging court proceedings, refusing to settle and bringing proceedings after final orders.

The key strengths of our research (see Chapter 3) included the incorporation of multiple perspectives (SRLs, judicial officers, lawyers and other professionals) and multiple data sources (interviews, observations and court files; see Chapter 3). We gathered data from regional centres through interviews and observations at circuit courts where access to services and resources that assist SRLs may be limited. We explored the experiences of SRLs through every stage of their litigation—from seeking advice and information, preparing documentation, appearing in court and conducting cross-examination, to participating in negotiations, achieving outcomes and involvement in subsequent proceedings.

The research limitations (see Chapter 3) included its focus on three jurisdictions on the east coast of Australia, the lack of diversity among SRL general interview participants, the absence of observations of appeal cases or interviews with appellate judges, and the restriction on interviewing court staff. These areas require further research.

Key thematic findings

The title of our report, "No straight lines", comes from one of the judges we interviewed, who said:

> There are no straight lines when it comes to family violence cases. At the coalface nothing is straightforward. And it's just a really difficult environment to operate in, especially when you've got self-represented litigants, or a poorly represented litigant. (J8)

This captures the intersecting and variable nature of the cases that informed our research. We found that numerous complexities and personal factors that go beyond allegations of family violence or the challenges of self-representation impacted an SRL's capacity to conduct litigation.

Four overarching thematic findings emerged in our research and frame our conclusions. These are underpinned by the experience of family violence, whether this describes the experience of a victim as an SRL or a victim who faces a perpetrator who is self-represented.

Variability

At almost every level, variability is a feature of the landscape of our research.

Like previous studies (e.g. see Dewar et al., 2000; McKeever et al., 2018; Trinder et al., 2014), we found it impossible to generalise about SRLs. SRLs are not a homogeneous group: they vary markedly in terms of their skills, knowledge and resourcefulness, and their approach and attitude to the litigation. The nature of the matters that SRLs were involved in also varied from the straightforward to the highly complex. The intersection of family violence with the absence of legal representation, whether as an alleged victim or an alleged perpetrator, added to the complexity and affected the extent to which an SRL could effectively manage their litigation.

We also found marked variability in the professionals (judicial officers, lawyers and others) that SRLs encountered in terms of their attitude and approach to SRLs, their knowledge of family violence and the assistance they provided to SRLs. Judges, lawyers and other professionals, just like SRLs, are not homogeneous (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

Variability also exists on a practice level. Even though family law is an area of federal law that applies across Australia, we found that the provision of legal aid, the nature of legal services provided at courts, and cultural practices and policies varied from state to state. In addition, each registry, and often even courtrooms within a registry, varied. We found differences in listing practices, court premises, services and facilities available to assist SRLs, and the availability of registrars and family consultants. These differences influenced the SRL experience across the family law court system.

The discretionary nature of most family law decision-making added to this variability. SRLs had little idea of "what the court will do" if the matter is litigated, even if they had the benefit of some legal advice (Parkinson, 2016, p. 499). SRLs also found that the discretionary nature of the jurisdiction meant that any advice they did receive was varied and conditional.

The extent of heterogeneity on multiple levels means that there are no "simple solutions" (McKeever et al., 2018, p. 203).

Complexity

Complexity is integrally connected to variability. SRLs encountered complexity on multiple levels: first, in terms of the family law system itself—that is, division of the two federal courts, the forms and documents to be completed and the procedural requirements. In addition, the *Family Law Act 1975* (Cth) is a large, often-changing, complex piece of legislation (ALRC, 2018a). The sheer number of reported cases has increased enormously, but there is little guidance for SRLs as to which decisions are significant and relevant to their matter. The literature recognises this structural complexity (ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Fehlberg et al., 2015).

The fragmentation of responses to family violence added to the complexity encountered by victims and perpetrators of family violence. The SRLs involved in our research needed to navigate family law while frequently engaging with other areas of law in response to family violence—sometimes simultaneously and sometimes also without legal representation. Most commonly for the SRLs we interviewed, this involved protection orders, criminal law and child protection, but also debt or bankruptcy proceedings and rental tenancies matters.

While the SRLs involved in our research were resourceful in seeking information and advice from multiple sources to help navigate this complex system, they were often unable to obtain the information and advice they needed in the form that they needed. SRLs encountered frequent feedback from services that their cases were "too complex" and fell outside that service's capacity. Cases are complex when there is a long litigation history, there are allegations of family violence or the family has other intersecting disadvantages that affect their matters.

Misalignment

We found misalignment between SRLs' expectations of family law litigation and the way family law processes and proceedings were conducted in family courts. SRLs who are victims wanted to talk about their experience of family violence and its impacts; other SRLs wanted to challenge allegations raised against them. They wanted the court to listen and to

decide quickly. However, courts are constrained by the law and procedural rules in an adversarial legal paradigm. The courts do not listen to stories; rather, they deal with legal issues and evidence, according to the legal rules (Booth, 2012). The adversarial legal paradigm expects all litigants (including SRLs) to know and comply with the law, the rules of evidence and court practice requirements. Family law litigation follows a trajectory, well known to the courts and professionals against a backdrop of under-resourced courts, crowded lists, backlogs and chronic delays. This is often unknown and unknowable to most SRLs.

Many SRLs did not know the law, rules or possible outcomes, and lacked the multiple skills required for their matter. For judges, the assistance that SRLs needed could challenge their role as impassive arbiters, as they cannot give legal advice (Moorhead, 2007). This engenders another tension: SRLs were encouraged to get advice within a system where there is a lack of affordable, accessible, ongoing legal advice tailored to their matters (Toy-Cronin, 2015).

Skilled lawyers are key

It may at first appear that a key mechanism to assist SRLs in this environment is to provide them with lawyers (Faulks, 2013). There is a definite need to increase access to legal aid, duty lawyers and ongoing affordable legal representation; at the same time there is also a need to improve the quality of lawyering for some lawyers. A clear theme in our research across all data sets is that a number of lawyers perform the tasks of family law litigation poorly. Good-quality lawyering could be critical to the course of the litigation, particularly in terms of marshalling and presenting evidence about family violence. SRLs reported that some lawyers made a difference in terms of their understanding of family violence; we observed and interviewed many excellent lawyers working in this area. Any examination of this complex and variable environment must focus on lawyering and the skills and knowledge that will benefit the court and the client.

Ways forward

We asked SRLs, judicial officers, legal and other professionals for suggestions for reform that would assist SRLs generally and in cases that involved allegations of family violence. There was surprising concurrence of views in a number of areas.

Need for the system to be better resourced

> The system is underfunded and if the government thinks it can fix it without putting proper funding into it, we're all wasting our time. (L17)
>
> More money, more judges, more courts, more lawyers, more everything. (L8)

Interview participants emphasised the need for better resourcing across the entire family law system. Judges, lawyers and other professionals noted the need for more resources on almost every level, particularly more judicial officers and more Family Report writers (J1, J2, J4, J7, J8, J13, J15, J18, J19, L8, L9, L17, L26, L34 and O7). Three judicial officers noted it was not an adequate approach for various governments to put money into front-end services such as duty lawyer services without funding the court properly (J7, J15 and R1). J7 argued that unless attention is paid to the court system, "It's going to be the same problem over and over and over again".

While SRLs did not specifically state that the court system required additional resources, many recommended the need for matters to be dealt with more quickly (Fiona, David, Jenny, John, Katherine and Tim; similarly L9 and O4). Better resourcing should assist here.

Increased access to lawyers and legal advice

Many SRLs, judges, lawyers and other professionals stated a need for greater access to lawyers and legal advice generally (J10, L9, L24, L31, O4 and O8) as well as specifically to FASS and other duty services (J4, J8, L10, L15 and R2). Some noted the need to increase funding to LACs and CLCs (L13, L15 and L23). Three judges recommended the appointment of ICLs in cases involving SRLs and for this appointment to happen earlier in the process (J2, J4 and J10). The call for more funding for legal services was not universal; one SRL suggested that the system "get rid of lawyers" (David).

FASS was identified in our research, and recent reports and evaluations (ALRC, 2019; House of Representatives Standing

Committee on Social Policy and Legal Affairs, 2017; Inside Policy, 2018), as a positive innovation that addresses the legal and non-legal needs of SRLs in matters involving family violence. As we noted in Chapter 7, this service operates in a limited number of registries and not in circuit courts. It has been recommended that FASS be expanded to other locations (ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017). Implementing this would greatly enhance access to family law for SRLs in matters involving family violence.

We also found more challenging suggestions to the delivery of legal services—that is, changing the business model of the legal profession and the way it charges and operates within the family law system (L25 and L32; similarly L34 and O12 who noted the high cost of legal services), including the provision of unbundled services (see Productivity Commission, 2014). We note that there are a number of new models of service delivery emerging in this space that provide non-profit or low bono legal practices.

