

## Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings

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### Abstract

Enquiries and research reveal that many victims of family violence who are personally cross-examined by the alleged perpetrator of that violence in family law proceedings find the process traumatising and intimidating. Not only can such processes generate unsafe and unfair outcomes but also they are unlikely to produce the high quality evidence required by the court. In deference to the emotional wellbeing and vulnerability of these victims, a number of measures for receiving such evidence are available to Australian Family Court judges. However, currently these are all discretionary powers and anecdotal evidence suggests that the use of these tools is unpredictable and dependent on the individual judge. In the absence of empirical evidence, this paper aims to open up potential emotional dimensions of judicial decision-making in this context with a view to exploring these theoretical ideas in later empirical work.

### Key words

Family violence; family law; cross-examination; judging; emotion

### Resumen

Investigaciones revelan que muchas víctimas de violencia doméstica que, en el curso de procedimientos en tribunales de derecho de familia, son sometidas a contrainterrogatorios por parte del supuesto autor de esa violencia consideran ese proceso traumatizante e intimidatorio. Esos procesos no sólo pueden arrojar resultados inseguros e injustos, sino que también tienen pocas probabilidades de producir el material probatorio de calidad que requiere un tribunal. Por deferencia al bienestar emocional y a la vulnerabilidad de esas víctimas, los jueces de familia de Australia tienen a su disposición varias medidas para obtener esas pruebas; sin embargo, actualmente, son sólo poderes discrecionales, y pruebas circunstanciales sugieren que su uso es impredecible y dependiente de cada juez. En ausencia de pruebas empíricas, este artículo intenta abrir una dimensión emocional potencial de

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la toma de decisiones judiciales en este contexto, con miras a explorar esas ideas teóricas en trabajos empíricos posteriores.

**Palabras clave**

Violencia doméstica; derecho de familia; contrainterrogatorios; juicios; emoción

**Table of contents / Índice**

1. Introduction .....	4
2. Family law legal processes .....	5
2.1. Family law context .....	5
2.2. Measures available to family law judges.....	7
3. Judicial decision-making .....	9
4. Emotional dimensions of judicial decision-making in this context .....	12
4.1. Empathy .....	14
4.2. Avoid or downplay empathy .....	15
4.3. Information processing .....	17
5. Conclusion .....	17
References.....	18
Case law .....	23
Legal sources (or Treaties, conventions and legislation).....	23

## 1. Introduction

In Australia, recent concern has focused on the difficulties faced by victims of family violence<sup>1</sup> who are cross-examined personally by the self-represented perpetrator of that violence<sup>2</sup> or, who being self-represented themselves, are required to cross-examine the perpetrator of that violence personally in family law proceedings. That cross-examination of victims of family violence conducted by a lawyer is a difficult and stressful process is well documented (Bowden *et al.* 2014, Lynch *et al.* 2016). These difficulties are exacerbated however and take on different dimensions when the cross-examination is conducted personally by the perpetrator of that violence (Loughman 2016, House of Representatives Standing Committee on Social and Legal Affairs 2017 [4.172- 4.174]). Research indicates that such personal cross-examination can be not only stressful, intimidating and traumatising, causing harm or “secondary victimization” to the victim, but it might also lead to unsafe parenting consent orders and/or disadvantageous property settlements (House of Representatives Standing Committee on Social and Legal Affairs 2017, [4.172-4.174], Loughman 2016). Nor is it likely to produce the high quality evidence required by the court to adjudicate matters (Lynch *et al.* 2016).

Despite high numbers of cases before Australian family courts<sup>3</sup> involving family violence and parties who are not represented by a lawyer – in this paper such parties are referred to as “self-represented litigants” (SRL) – currently, personal cross-examination is not prohibited in Australian family law proceedings. Legislation that will become operational in the second half of 2019 however will prohibit personal cross-examination in matters involving an allegation of family violence subject to certain conditions that will likely limit the impact of the provision. Whether or not this provision applies, under the law there are already a number of other measures including a range of interventions in the cross-examination process, designed to reduce trauma for victims of family violence giving and receiving evidence, available to judges in family law proceedings. However, these powers are discretionary and submissions to numerous inquiries over the last decade suggest that the use of these tools is unpredictable and dependent on the individual judge (Kaye *et al.* 2017). Specialist education and training for judicial officers has been a common recommendation of many of these inquiries to enhance judicial understanding of the nature and impact of family violence (House of Representatives Standing Committee on Social Police and Legal Affairs 2017, [1.12]). Nonetheless, despite several years of advocacy and education programs, submissions to the recent 2017 inquiry into *A Better Family Law System* reveal that many victims of family violence continue to be traumatised, distressed and intimidated by family law processes that enable and facilitate direct and personal confrontation with the perpetrator of that violence.