Enhanced and better information for self-represented litigants

SRLs and professionals emphasised the need for more information, particularly about procedures but also about what SRLs need to do to in a substantive sense to pursue their matters effectively. Confusion in this area was exacerbated by the existence of two courts with different forms and rules (L7, L8 and L24). It is also important that legal and other professionals including court staff are made aware of the information that is available (R2).

Professionals called for "more resources" (L24), "better online resources" (L8), "better fact sheets" (L8), "a better handbook" (O10) and a checklist about each court event (J16) and noted the need for greater use of plain language (L24). Some requests for better information were simple; for example, O8 noted the need for improved "court signage". Others were more ambitious and involved, for example, remodelling the court websites to make it easier to find information (L26). L7 and L14 suggested better information was required about court processes and the litigation pathway, and L8 suggested a flow chart.

SRLs also recommended that more information be made available. This was sometimes a general recommendation about the need for more information about procedures and different court events (Elizabeth and Hugh), or about particular aspects of the process or roles in the process (e.g. Anna recommended more information about ICLs). Some SRLs made recommendations about the format of available information; Jess noted the need for succinct information as she did not want to read anything "longwinded". Given the extent to which SRLs reported being unaware of the expectation to negotiate, we recommend providing information about negotiations, how to conduct and participate in negotiations, and how to do so safely.

Given the diversity of SRLs and their needs, attention needs to be paid not only to online and written information but to the need to provide access to face-to-face delivery of information (see Trinder et al., 2014).

Information available online

There is a need for a central repository or "information hub" (O5) that contains the information and referral links that SRLs require to assist them to navigate the family law system. A considerable amount of useful information exists—for example, there is very useful information available on the federal family courts' websites; there is also useful information available on multiple LAC and CLC websites and that of the federal Attorney-General's Department—however, this information can be difficult to locate within a website, particularly when an SRL is already having to navigate multiple websites to gather all the information. Like Trinder and colleagues (2014, p. 107) we find that there is a

> pressing need to establish a single authoritative "official" website that LIPs [litigants in person] will know immediately can be trusted as a provider of accurate, comprehensive and unbiased information with no hidden agenda.

Such a central site could be provided by National Legal Aid in the same way that they have created the website Family Violence Law Help (see Chapter 5), or by the federal Attorney-General's Department (see McKeever et al., 2018; Trinder et al., 2014).

Considerable information about family law processes is provided in written form. Many interviewees emphasised the need for information in different media (e.g. videos, YouTube, podcasts, interactive technology; e.g. Lachlan and Megan; J11, L15 and L24). The need for different formats has been emphasised in previous research (see McKeever et al., 2018). One judge (J16) suggested that given the amount of time people spend in waiting areas at court this could be a good location to show videos about the nature of court events.

It was also noted that courts do not provide information in languages other than English (L7 and L15). Consequently, the work producing information in other languages is "pushe[d]" down to other services such as LACs (L7).

Face-to-face information

Written or online information cannot fully replace the delivery of face-to-face information and support (see Trinder et al., 2014). This is not only necessarily as a result of differences in SRLs' literacy or technological skills, but also simply because some information "should be delivered directly" to SRLs in such a way that they can interrogate it to ensure understanding (Trinder et al., 2014). There are a number of useful models that can be explored:

- the extensive self-help centres that operate in Californian courts[74]
- the Self-Represented Litigant Coordinator at the Supreme Court of Victoria, who can assist SRLs with information about procedure, court forms and fees, alternative dispute resolution and referral to "free or low cost legal services", and can provide "self-help packs on various types of proceedings" (Supreme Court of Victoria, n.d.)
- the procedural advice clinic that formed part of the SRL study conducted by McKeever and colleagues (2018) in Northern Ireland.

Professionals also noted that face-to-face information sessions are an important measure to assist SRLs. L23 recommended workshops or information sessions for SRLs facilitated by the court itself, LACs or CLCs. Some interviewees recalled that the FCA used to run useful information sessions at the court (J3, J4, J17 and L18). L18 recalled:

> Those information sessions I think were helpful in … explaining to litigants … It explained the process and some basics about the trajectory of the litigation and those sorts of things and the counselling [provided] … was an early intervention in terms of getting people to understand what this litigation was going to look like and how it might impact their children and them and those sorts of things.

Information needs to be more practical. What should an SRL do with the information they obtain? How should an SRL organise their material? In this context, O5 noted the benefits of coaching or mentoring for SRLs (see Trinder et al., 2014), and other professionals noted that they provided advice to SRLs about how to organise their material for it to be useful in the litigation context.

Some professionals noted the potential for technological innovations to assist SRLs—for example "online dispute resolution tools" (L29)— and recommended "look[ing] at how emerging technology can be harnessed to give that access" (L29). There has been considerable work in this technology and design space (see Zorza, 2009) and there are developments in Australia to investigate and utilise technology such as apps to enhance access to the legal system. This requires further investigation (Toy-Cronin et al., 2018).

Training and education for professionals

A constant refrain in the many reviews on the family law system and family violence is the need for further education of all professionals working within the system. Once again, this need was emphasised by our research participants. The need for more education on family violence and trauma-informed practices was emphasised for three key groups of professionals:

- judicial officers (L18, L27, Maxine; Megan recommended greater use of the *National Domestic and Family Violence Bench Book*, 2020)
- lawyers (Carol, Kristy, L20 and L25). This is critical given that lawyers provide advice to SRLs and assist them to

74 See https://www.courts.ca.gov/selfhelp.htm?rdeLocaleAttr=en (accessed 25 May 2020) and https://www.srln.org/node/1252 which provides a link to a video produced by the Judicial Council of California about the San Francisco Access Centre (accessed 25 May 2020).

prepare their documentation. Judicial officers emphasised that some lawyers also do not complete these tasks well. L25 said that while family violence training may be mandatory in some professional groups it is not for lawyers, yet for those working in family law most cases would involve family violence

- Family Report writers (e.g. Carol, Lydia and Maxine).

While these groups can access training and education in different modes, it is not mandatory (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).

Carol distinguished between knowing the law around family violence and "understanding" family violence. She identified this latter area as missing for lawyers. She noted that lawyers should stop being trained by other lawyers. Other SRLs emphasised the need for education provided by professionals with expertise in dealing with and responding to family violence.

Further education and training around the issues and impacts of family violence for family law professionals is a sensitive topic. While some judicial interviewees spoke positively about the training they had received (e.g. J5, J9 and J10), others did not (e.g. J12, J15 and J16). An issue might be the extent to which content is responsive to the experience and capacity that a judge may already have, whether the judge has a background in family law and family violence, and the extent to which material can be utilised in the work setting. Calls for education and training of legal professionals have been reiterated in successive reports (see ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; FLC, 2016) suggesting complex, translatable and sustainable work is needed.

The capacity of lawyers to deal with family violence issues needs to be addressed. Family violence content is not necessarily a part of the degree required to qualify to be a lawyer, nor part of any practical legal training or a compulsory requirement for continuing legal education. Lawyers not only potentially represent alleged victims and perpetrators in family law proceedings and need to know how to do so effectively, they are the professionals who provide advice and assistance to SRLs when drafting their documentation.

We found that some lawyers and judges appear to have inadequate understandings about family violence; they failed to recognise the full nature of family violence, its impact on victims and its relevance to parenting and property matters. We also observed and heard about lawyers and judges who clearly understood family violence, as evidenced by how these professionals engaged with alleged victims and perpetrators, how the matters were conducted, and the outcomes achieved. Good practice in this regard was revealed by some judges who described their scrutiny of consent orders in matters involving family violence (see Chapter 12) or challenged alleged perpetrators about what they had learnt from their participation in men's behaviour change programs (B-C). Promoting examples of good practice could be a useful educative tool, as Megan (who reported positive and negative experiences with judges) pointed out: "We need to start celebrating those who are doing it well".

Addressing complexity

> Simplify it. So, when you lodge an application you've got to have multiple forms lodged at the same time. You know, why? You've got to have an affidavit, a brief, and the actual application. I get that you need the affidavit and what have you and Notice of Risk and I guess the Notice of Risk gets child protection to investigate and all that stuff but I wish it was just simpler and there was information that was easy to access. (Jess)

Addressing the complexity that permeates almost every level of engagement with the family law system will assist SRLs to navigate the system. Suggestions included:

- simplify or streamline the process (Jess, J2, L2, L6 and L24)
- simplify the legislation, particularly pt VII (J7, L34 and R1)
- reduce formality (Tim and L6)
- simplify forms and documents required (L2, L6 and L26; L21 noted that "every attempt to make the forms easier has not worked either", presenting a continuing challenge to make the system more accessible. J15 suggested that "the people who should be drafting the forms are the self-represented litigants, I think, because they're the ones who are filling them in")
- reduce reliance on affidavits (O3; similarly L21)
- reduce jargon (L26 and O12), particularly ESPR (L34,

> O12 and R1) and "unacceptable risk" (L34) due to the lack of understanding in the general public about what these concepts mean legally.