Education and training aimed at enhancing judicial knowledge of family violence does not appear to have been sufficient to bring about shifts in judicial decision-making in this particular legal context. It is timely then to investigate fresh approaches to this problem in order to alleviate the harms caused to victims of family violence by legal processes, and enhance victims’ access to justice in family law proceedings. Drawing

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<sup>1</sup> For the purposes of this paper, the term “family violence” is conceptualised as it is in the Australian family law system. According to s 4AB of the *Family Law Act 1975* (Cth), family violence is “violent, threatening, or other behaviour by a person that coerces or controls a member of that person’s family (the family member) or causes that family member to be fearful”. The section includes examples of behaviour that may constitute family violence such as physical violence, sexual violence, financial abuse, and emotional abuse. There are however, a variety of terms used in other legal and non-legal contexts to characterise such conduct including domestic violence, domestic and family violence and intimate partner violence.

<sup>2</sup> In this paper, all references to “victims” and “perpetrators” of family violence, are to *alleged* victims and perpetrators of family violence.

<sup>3</sup> There are three main courts responsible for family proceedings in Australia: the Family Court of Australia (FCA), the Family Court of Western Australia (FCWA) and the Federal Circuit Court of Australia (FCCA). For the purposes of this paper, reference to “family courts” in Australia, is a collective reference to these courts.

on lines of enquiry emerging from the emotion and law literature, this paper explores potential emotional dimensions that underpin the exercise of judicial discretion in deciding whether to invoke protections in question. In the absence of research in relation to judicial perspectives on emotion in family law, this paper sets out the theoretical basis for a larger study that aims to investigate emotion work undertaken by family court judges and explore the role of emotion in judicial decision-making in matters that involve allegations of family violence.<sup>4</sup>

The paper is in four sections. The first section introduces the paper and the second section contextualises the problem in the Australian family law system, outlines the adversarial frame for family law judging and sets out the relevant measures available to judges to protect victims of family violence in the event they are personally cross-examined by the perpetrator of that violence in family law proceedings. The third section highlights the tensions that underpin procedural reform to address the impact of family violence on giving evidence in family law proceedings and examines the exercise of judicial discretionary power in this context. The fourth section explores the potential emotional dimensions of judicial decision-making in this context. It takes empathy as the starting point and theorises about the influence of fear, anger, and emotional investment in traditional legal processes, on avoiding or downplaying empathy in the course of processing information relevant to the decision.

## 2. Family law legal processes

### 2.1. Family law context

Australia is a federation of states and territories, and legislative power is divided between a central federal government and individual state governments. The Australian Constitution sets out the areas in which the federal government can legislate; and areas that are not covered by this list are the province of the states. There is no one court in Australia at the federal or state level that specialises in family violence and deals with all issues connected to family violence. Instead, “a complex network of courts and processes [have] to be negotiated by women dealing with domestic violence” and related issues (Stubbs and Wangmann 2015, p. 113). For instance, if a victim of violence seeks protection from further violence and applies for a protection order, this is a state issue and it is dealt with in a state court. If the victim of violence seeks to resolve parenting issues where the other party is the perpetrator of violence, this is a federal issue and is dealt with in federal family courts.

To better understand the issue of family violence in Australian family law, it is useful to distinguish the issue in criminal and protection order legal contexts. Criminal law is a public legal domain and comes within the province of the states. In criminal proceedings, the State prosecutes the defendant for criminal conduct that comprises family violence. A victim of that violence is a witness in such proceedings. If the offence is proven (at the higher criminal standard) the defendant is punished by the State. In protection order proceedings, the victim of family violence applies for a protection order against the perpetrator of that violence. These proceedings are conducted in state magistrate courts – they are not family court matters –. If the violence is established (to the lower civil standard), an order can be made that seeks to protect the victim from future violence and is tailored to meet the individual needs of the victim. Although protection orders are civil in nature, a breach of a protection order is prosecuted by the State as a criminal offence.

Family law in Australia is a private civil legal domain that involves individual litigants or “parties”. It deals with post-separation rights, duties and liabilities relating to children, parenting, financial and property matters. Family violence is generally part

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<sup>4</sup> The study will be undertaken as part of a larger project with Jane Wangmann and Miranda Kaye – *Exploring the impact and effect of Self-Representation by one of both parties in family law proceedings involving allegations of family violence* funded by Australian National Organisation for Research on Women's Safety (ANROWS).

of the factual background to a dispute before the court rather than a key constituent of the dispute itself. In making parenting and child contact orders, the court considers a range of matters, guided by the core principle of the best interests of the child. More recently a new principle to ensure safety from family violence has emerged (Stubbs and Wangmann 2015) and in this context, evidence of family violence might be relevant to the nature of parenting (child contact) orders made in circumstances where the evidence suggests a need to protect a child from harm or from witnessing family violence between parents. According to Stubbs and Wangmann (2015, p. 120) however, "the Australian family law regime stays firmly within a pro-contact culture" which means that it, like other jurisdictions such as the United Kingdom, promotes shared parenting and continuing contact between the child and the non-residential parent. Parties are expected to reach agreement that maintains future relationships between parents and children. In designing such orders, the focus is on the future where "the father is highly visible (...) not as a perpetrator of violence but primarily as a father" and family violence is generally regarded as a past event (Stubbs and Wangmann 2015, p. 121).

Specialist family courts conduct family law proceedings underpinned by conventional adversarial principles. Two opposing and partisan parties shape the proceedings, identify the relevant and contentious issues, present and scrutinise the evidence, and make submissions in support of their case. Oral evidence, presented and tested by direct questioning of witnesses in particular, is a distinctive feature of fact-finding in adversarial legal proceedings. Cross-examination is the process of questioning a witness called by the opposing party. If a party wants to contradict evidence given by a witness (who might also be the other party), the law requires the party to put their case to that witness in cross-examination. Failure to put the case in cross-examination means that the party cannot rely on contradictory or discrediting evidence in support of their case.

An important assumption underpinning this process is that the parties have lawyers and the parties' legal representatives will conduct cross-examination. In Australia however, there is no general legal right to legal representation in legal proceedings whether proceedings are civil or criminal. Australian law does not require people who litigate family law proceedings to have a lawyer and parties can be self-represented. Research shows that the most common reason for self-representation in family law proceedings is financial; people cannot afford to pay for private legal representation; or they have been privately represented but run out of money; or they do not qualify for legal aid (Dewar *et al.* 2000, Hunter 2000, Birnbaum *et al.* 2012, Macfarlane 2013, Trinder *et al.* 2014). With regard to the final point, it is important to note that in Australia, as in the United Kingdom, the availability of legal aid for family law proceedings is greatly restricted (Trinder *et al.* 2014). Another common reason for self-representation is distrust of lawyers (Macfarlane 2013, Knowlton *et al.* 2016). Recent Australian literature also suggests that there may be a small group of SRLs who use the family law proceedings as a means to extend the abuse of their victims (Loughman 2016, Kaspiew *et al.* 2017, Douglas 2018, Carson *et al.* 2018, pp. 5-7). According to Kaspiew and colleagues (2017, 180) such legal systems abuse (and this would include personal cross-examination) is a tactic intended to "perpetuate the dynamics of control".

Over the last two decades, Australian family courts have expressed concerns about the extent to which parties without legal representation (SRLs), appear in family law proceedings (House of Representatives Standing Committee on Social and Legal Affairs 2017, [4.164]). The 2017 House of Representatives Standing Committee report, *A Better Family Law System to support and protect those affected by violence* (House of Representatives Standing Committee on Social and Legal Affairs 2017),<sup>5</sup>

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<sup>5</sup> One of issues considered by the inquiry was the effectiveness of arrangements, which are in place in family courts to support families before the courts where one or more party is self-represented, and where

found that in 2015-2016, 15 per cent of matters before the Family Court of Australia (FCA) involved parties without legal representation and in 26 per cent of matters only one party had a legal representative (*ibid.* [4.165]). In its submission to *A Better Family Law System* inquiry, the FCA stated that the extent of self-representation was increasing in matters before the court (*ibid.* [4.165]). The rate of self-representation appears to be higher in the Federal Circuit Court of Australia (FCCA) where in 2014-15, 52 per cent of trial matters involved at least one party who was unrepresented and in 20 per cent of these cases, both parties were unrepresented (House of Representatives Standing Committee on Social and Legal Affairs 2017, [4.166]).