Recent reports have sought to address these areas of complexity in the legislation and process (see ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009). In terms of the *Family Law Act 1975* (Cth) pt VII, the ALRC (2018a) noted that its complexity creates and compounds difficulties experienced by SRLs. There have been multiple recommendations that this part of the Act needs to be simplified (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009; see also ALRC, 2019, p. 425 which called for a "comprehensive" redraft of the Act and its subordinate legislation). Implementation of these recommendations would enhance the accessibility and transparency of the law that applies in parenting matters. The Act's provisions relating to financial matters also require simplification (see ALRC, 2019).

There may also be a place to consider the accessibility of legal language—such as "affidavit", "subpoena" (ALRC, 2018a) and the words required in a recovery application (L26). Here McKeever and colleagues (2018, p. 231) argued that

> current legal terminology, including that contained within court forms and types of court submission, draws upon dead languages and centuries of tradition in a way that is arguably unnecessary and unhelpful … The fact that such simple reforms are conceived as "changing the system" may indicate some reticence within the system to change, but the inability of LIPs to comprehend the legal terminology indicates the need for change.

Other research has also noted the need to "redesign" forms and other documentation and information sheets produced by the courts (Trinder et al., 2014, pp. 105–106). As Zorza (2009, p. 527) argues, all participants in the legal system (SRLs, represented parties, lawyers and judicial officers) "gain immeasurably" when there are a "set of easy-to-understand and use forms". This is a space in which there has been activity in terms of the use of technology and design with both courts,[75] and other services developing online forms that assist SRLs to identify and articulate the issues in their matter (Zorza, 2009; see also McKeever et al., 2018; Richardson et al., 2018; Trinder et al., 2014).

Addressing system change

One lawyer noted that the system was not designed for SRLs (L4) and a number of SRLs and professionals advocated structural changes. Danielle recommended "scrapping" the family law system altogether, while others stated that it needed to become less adversarial (Megan, Lachlan, L4, L29, O12). The need to address the adversarial nature of family law proceedings has been a consistent theme in previous reports (see ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009). The adversarial reliance on parties to "collect, collate and tender that evidence [about family violence]" is a concern in matters involving SRLs (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017, para 3.8).

Another key concern was the need to address the fragmentation across areas of law that respond to family violence (Emma and L24). L24 suggested having "one court" that would be able to address "family violence, child protection and family law", noting that many people don't understand the difference and are often in different courts at the same time addressing different aspects of the same issue. Many SRLs were involved in multiple court proceedings, often simultaneously. One legal aid lawyer (L21) spoke in favour of the recent ALRC recommendation to devolve family law work to the local/magistrates court (ALRC, 2019, p. 113). Several judges talked about improving information sharing between courts (J1, J7, J10 and J15).

Once again, the need to address system fragmentation has been a theme of recent reports (see ALRC, 2019; ALRC & NSWLRC, 2010; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017). Recommendations to improve information sharing between family law, family violence and child protection systems have also been made (ALRC, 2019; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Royal Commission into Institutional Responses to Child Sexual Abuse, 2017; State of Victoria, 2016). We note with interest the recent

75 For example in the United States; see https://lawhelpinteractive.org/ (accessed 8 October 2020).

federal government proposal to co-locate state and territory child protection and policing officials in Family Court Registries together with funding to scope technological solutions to facilitate information sharing between family law, family violence and child protection systems (Australian Government, 2019b).

One FASS women's worker suggested a "systemic, futuristic system, best practice" system be established in which family violence expertise could play a greater role (drawing analogies to the role of the ICL and the Family Report writer). In this way, family violence expertise would be more central, as opposed to now, where the family violence expertise is outside the courtroom (in FASS) and functions as "more damage control rather than … as part of the process".

Case management and referral pathways

Several SRLs and professionals spoke of the need for case management, consistent assistance and clear referral pathways to help SRLs navigate the family law system. Moreover, SRLs who are victims of family violence must have their legal and non-legal needs addressed. Kate said her "wish for the entire experiences was that I had access to continuous legal help". Emma emphasised that "case management is the only way" and that it would involve regular "interaction and reflection" to assess how the SRL was progressing.

Professionals made similar suggestions: L27 recommended a "referral pathway or some way for clients to know that they can have a safety plan at that first day or where they can obtain advice prior to that first date"; O1 emphasised the "need for more intense support"; L9 recommended "more support in the front end of the court process" to assist with SRLs' social and legal needs; O9 noted that there need to be more services for men attached to the court system; and one registrar (R1) would "like to see more boutique management of cases" or "triaging of cases". R1 made specific mention of the case management system that is employed in the Magellan list.

Case management can take place on different levels:

- within the Family Court system itself (such as the Magellan program)
- between different legal systems providing a response to family violence (House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017); for example, some FASS locations perform this work by having duty lawyers who work across jurisdictions (Inside Policy, 2018)
- between services that assist SRLs to engage with the family law system (e.g. through FASS).

Risk assessment, case management and triaging have been discussed and recommended in the context of family violence cases generally (see House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017).[76] We note that the FCA and the FCCA, in *Joint Practice Direction 1 of 2020: Core Principles in the Case Management of Family Law Matters* (28 January 2020), identified the following core principle in relation to risk:

> The prioritisation of the safety of children, vulnerable parties and litigants, as well as the early and ongoing identification and appropriate handling of issues of risk, including allegations of family violence, are essential elements of all case management.

Case management is important when the alleged victim and/or the alleged perpetrator of violence is an SRL; without a lawyer to keep the party informed and the matter progressing, the parties may encounter additional delays which may serve to heighten risk (see House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017). Here we note that the FLC (2016, p. 14) recommended piloting a "Counsel Assisting model in cases with self-represented litigants and allegations of family violence or other safety concerns for children". The ALRC (2019) also recommended an expansion of FASS case management beyond the day at court and that case management be introduced to Family Relationship Centres. All of these recommendations would assist SRLs in matters involving family violence.

Two professionals (R1 and O2) noted the need for additional supports for those families engaged in continuous litigation (see Chapter 13). We note that the ALRC (2019) made

76 We note the recent work on urgent listing and triaging as a result of parenting disputes impacted by Covid-19. See http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-profession/mr260420 (accessed 7 October 2020).

recommendations to assist litigants (not only SRLs) in terms of compliance with parenting orders. These are directed at assisting litigants to understand the terms of the order and the obligations imposed, and in turn to assist parenting in the post-separation context without necessitating returning to court.

The FCA and FCCA have recently commenced important work in this area developing the Lighthouse Project (FCA, 2020; FCCA, 2020a). This project will incorporate early risk assessment of parenting matters involving family violence and other issues that may give rise to risk (e.g. drug and alcohol use and mental health issues), tailored case management of matters and the creation of a dedicated list for high-risk matters (the Evatt list). The project will include further training of key professionals (family consultants and judicial officers) that addresses the need to be trauma-informed as well as addressing their own professional wellbeing. It is intended that the project will enhance access to justice for families experiencing risk, generate improved outcomes for litigants (including outcomes that better address safety concerns), reduce the number of adjournments and delays experienced by many litigants in the family law system, and provide better opportunities for appropriate matters to settle earlier in proceedings. The project is currently being developed and it is expected that the pilot will commence at the end of 2020 in three registries for parenting matters only (Adelaide, Brisbane and Parramatta).

The Lighthouse Project responds to the issues that have been raised in multiple reports (see ALRC, 2018a; House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; Chisholm, 2009; LCA, 2015) and reiterated in the present study on self-representation in matters involving allegations about family violence. The information available about the Lighthouse Project suggests that the pilot will meet a number of the gaps experienced by victims of family violence within the family law system, and will provide earlier access to information for people who are representing themselves particularly around safety concerns.

Key areas to enhance and address

Safety

Safety at court for SRLs who experienced family violence emerged as a key issue (see Chapter 8). The absence of legal representation had negative consequences for SRLs in terms of knowing about safety plans, accessing those measures, adequately documenting the experience of family violence in their documentation and being able to advocate and negotiate with this background.

Safety plans

Without legal representation, SRLs were usually unaware that they could contact the court to arrange for a safety plan to be put in place until the first return date or much later, with two SRLs unaware until it was raised in our interviews (Robyn and Karen). A noticeable place to alert the court of the need for safety measures would be the Notice of Risk form used in the FCCA and the Notice of Child Abuse, Family Violence or Risk of Family Violence form used in the FCA. We understand that this gap is currently being addressed by the FCA and FCCA.[77]

Alternative mechanisms for giving evidence

Concerns about safety arise inside the courtroom. The recent legislative protections regarding personal cross-examination (Chapter 10) are much needed; as O11 said, "I can see that really making a massive difference". While we note issues arising in early implementation phases, we re-emphasise the traumatic experience of personal cross-examination.