Family violence is an issue raised in a substantial proportion of the matters heard in the family courts (Australian Law Reform Commission 2018, [6.22]). Some 50 per cent of matters that come before the FCA and 70 per cent of matters that come before the FCCA involve allegations of family violence (House of Representatives Standing Committee on Social and Legal Affairs 2017, [1.6]). In 2017, the Commonwealth government commissioned the Australian Institute of Family Studies (AIFS) to explore the extent to which direct cross-examination was a feature of matters involving self-represented litigants and alleged or substantiated family violence (Carson *et al.* 2018). The findings indicated that the majority of both self-represented fathers and mothers conducted direct cross-examination. The report concluded that approximately 122-173 cases in the FCA and FCCA over two financial years would have involved direct cross-examination in cases involving violence.

## 2.2. Measures available to family law judges

Currently, the *Family Law Act 1975* (Cth) (hereinafter, FLA) does not prohibit self-represented perpetrators of family violence from directly cross-examining the victim of that violence; nor does it prohibit self-represented victims from directly cross-examining the perpetrators. Although cross-examination is often regarded as a fundamental entitlement of parties in adversarial legal proceedings, it is not necessarily an unfettered entitlement (Bowden *et al.* 2014). A number of key measures are available to Australian family courts, that if utilised, could minimise the harms caused by such cross-examination and more generally assist victims to give their evidence. Those statutory measures available include:

- A specific power to limit, or prevent, the cross-examination of a “particular witness” in child-related proceedings (FLA s 69ZX(2)(i)). This power is informed by the principles set out in section 69ZN including “that the proceedings are to be conducted in a way that will safeguard (...) the parties to the proceedings against family violence” (FLA s 69ZN(5); Principle 3). Notably, these provisions do not apply in financial/property proceedings.
- A general power to direct or allow a person to give evidence via video or audio link in family Law proceedings (FLA s 102C). This is dependent on the appropriate facilities being available in the court and/or the remote location.
- A general power to protect witnesses from being asked, or having to answer, questions that the court regards as “offensive, scandalous, insulting, abusive or humiliating” and to “forbid 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” (FLA s 101).
- A general power to disallow improper questions in cross examination; that is questions which in the opinion of the Court are “misleading or confusing”, “unduly annoying, harassing, offensive, oppressive, humiliating or repetitive”, are “put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than in stereotype” [*Evidence Act 1995* (Cth) s 41].

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there are allegations of family violence. See: [www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/FVlawreform](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform)

Aside from these legislative measures specific to family law proceedings, general powers relating to court management are also available at common law. Courts have an inherent power to make orders for the administration of justice and a proper exercise of this power can include orders for alternative arrangements to give evidence [*BUSB v R* (2011)]. The Full Court of the FCA identified further court powers when it reviewed and revised guidelines to assist family court judges to enable a fair trial for self-represented litigants in *Re F* (2001). Of particular relevance to this paper is guideline 9: “where in the interests of justice and the circumstances of the case require it, the judge may (...) question witnesses; identify applications or submissions which ought to be put before the court; suggest procedural steps that may be taken by a party (...)” [*Re F* (2001), p. 519].

Outside this legal framework, the FCA has also developed best practice principles, Family Violence: *Best Practice Principles* (BPP), to assist judges manage legal proceedings involving allegations of family violence. These principles are voluntary and not intended to constrain judicial discretion. According to the BPP, victims of family violence are characterised as “often traumatised and vulnerable witnesses” and judges are advised:

To ensure that parties are afforded fair and equal access to justice and those at risk of harm are not re-traumatised by the court process, it is essential that judicial officers and practitioners utilise the courts’ powers to achieve a fair hearing.

The BPP remind judges of the wide powers available to them to manage court processes in child-related proceedings and set out the following principles:

- The court is to actively direct, control and manage the conduct of the proceedings and is to conduct proceedings in a way that will safeguard the parties to the proceedings against family violence;
- The courts can give directions or make orders about how particular evidence is to be given;
- Make orders limiting or not allowing cross-examination of a particular witness.

Further, in exercise of its general powers to control proceedings, the court may:

- Require that an alleged perpetrator be shielded from view while the victim is giving evidence;
- Allow the victim to have a support person near them while giving evidence;
- Close the court to the public or exclude specific persons from the courtroom.

It is clear therefore, that while the law does not currently prohibit direct cross-examination in family law proceedings, nonetheless judges have wide discretionary powers to ameliorate the stress and trauma associated with giving evidence by constraining cross-examination or by ordering alternative arrangements more generally to assist victims of family violence to give and receive evidence. Indeed, the BPP actively encourage judges to exercise these powers in appropriate circumstances. It is also important to note that the court can exercise these powers on its own motion; judges do not have to wait for a relevant application by a party to proceedings before invoking protective measures.