Our study, like previous research, suggests that the use of alternative means of giving evidence such as AVL has been limited (Chapters 9 and 10; see also Carson et al., 2018; Kaspiew, Carson, Coulson, et al., 2015; Kaye, 2019b). The new provision inserted in the *Family Law Act 1975* (Cth), s 102NB, should increase the use of these alternatives. Family law courts have limited technology and space and we note that the FCA and FCCA Family Violence Committee are developing a list of "minimum requirements for court premises to ensure safety for all court users" and are "undertak[ing] an audit of all court premises, including circuit locations to

77 Meeting with senior officers of the FCA and FCCA, 29 June 2020.

identify gaps in minimum requirements" (FCA & FCCA, 2019). Recommendations will then be made to "courts' administration to address the identified gaps" (FCA & FCCA, 2019). The committee will also develop the policies on safety for litigants in the courts (FCA & FCCA, 2019).

Safety of parenting orders

Our study highlighted the clear risk of unsafe parenting orders being consented to or made by the court as a result of self-representation. As noted in Chapter 12, we agree with the FLC that there is a "lack of information" available about consent orders made in family violence cases, and an absence of information about whether the court rules on oral and/or written submissions about risk are effective in reducing risk in those orders (FLC, 2016). Safety in parenting orders may also depend on the use of contact centres and we note the limited availability of such centres, the long waiting lists and the high cost of private supervision (L9).

We also note calls for "early risk assessment" and early identification of family violence (see J10, J11, L15 and L34), including in property matters that can be high risk (J2; see House of Representatives Standing Committee on Social Policy and Legal Affairs, 2017; FLC, 2016). Although beyond the scope of our research, we suggest if there are any moves in this area that the needs of SRLs are identified and addressed to equip and support them through any such "early" processes (Barnett, 2014).

Addressing ongoing legal needs

Considerable work has gone into enhancing and increasing service delivery at the beginning of family law proceedings. Duty lawyer services and FASS are invaluable; many professionals and SRLs commented on the benefits of these services and the need for these services to be enhanced and expanded (see Chapter 7).

While many of the professionals we interviewed noted the need for early assistance, including before people attended court (L2, L9, L10, L11, L15, L18, L27, L29 and O8), there is an absence of ongoing assistance or assistance at the point where a person is heading into a defended hearing. This was recognised in the FASS evaluation which recommended that, among other things, FASS should be enhanced to enable "duty lawyers to assist vulnerable clients in the later stages of matters" (Inside Policy, 2018, p. 5). Not all matters are amenable to resolution at early stages, or open to settlement, and as a result matters involving SRLs can and do continue to litigate. As noted in Chapter 5, several SRLs reported that their matters were "too complex" for advice provided by CLCs, duty lawyer services or legal aid advice sessions. Two lawyers emphasised that duty lawyers are not an answer for ongoing representation and that this remains a gap for SRLs that is not adequately filled (L23 and L24).

Assistance with completing documentation

> The best assistance you could give them was to draft their affidavit. Their initiating affidavit. Because I think, even if they're pretty hopeless in court, having that basic information before the judge, and a good application too, is important, but that's not so significant. But to do the application and the affidavit, a very detailed, very good affidavit and they're on their way. (L31)

The primacy of paperwork in the family law system means well-targeted assistance could make a difference to the articulation of an SRL's case, the nature of the decision made and the outcomes achieved (see Chapter 6). Many professionals recommended assistance in this area:

- more assistance with drafting, particularly affidavits (J13, L2 and O3), "maybe at a fixed price" (L31)
- a toolkit for drafting affidavits (L23)
- precedent of standard orders (L23)
- more templates (L2)
- university clinics that rely on law students supervised by a lawyer to assist with drafting documents (L31), such as the Family Law Assistance Program (FLAP) at Monash University.

Some suggestions about tools and templates already exist (for example, *Parenting orders—What you need to know* is useful; Commonwealth of Australia, 2016), yet there is no central point to locate these tools and some may be outdated. Both federal family courts provide a link to this resource

on their websites,[78] as does the new Family Violence Law Help website.[79] However, it is unclear how well known this resource is; it was referred to by one legal practitioner (L23) and no SRLs interviewed had used it.

The FASS, as an "enhanced duty service" (Inside Policy, 2018, p. 29), at some locations provides much-needed assistance to SRLs in the preparation of documentation. However, as noted in Chapter 7, FASS is not available at all locations, and may lack capacity to perform this work when it is.

Family Advocacy and Support Service: The need for holistic support

> … it's not all legal. Most of it's completely in the social context and that never gets addressed, only actually the legal part. (O2)

A key innovation of FASS is that it assists people with their legal and non-legal needs in the context of family violence. To do this many, but not all, locations have a men's and a women's social support worker on site (see Chapter 7). We heard many glowing comments about FASS and all its elements echoing the positive findings in its recent evaluation (Inside Policy, 2018) and in the recent ALRC report (2019). We endorse the call for expansion of FASS to more locations.

Currently, not all FASS sites have a men's support worker. This component of the service was highly regarded in our research (see also Inside Policy, 2018). We note the federal government's commitment to fund men's support workers in all FASS locations to reduce "court time spent on self-represented matters as well as further supporting victim safety" (Australian Government, 2019a).

78 See http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i/apps-orders/parenting-orders/fcc-apply-parenting-orders (accessed 7 October 2020); http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/how-do-i/apps-orders/parenting-orders/fcoa-apply-parenting-orders (accessed 7 October 2020).

79 See https://familyviolencelaw.gov.au/family-law/arrangements-for-children/how-to-make-arrangments-for-children-without-going-to-court/#collapse6755289 (under the "Resources" tab; accessed 7 October 2020).

Further research

As the first research focused on the intersection between self-representation and family violence in family law proceedings, our work has been necessarily exploratory. Some areas require further research, for example:

- whether people from Aboriginal and Torres Strait Islander and CALD backgrounds who represent themselves in matters involving family violence face additional hurdles
- the nature of self-representation in appellate matters
- SRL engagement with court staff
- whether consent orders reached when one or both parties are self-represented are less resilient or satisfactory (leading to subsequent proceedings such as contravention and enforcement)[80]
- the nature of judicial scrutiny of consent orders when both parties are SRLs and may not make submissions to the court on matters such as risk in parenting matters and "just and equitable" outcomes in property matters
- the use of technology and design innovations to assist SRLs in completing documentation and to identify the legal issues in their matter.

We finish our report with a quote from Kate, whose parenting matter concerned IPV and child sexual abuse by her former partner. Kate's litigation journey started in 2014, and is ongoing despite final orders made following a trial in 2016. Following a poor response from her first lawyer who pressured her to agree to unsafe interim consent orders, she has represented herself. Since the making of final orders, Kate has been subject to an unsuccessful appeal, an application to vary the orders (which was successful) and a contravention application all brought by her former partner. Her case captures the fragmentation in legal system responses to family violence, her struggles as an SRL obtaining advice throughout her litigation, and the way in which legal proceedings can be utilised to continue abuse rather than enhance safety.

> [I wish] … I had access to consistent legal help … I think I'll go back to my analogy of when this all happened to me, I associate it with a traumatic car accident where that support … it comes to you and they literally, they take

80 We note that this may be considered within a current ANROWS research project: see https://www.anrows.org.au/project/compliance-with-and-enforcement-of-family-law-parenting-orders/

you out of the car and they take you into the ambulance, they take you to the hospital. They will not let you out of that hospital until you are perfectly, 100 percent ready to leave and, you know, it's that whole process where, that it works really, really well. I think that the same needs to happen this way, because it's the same, sort of, trauma; it's just not a physical trauma.

So, if I'd had, in a legal sense, somebody take my hand, from the moment the police applied for that intervention order against my husband on my behalf, and they do such a brilliant job, that's where it fell down, from the moment, that after that, that somebody should have been able to take my hand, in a legal sense, and manage my case. Or give me the ability to manage my case … So, it's really, it's about having consistent reliable [advice and case management] …

And as the case grows to not have to go over the entire, like, to try and explain seven years, you know, mine's an extreme case, but there's got to be an easier way to have women supported right from the moment that they need it and keeping it consistent, so that they don't fall through the cracks, and it's really about falling through the cracks.

Addendum: Developments since the completion of the research

The fieldwork for this project was conducted prior to a number of recent changes that have been introduced to the family law system. Some of these changes have been necessitated by COVID-19, while others, such as the Priority Property Pools under $500,000 (FCCA, 2020b) and the Lighthouse Project (discussed above; FCA, 2020; FCCA, 2020a), are innovations that the family law courts have been working on for some time. The developments that have been put in place due to COVID-19 have included a COVID-19 List to deal with urgent family law disputes that have arisen due to the pandemic. The FCA and the FCCA have remained open by conducting trials and other hearings electronically via telephone or Microsoft Teams. It remains to be seen whether the fast-tracking of cases will be expanded to cases that are not pandemic-related and will continue when COVID-19 restrictions have been removed. There are key benefits including fast-tracking urgent matters, the enhancement of safety when matters are heard remotely and parties do not have to attend court, and the normalisation of the use of AVL. However, we raise some issues for consideration in the light of our research:

- Inequitable access to technology: while the move to an online system and fast-track lists increase access to the family law system and may potentially reduce delays, concern has been raised in this report about inequitable access to technology and access to the family law system (see Chapters 5 and 6). This was raised as a particular issue in regional and remote areas.
- The importance of access to services face-to-face at the time of the court event: coming to court is often the first time many SRLs, and litigants more generally, may come into contact with legal and other services that can assist them. These services at court provide critical "on-the-ground" and "on-the-spot" support. FASS is a key service for SRLs involved in matters that involve allegations of family violence. Due to COVID-19 this service is being provided via email or the telephone.[81] A number of the professionals who work in FASS commented in Chapter 7 that the availability of these support services on the ground at court means that there may be greater uptake by people and this was identified particularly as a benefit for men who may be more reluctant to seek assistance. In addition, the findings in Chapter 7 draw attention to the way in which FASS support services not only provide referral to much-needed other supports, but provide a critical role in calming and assisting SRLs in cases involving violence (whether as alleged victims or perpetrators), facilitating their ability to obtain legal advice on the day at court and present their case inside the court room.
- Potential loss of the formality/solemnity of the courtroom: the formality that is provided by a perhaps intimidating court environment can make litigants fully appreciate the obligations created by court orders. Consideration may need to be given to how the seriousness of court hearings can be conveyed in virtual hearing.

81 See https://familyviolencelaw.gov.au/fass/ (accessed 7 October 2020).

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APPENDIX A

General interview sample: Interview template

This schedule has 5 parts:

Part 1–demographic
Part 2–background to the relationship and FV
Part 3–overview of the matter
Part 4A–if the interviewee represented themselves
Part 4B–if the interviewee faced a self-rep
Part 5–final reflections/wrap-up

In some interviews one of Part 4A or 4B may be necessary–in others you may need to do both these parts.

Interview participants will jump around a lot–the first two pages tend to gather a lot of information, and it may not be necessary to directly ask some of the questions in the other parts, or you may find it useful to bring some of those questions forward.

Part 1—Demographics

1. Personal:
   a. Gender
   b. Age
   c. Highest level of education
   d. Occupation
   e. Children (how many, ages, or the relationship connected to the FL proceeding)
   f. First language
   g. Born in Australia? Aboriginal or Torres Strait Islander?
   h. Personal income at time of interview
   i. Where do you live (postcode/state)? Do you live in a metropolitan, rural or regional area?

2. How did you find out about the research project?

Part 2—Brief background to the relationship

1. Were you married, de facto, other etc. with the other person involved in the FL proceedings?

2. How long were you together?

3. When did you separate?

4. As you know our project concerns family violence–was it you or the other person who raised these allegations (or both):
   - What did it involve? Forms of violence
   - When did it start?
   - Did it continue after separation?
   - Seek any help (contact police, intervention orders, charges, refuge, other)?
   - Did the children witness/were aware of the family violence?
   - Were the child/ren direct targets of violence?

5. What legal proceedings have you been involved in arising from the FV? (family law, intervention order, criminal …)

Part 3—Overview of the family law matter in which one person was an SRL

1. What was the FL proceeding in which one/both of you were self rep about–parenting, property, etc.

2. Were you the applicant or respondent (party)? Who started it?

3. When did it commence/start?

4. Is it finished or is it still ongoing? If ongoing, where are you up to now?

5. In what court (and jurisdiction) did your matter commence?

6. Were you or the other person self-represented in this case–was this for the whole case?

7. Tell us about the proceedings? Prompts:

- How many times have you been to court? What were they about?
- Was there a Family Report?
- Was there an ICL?
- Did you have a support person?

8. Did you or the other party attempt to settle the matter at any stage? Was there any attempt to resolve the matter not using legal processes (mediation, etc.)?

9. To what extent did your allegations about family violence get documented in the family law forms (e.g. affidavits, Form 4s/Notice of Risk) or spoken about in court?

10. Outcome. Were you happy with the outcome? Is it what you wanted? Is it safe for you/children etc.? Do you think it takes account of family violence? If so in what way?

Part 4A: Interviewee—Experience as a self-represented litigant

1. *Why* were you self-represented? Prompts:

- Costs of hiring a lawyer
- Denied legal aid or legal aid was terminated at some stage
- Financial priorities
- Your assessment of your ability to represent yourself
- Preference for handling the matter yourself
- Dissatisfaction with prior legal representation (get them to detail)

2. Did you have a lawyer at any stage in this matter? Legal aid, private, pro bono?

a. If you did, at what stages (before contact with the court, assistance with completing documents, during early and/or later appearances in court)?

b. Why did you stop using them?

c. How much did you spend on legal fees?

3. What were your *expectations* at the outset of your case about what you could achieve?

4. When you were representing yourself, how did you go about doing this … what *resources* did you use?

a. Use any of the following:

- Court website/court information
- Court staff
- Phone lines such as the National Enquiry Centre (the number on the court forms)
- Community legal centre (including women's legal centres)
- Legal aid services (FASS, duty lawyer, DV service such as EIU)
- Other internet information (such as AustLII)
- Social media chatrooms

5. Did you know where to look for information about representing yourself?

6. What was the *most/least useful*–why?

7. Did you find the resources (particularly those online) *easy to use, navigate and understand*?

8. Did you *consult any experts* to help you in your case (e.g. psychologist, doctor, social worker, property valuer, accountant, private investigator)?

9. Did you find the *court forms and information* packs to be user-friendly? How confident did you feel about completing those forms?

10. Tell us about *your experience* being self-represented. How confident were you about conducting your own case? Was it what you expected? What surprised you? If not, what were the differences (e.g. court process, your interaction with others in the courtroom)?

11. Did you experience any *difficulties* representing yourself?

12. *Presentation of your case* in court:

a. How did you present your story to the court (evidence-in-chief)?

b. Did you have to cross-examine the other party? How was that?

c. Did you have to cross-examine other witnesses? How was that?

d. Did you have to deal directly with the other lawyers involved (other party's rep, ICL)?

13. If you did give evidence, did you use or have access to any of the following *special arrangements*:

a. Video link (you were in a room outside the courtroom)

b. Screens (so you could not see the other party while you gave evidence)

c. A support person (who was close to you while you answered questions)

d. A closed court

e. Access to a safe room

f. Other

14. If you did have access to special arrangements, how did this come about (your application, the court)? If you did not have access, do you know whether such protections were available?

15. As an SRL—how did you feel about the *people that you encountered* (the judge, registrar, court staff, opposing lawyers etc.)?

a. The way they treated you

b. Anyone particularly helpful, if so, how?

16. What parts of the process did you find to be the *least stressful or easy to handle*? What parts of the process did you find to be the *most stressful or difficult to handle* without a lawyer?

17. What were your *costs* in preparing the case?

18. *How much time* did you spend in preparing the case and attending court?

19. How would you describe the *impact of this experience on your life*? How did you cope?

20. What was the i*mpact of this experience on your children*?

Part 4B: Interviewee—Experience facing a self-represented litigant

1. Was the other person self-represented for the whole proceedings?

2. If they were represented for part of the proceedings—what parts?

3. *Why do you think* they were self-represented?

4. How did you *feel about* the other party being unrepresented?

5. How did the other party's self-representation *affect your experience* of the legal process? Did it cause any difficulties for you?

   a. Prompts: delays, costs, contraventions

6. Did the other party *cross-examine you* personally? If so, please tell us about your experience (nature of the questions, length of time). Did the other party ask you questions about the allegations of family violence?

   a. Were any *special arrangements* made for your cross-examination?

   b. Did the judge or your lawyer *intervene* at any stage?

7. How do you think the court, including the judge and other lawyers, responded to the other party as an SRL?

   a. Any special help (information, concessions, adjournments, endless opportunities, what they were allowed to say)

8. Did the other person have any supports in court (friends, family etc.)—how did this make you feel?

9. Do you think that the fact that the other person did not have any representation had any impact on the way the allegations about family violence were treated/responded to/addressed?

Part 5—Final reflections

1. What advice would you give someone else who was going to be representing themselves in family law proceedings?

2. If you could get legal representation for particular portions of the process, would you choose to do so?

   a. If yes, what would those portions be?

   b. If no, why not?

3. Thinking of your experience as a self-represented litigant:

   a. What was the best/worst moment?

4. Do you think that your self-representation (or that of the other party) had any impact on the outcomes of your case? If so, what?

5. If you could make one major change with respect to process and procedures that you experienced in your case, what would you want to tell policymakers?

Do you have any further thoughts or ideas that you would like to discuss?

- Do you want a copy of your transcript to be sent to you?

Thanks so much.

APPENDIX B

Legal professionals: Interview template

Background

1. Gender

2. General question about employment of participant:

   a. Legal practitioner (private/government), service provider (organisation)

   b. State? Metropolitan/rural/regional?

   c. Years of experience in this role

3. To service provider—organisation question: could you give me some details about your organisation? Services, constraints on services.

4. Is all your work in family law (or other areas) how much would involve family law?

5. What is the nature of your involvement with self-reps? Does your role involve helping them? (Examples?) If SRLs come to you for help, what are they asking for or expecting?

- *Alternatively—I've found it useful to ask if they are a duty solicitor (or indeed other professional)—so tell me about a typical day at court? How do you come to meet an SRL? What do you do to assist them? Do you go into court? If you do sometimes, what determines whether you go into the courtroom to assist?*

Self-representation in family law proceedings

6. What do you think is the prevalence of SRLs in family law proceedings you have been involved in?

7. How many of those cases involve allegations of family violence?

8. In your experience, do you think the extent of self-representation is increasing, decreasing or staying the same in family law matters?

9. In your experience, are parties more likely or less likely to be self-represented in family law matters involving family violence? Does the stage of the matter (or the nature of the hearing) make a difference? Is the gender of the party a relevant factor?

10. Is there variation in the extent of self-representation in different geographical areas (e.g. rural versus metropolitan) or for different groups of parties (e.g. Aboriginal and Torres Strait Islander peoples, CALD)?

11. Why do you think parties are without legal representation?

12. Parties come to family law proceedings looking for a resolution of their case. Do you think expectations of self-represented litigants align with actual court experience?

13. How prepared do self-represented litigants tend to be when they come to court?

- Prompts:

  a. How adequately do you think they have completed their forms (affidavits; risk forms)?

  b. Do they appear to know what to do (what that particular court event is about)?

  c. Do they know how to present themselves and their matter in the courtroom?

14. How often do SRLs have friends or family with them for help/support? Have you seen a case where a SRL has asked for a McKenzie Friend to assist them? How was that request dealt with? Do you think the McKenzie Friend was of assistance to the SRL?

Views about the judicial role in relation to self-represented litigants

15. In your experience, how do judges actually manage proceedings with SRLs? How do they manage SRLs? Do they provide SRLs with assistance?

16. What do you think the judicial role should be here? Do different judges manage this issue differently? If so, in what way?

As a legal practitioner when the other side is without legal representation

17. Do you make any adjustments to how you do your work when you are aware that the other side is an SRL? If yes, what kinds of things do you do?

- *Prompts: alerted court to some of the vulnerable witness provisions; suggested evidence be given by alternative means or in a different order than usual; intervened in cross-examination; intervened in evidence-in-chief; provided explanations to the defendant/victim; undertaken the cross-examination yourself*

18. Have you been required by a judge to make any adjustments as to how you conduct the court (or legal proceedings) when one or both parties are self-represented litigants (SRLs)? If so, what kinds of things have the judges asked you to do that are different?

Impact of self-representation on family law matters where there are allegations of family violence

19. What do you see as the impact of self-representation on the conduct of the proceedings, generally?

- *Prompts:*
  - quality of evidence
  - timeliness/delays
  - satisfying the requirements of the law

20. Does the fact that there is an SRL on the other side have any impact on you as a legal practitioner, or on your client?

21. What is your most common frustration when it comes to handling cases that involve SRLs and FV?

22. Few family law cases are fully litigated—how do you think SRLs deal with negotiations outside the court room?

23. If a consent order is reached in a matter involving SRLs—do you do take any steps to ensure that the SRL understands what they have consented to if you are on the other side or are giving them advice (e.g. ICL/duty lawyer)?

24. Do you approach consent orders differently when there is an SRL on the other side?

25. Do you approach consent orders differently if there has been FV?

26. Do you think that self-representation has an impact on outcomes in family law cases? If so, please describe the impact.

27. Have you seen any significant changes in the last five years that have impacted on your work with SRLs?

28. Do you think that ICLs have an impact on matters when one or both parties are self-represented? Please explain your answer.

Impact of self-representation on parties involved in family law proceedings

29. In your experience, has the direct-cross examination of a party by an unrepresented party (particularly where the party doing the cross-examination is the alleged perpetrator of violence and is questioning the alleged victim of violence) been a problem in family law proceedings?

- *Prior to the recent changes prohibiting direct cross-examination did you have any experience with this in court? If so, how did the court deal with it?*

30. Have you seen a case where special arrangements (e.g. audio/video link/screen) were requested in relation to the evidence or cross-examination of an SRL due to violence? If so, who requested the arrangements? If arrangements were made, was any mention made of who would pay for those safety measures? How did the arrangements affect the hearing?

31. Have you seen a case where such a request was refused—were reasons given?

32. Have you seen or conducted any matters that have been conducted under the new scheme which prohibits personal cross-examination by or of SRLs in cases of violence? [Prompt: that is under s 102NA of the *Family Law Act 1975* (Cth)—ban comes fully into place on 10 September 2019—Legal Aid is funded to administer the scheme for legal representation under the Cross-Examination Scheme]. If so, what are your thoughts on how that operated?

33. Have you seen or conducted a case SINCE the new scheme came into place where direct cross-examination was allowed? If so, what reasons were given?

34. What do you think is the impact of self-representation on the parties to a matter?

- *Prompts:*
  - Emotional distress
  - Sense of being heard/justice
  - Sense of fairness
  - Withdrawal/settling for a less satisfactory outcome

35.What do you think is the impact on any children involved in the matter?

Training and education

36. Do you receive any training or education on how to respond to, deal with SRLs in legal practice?

37. Do you receive any training or education about family violence? What is the nature of this training (i.e. content only, how to respond to victims/ perpetrators …)?

38. Does any of your training address where these two issues might intersect?

Reform

39. A number of measures have been introduced over the years that assist SRLs both inside and outside the courtroom (e.g. plain language on website, duty solicitor services, FASS, LAT [less adversarial trials])—what would you identify as having made a difference?

40. Do you have any suggestions for reform in relation to self-represented litigants in the Family Court generally? What reforms would you suggest to accommodate SRLs? What suggestions do you have in relation to family proceedings that involve family violence (and SRLs?) more specifically?

Do you have any further thoughts or ideas that you would like to discuss?

Thanks so much.

APPENDIX C

Observation notice

Research team may be present in this court room today

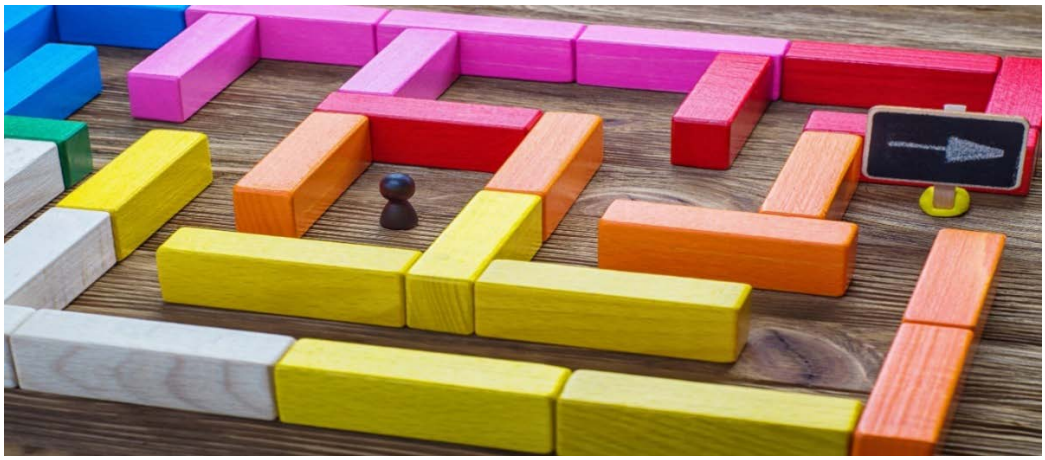
A research team from the Faculty of Law, University of Technology Sydney may be present in this court room today observing proceedings. This research has been funded by ANROWS (Australia's National Research Organisation for Women's Safety) and is **completely independent** of the Family Court of Australia and the Federal Circuit Court of Australia. Your participation in this research project will have no influence on the court proceedings or court outcomes in any way.

The focus of this research is self-represented litigants in family law proceedings involving allegations of family violence. This research project has ethics approval from the UTS Human Research Ethics Committee (ETH18-3133). All the information that is gathered during this observation is confidential, you and anyone else that is mentioned in the proceedings would not be identified in any way in any resulting report or paper.

If you do not wish your case to be observed as part of this research study please notify one of the researchers present (they are wearing a badge that identifies them) that you do not wish to be part of this research study.

If you do not want your case to be observed as part of the study the research team will not take any notes regarding your case and it will not be included in the study in any way.

If you would like further information about this research project please contact the research team (Dr Jane Wangmann, Dr Tracey Booth and Miranda Kaye) on 0423 552 565 or selfreps@uts.edu.au



APPENDIX D

In-depth coding sheet for court files

1. Date matter observed: _____

3. Registry: _____

4. Court: _____

5. Name of parties
(NOTE: for research team use only. This will be anonymised once all data around case gathered. The case will be allocated a code number/name): _____

6. Type of matter (indicate as many as appropriate):

Parenting ☐ Financial (property and/or maintenance) ☐

Other: _____

7. What was the nature of the court event observed? _____

8. Who was the self-represented party?

Applicant–Mother ☐ Respondent–Mother ☐ Other ☐

Applicant–Father ☐ Respondent–Father ☐

10. Provide a brief overview of the stage that the case is at:

_____

_____

_____

OVERVIEW OF KEY DOCUMENTS on the FILE

Date of first document on file: _____ What was this first document? _____

Who filed it? _____ Represented? Yes ☐ No ☐

Initiating application ☐ Date when filed: _____

Response to initiating application Yes ☐ No ☐

Affidavits:

1. Affidavit applicant ☐ Affidavit respondent ☐

Any other affidavits (specify):

_____

Family violence/child abuse:

Notice of Child Abuse, Family Violence or Risk (FCA) or Notice of Risk (FCCA) Yes ☐ No ☐

60I Certificate from a registered FDRP? Yes ☐ No ☐ Exempt ☐

Any subpoenas on file? Yes ☐ No ☐

When was it filed? By whom and to whom was it addressed?

_____

_____

Are there any current/prior protection orders: Yes ☐ No ☐ Unclear ☐

Does the court file indicate any involvement or contact with a child protection agency?

Yes ☐ No ☐

Family report:

Is there a Family Report on the file? Yes ☐ No ☐

Other:

Date of last document on file:_____

How many court attendances to date: _____

Transferred between courts: Yes ☐ No ☐

If yes, indicate direction of transfer and if possible why (e.g. filed in wrong court, serious of allegations)?

_____

_____

Demographic details

Note to research team—most of this information will be available in the Initiating Application and Response.

If there is more than one applicant and/or respondent—this is covered at the end of this section of the coding form.

Applicant	**Respondent**
Male ☐ Female ☐ Other ☐	Male ☐ Female ☐ Other ☐
Country of origin (tick to indicate yes): Australia ☐ • Aboriginal or Torres Strait Islander ☐ Other English-speaking country ☐ Non-English-speaking country ☐ Unknown ☐	**Country of origin (tick to indicate yes):** Australia ☐ • Aboriginal or Torres Strait Islander ☐ Other English-speaking country ☐ Non-English-speaking country ☐ Unknown ☐
Interpreter required? Yes ☐ No ☐	Interpreter required? Yes ☐ No ☐
Usual occupation:_____ If there is a financial statement: Average weekly income: _____ Net assets:_____	Usual occupation:_____ If there is a financial statement: Average weekly income: _____ Net assets:_____
Children: Yes ☐ No ☐ If yes, how many (indicate age as well) Any children not of the relationship?	

If there was more than one applicant and respondent, provide details below:

Additional applicants:	**Additional respondents:**

Legal representation

This section focuses on the person who was observed to be an SRL during the observation stage.

Has this person always been an SRL—or does the file indicate that they have previously been represented?

Always an SRL ☐ **Previously had legal representation ☐**

If the person had previously had legal representation—please indicate the following: at what stage did representation cease; is there a notice of withdrawal on the file; does it appear to be legal assistance with some forms etc.:

_____

_____

_____

Are any forms on the file completed by the SRL? Yes ☐ No ☐

If yes, please indicate what forms were complete by the SRL (initiating application; affidavits; application in a case; Notice of Risk etc.):

_____

_____

If yes—looking at forms completed by the SRL—provide an assessment of the following:

- *Adequacy (including orders sought)*
- *Address requirements of that stage*
- *Clarity*
- *Structure*
- *Language choice*
- *Relevance*

_____

_____

_____

Vulnerabilities

Using the work by Moorhead & Sefton (2005) applied in Trinder et al. (2014) we will code the SRLs for vulnerabilities.

Yes–means that this is explicitly indicated on the court file

No–means that there is no mention at all on the court file

Unsure–means that there is some implied reference but it remains unclear

Applicant	**Respondent**
Victim of violence Yes ☐ No ☐ Unclear ☐	Victim of violence Yes ☐ No ☐ Unclear ☐
Alcohol use Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Respondent ☐ Other ☐	Alcohol use Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Applicant ☐ Other ☐
Drug use Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Respondent ☐ Other ☐	Drug use Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Applicant ☐ Other ☐
Being a young lone parent (under 25 yo) Yes ☐ No ☐ Unclear ☐	Being a young lone parent (under 25 yo) Yes ☐ No ☐ Unclear ☐
History of imprisonment Yes ☐ No ☐ Unclear ☐	History of imprisonment Yes ☐ No ☐ Unclear ☐
Mental illness Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Respondent ☐ Other ☐	Mental illness Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Applicant ☐ Other ☐

Depression Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Respondent ☐ Other ☐	Depression Yes ☐ No ☐ Unclear ☐ If yes, who alleges: Self ☐ Applicant ☐ Other ☐
Living in temporary accommodation with children Yes ☐ No ☐ Unclear ☐	Living in temporary accommodation with children Yes ☐ No☐ Unclear ☐
Illiteracy Yes ☐ No ☐ Unclear ☐	Illiteracy Yes ☐ No ☐ Unclear ☐
Terminal illness Yes ☐ No ☐ Unclear ☐	Terminal illness Yes ☐ No ☐ Unclear ☐
Involvement with child protection agency Yes ☐ No ☐ Unclear ☐	Involvement with child protection agency Yes ☐ No ☐ Unclear ☐

Examining some particular documents in detail

Notice of Child Abuse, Family Violence and Risk (FCA) OR Notice of Risk (FCCA)

1. Who filed the notice?

Applicant ☐ Respondent ☐ Both ☐

2. Does this relate to? Child abuse ☐ Family violence (intimate partners) ☐ Both ☐

3. Who is alleged to have perpetrated?

Applicant ☐ Respondent ☐ Both ☐ Other person (specify): _____

4. Details about the abuse (Part E) (Definitions to be provided to research team)

4A—Intimate partner violence: Physical ☐ Sexual ☐ Emotional/psychological ☐ Property damage ☐ Verbal abuse ☐ Controlling behaviours ☐ Technology ☐ Other ☐

4B—Child abuse: Physical ☐ Sexual ☐ Emotional/psychological ☐ Property damage ☐ Verbal abuse ☐ Controlling behaviours ☐ Technology ☐ Witnessing IPV between parents ☐ Other ☐

5. Assessment of information provided (how detailed, specific, duration, injuries/impact noted):

_____

_____

6. What evidence is included to support the allegations (e.g. civil protection order; criminal convictions; photographs; witnesses …)

_____

_____

7. Any other child abuse matters raised (e.g. parental capacity; drug and alcohol use; mental health; neglect):

_____

_____

Affidavits completed by the self-represented litigant

1. Was this completed by a lawyer? Yes ☐ No ☐

2. In your assessment, is the affidavit set out in a logical affidavit format?

3. Allegations about family violence? Yes ☐ No ☐

4. Are the allegations detailed and specific? Yes☐ No ☐ Some, but not all ☐

5. Please provide an example to support your answer to (4):

_____

_____

6. Does the affidavit provide/outline evidence to support the allegations?

Yes ☐ No ☐ Some, but not all ☐

7. If yes, what kinds of evidence (e.g. witness statement, other affidavit, orders, police record)

_____

_____

8. How well claims (or denials) about FV connected to orders sought?

_____

_____

Family Report

1. If there is a Family Report on the court file—does it provide any information about the allegations/denials about family violence. Please detail:

_____

_____

General section for comments:

Please provide any additional comments in relation to the court file that was unable to be captured in the above coding sheet–with particular focus on FV allegations and representation status.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

APPENDIX E

Intensive case study: Interview template self-represented litigants

Interviews will vary depending upon whether the interviewee was self-represented or represented in the observed hearing.

To be completed by interviewer in advance of interview:

Reference number:

Name/code name of participant:

Representation status as observed:

Gender of interviewee:

Time and date of interview:

Registry:

Name of interviewer/s:

Was interview immediately after the hearing or at a later time?

If later, how was it conducted?

Start of interview:

Reference to consent form, anonymity, destruction of records, project, questions?

Demographics:

a. Age range

b. Highest level of education

c. Occupation

d. Children

e. First language

f. Country of origin (identify as Aboriginal or Torres Strait Islander?)

g. Personal income at time of interview—prompt card will be available to point to broad set of income ranges

h. Where do you live (postcode)? Do you live in a metropolitan, rural or regional area?

Questions in relation to the observed matter:

- So what was your court matter today about?
- Reason for representation/lack of representation today and previously.
- Legally aided (or applied for legal aid) at any time?
- If represented, is your lawyer a private practitioner?
- Have there been attempts to settle the case out of court? Did you participate in any negotiations today?
- Experience. What was the impact of being self-rep?
- Experience of the hearing:
  - Confidence
  - Expectations
  - Understanding—What did the judge say? What did the other side say? What happens next? What do you have to do?
  - Having your say/being heard. How much of what you wanted to say did you actually say?
  - How much did you feel the judge listened to you?

  - How much did you feel the other side listened to you?
  - How satisfied were you with your performance in court today?
  - Cross-examining? Being cross-examined?
  - How did you feel about the outcome today?
- Any difficulties/any advantages of being represented/unrepresented.
- How did the other party being represented/unrepresented affect your experience of the matter observed?
- Any fears for your safety today?
- Information and advice before court.
  - Did you request help from court staff at all?
  - If unrepresented, any interaction with duty services or other services today?
- Readiness for court—what did you do? Did you do enough?
- Costs in preparing for this hearing?
- If unrepresented, do you think you might need a lawyer in future hearings?
- Interviewer may want to ask particular questions in response to observed interactions/outcomes.
  - For example:
    - "A screen was used for your protection during cross-examination: how did this impact on your evidence/feelings of safety?" OR
    - "The judge ordered that the other party should be allowed more time to file their documents because they are unrepresented, do you think this is fair?"
- Any changes to improve the process generally?

Comments by interviewer after interview:

Was participant emotional or distressed?

Was it necessary to stop the interview at any time or completely?

Was the participant co-operative?

Any communication/language issues?

APPENDIX F

Intensive case study: Legal professional interview template

To be completed by interviewer in advance of interview:

Reference number:

Name/code name of participant:

Gender of client as observed in court:

Time and date of interview:

Registry:

Name of interviewer/s:

Was interview immediately after the hearing or at a later time?

If later, how was it conducted?

Any communication/language issues?

Reference to consent form, anonymity, destruction of records, project …

Questions in relation to the observed matter:

- Solicitor/barrister? How long have you been practising? How long have you been engaged in observed matter?
- Which party has made the allegations of family violence? Brief details.
- Is your client partially represented by you or have you been engaged from the start of the matter?
- What do you think are the reasons for other side's non-representation?
- Initial reaction to other side being unrepresented.
- Impact on pre-court negotiations or correspondence about court event today? Did you have to deal with the self-rep directly?
- Was your behaviour in relation to the SRL today either during negotiations, preparation for the court event, in court, or afterwards, different to what it would have been if you were dealing with legal rep? How?
- Thoughts on self-represented party in court—preparation, participation, understanding of events and outcomes—and impact of self-representation on these issues.
- Effectiveness of judge in ensuring efficient and just hearing. Prompt—when is a hearing fair or efficient?
- What is your impression of the self-represented party's general understanding of the next steps?
- Given allegations of family violence, were there any safety issues today? What was the impact of self-representation on these issues?
- Impact of self-represented party on the representation of your client.
- Views on McKenzie Friends or other support personnel.
- Impact of self-represented parties on court system generally.
- Support needs of self-represented parties.
- Interviewer may want to ask particular questions in response to observed interactions/outcomes.
    - For example:
        - "A screen was used for protection during cross-examination: how did this impact on your ability to undertake cross-examination? Evidence/feelings" OR
        - "The judge ordered that the other party should be allowed more time to file their documents because they are unrepresented, do you think this is fair? How will this impact on your client? You?"
- Changes needed—to make today's hearing more effective?

APPENDIX G

Advisory committee list of members

Kylie Beckhouse—Director, Family Law, NSW Legal Aid

Antoinette Braybrook—CEO of Djirra (formerly the Aboriginal Family Violence Prevention and Legal Service Victoria)

Professor Thea Brown—Emeritus Professor, School of Social Work, Monash (Vic)

Janet Carmichael—Principal, Child Dispute Services, Federal Circuit Court of Australia

Gabrielle Craig—Solicitor, Women's Legal Service NSW

Professor Rosemary Hunter—Professor of Law, University of Kent (United Kingdom)

Angela Lynch—CEO, Women's Legal Service Queensland

Professor Kathy Mack—Emerita Professor, College of Business, Government and Law; Senior Research Fellow, Judicial Research Project, Flinders University (Adelaide, Australia)

Professor Greg Reinhardt—Executive Director, Australasian Institute of Judicial Administration (AIJA)

Dr Liz Richardson—ICCE Secretariat Officer, AIJA; Senior Research Fellow, Australian Centre for Justice Innovation (Monash)

Justice Judy Ryan—Judge of the Appeals Division, Family Court of Australia

Emma Smallwood—Program Manager, Family Violence/ Associate Director, Family Law, Victoria Legal Aid

Representation from ANROWS

APPENDIX H

Information and resources available on the federal Family Court websites targeted at self-represented litigants (as at 26 February 2020)

	Family Court of Australia	Federal Circuit Court
Do-it-yourself kits (a number of these kits are common resources across both courts)	• Application for consent orders • application for consent orders–proposed orders template • application for divorce kit • divorce service kit • financial statement kit • initiating application kit • response to initiating application kit • service kit • superannuation kit	• Application for divorce kit • divorce service kit • financial statement kit • initiating application kit • service kit • superannuation information kit
How Do I... (these links often connect to the other court's website where appropriate. For example while the FCA lists the divorce "How do I ..." information, if you select it you will be taken to the relevant FCCA page)	Divorce–How do I: • Apply for a divorce • register for the Commonwealth Courts Portal and eFile an application for divorce • file further documents to support my application for divorce • serve a divorce • prove I am divorced Commonwealth Courts Portal–How do I: • Register for the Commonwealth Courts Portal? • electronically file • navigate the Commonwealth Courts Portal Applications and orders–How do I: • Apply for parenting orders • apply for property and financial orders • apply for consent orders • accessing orders Service–How do I: • Serve court documents Breaches and non-compliance–How do I: • Apply to the court when parenting orders have been breached or not complied with	Divorce–How do I: • Apply for a divorce • file further documents to support my application for divorce • serve a divorce • prove I am divorced Commonwealth Courts Portal–How do I: • Register for the Commonwealth Courts Portal? • electronically file • navigate through the Commonwealth Courts Portal Applications and orders–How do I: • Apply for parenting orders • apply for property and financial orders • accessing orders Service–How do I: • Serve court documents Breaches and non-compliance–How do I: • Apply to the court when parenting orders have been breached or not complied with

	Family Court of Australia	Federal Circuit Court
Fact sheets	• Applying to the court for orders • before you file–pre-action procedure for financial cases • before you file–pre-action procedure for parenting cases • children and international travel after family separation • court fees • compliance with parenting orders • do you have fears for your safety when attending court • exposure to family violence and its effect on children • separation and stress • court to court–tips for your court hearing • legal words used in court • marriage, families and separation • parental conflict and its effect on children • preparing an affidavit	• Applying to the court for orders • are you having trouble serving your divorce application • child support applications • court fees • compliance with parenting orders • do you have fears for your safety when attending court • dispute resolution in family law proceedings • enforcement hearings • exposure to family violence and its effect on children • separation and stress • first court event–helpful information • legal words used in court • marriage, families and separation • parental conflict and its effect on children
Videos (official YouTube accounts)	• eFiling your family law matter in the Commonwealth Court Portal (3 years old) • court tour (5 years old) • mediation–what to expect (5 years old) • about the Commonwealth Courts Portal (5 years old) • how to apply for a divorce: serving divorce papers (6 years old)	• eFiling your family law matter in the Commonwealth Court Portal (3 years old) • how to apply for a divorce: serving divorce papers (6 years old) • court tour (5 years old) • about the Commonwealth Courts Portal (5 years old)

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to Reduce Violence against Women & their Children