In response to the findings of the 2017 *Inquiry into a Better Family Law System* regarding the trauma and intimidation caused by personal cross-examination in family law proceedings where the matters involve family violence, the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth) was passed by Parliament in December, 2018. Subject to certain conditions, the Act prevents perpetrators of family violence from personally cross-examining the victims of that violence and it also prevents victims from having to cross-examine the perpetrators personally in family law proceedings. If an order is made prohibiting such cross-examination under the Act, the cross-examination must be conducted by

a legal practitioner acting on behalf of the examining party. Prohibitions ordered under the Act will take effect from September 2019.

Under the Act, such personal cross-examination is prohibited in cases where there is an allegation of violence and one of the following conditions is satisfied:

1. Either party (victim and perpetrator) has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party;
2. A family violence order (other than an interim order) applies to both parties;
3. An injunction under the *Family Law Act 1975* (Cth) applies to both parties;
4. The court orders that the provisions apply.

Section 102NB of the Act further provides that in the event that this provision does not apply, 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.

It is likely that these conditions will significantly limit the application of the prohibition. Given family violence remains a highly unreported crime and there is a high rate of attrition through the legal system (Cox 2016, pp. 39-42), it will be difficult for many victims to satisfy the first condition. Furthermore, although civil protection orders are sought more widely than reporting the violence to the police, recent research indicates that approximately one-quarter of family law cases included information about a family violence order on the file and at least half of these were interim orders (Kaspiew *et al.* 2015). This suggests that few victims may satisfy the second condition. In a similar vein, very few injunctions referred to in the third condition are granted under the *Family Law Act*. It appears then, that given the limitations of these three conditions, a significant proportion of victims of family violence will not be eligible for the mandatory protection and the current law will continue to apply unless judges use their wide discretion in the fourth condition to prohibit personal cross-examination. Although the provision holds considerable promise for victims of family violence on its face, there is no legislative guidance provided for the exercise of such discretion. If family law judges' current approach to the issue (discussed below) is any guide, it is unlikely that the fourth condition will be invoked to any great extent. The next section examines family law judges' current approach to the issue.

### 3. Judicial decision-making

Despite the wide discretionary powers available to judges in family law proceedings under the current law and the exhortations of the BPP however, the evidence suggests that most judges do not utilise these protective measures to assist victims of family violence in direct cross-examination confrontations with the perpetrator of that violence. In its submission to the 2017 Parliamentary inquiry, *A Better family Law System*, Victoria Legal Aid (VLA) described the use of these available measures "as unpredictable, inconsistent and dependent on the individual judge. There is no certainty of process in the family law system for those experiencing or using violence. The unpredictability is distressing and can result in unsafe or inequitable outcomes." In its report at the conclusion of this inquiry, the Senate Committee stated it was "deeply concerned that the Court has not more actively used its existing powers to regulate this practice [direct cross-examination]" (House of Representatives Standing Committee on Social Police and Legal Affairs 2017, [4.273]).

A woman interviewed by Kaspiew and colleagues in their recent research on family violence and parenting described her experience of direct cross-examination by her former abusive partner in the absence of protective measures.

Um, you know, at one point when my ex was representing himself (...), he questioned me directly for days on the stand (...). And at one point, he started questioning me completely off topic and not related to anything, about [sexual practices] and nobody stopped him. I'm sort of looking at the judge and looking at my solicitor, looking at

the barrister, and they all just looked the other way, [indistinct], I don't know, was asleep or something. Nobody stopped him. (Kaspiew *et al.* 2017)

In the recent judgment of *Carmichael and Linton* [2017], a family court judge recounted a similar situation.

The father cross-examined the mother at hearing for a number of hours. The father frequently asked irrelevant and misleading questions, despite regular interjections from the mother's counsel and despite the court's intervention. He was repeatedly asked to restrict his questions to the issues in dispute. ([73])

The judge does not describe the nature of the court's intervention nor comment on whether the court offered other protective measures such as a video-link or screens to assist the victim to give evidence in these circumstances. There is no mention of protective measures in the judgment at all.

Women's Legal Services Australia (WLSA) surveyed 330 women who had been victims of family violence in order to examine the extent and impact of personal cross-examination in family law courts (Loughman 2016). The 2015 WLSA survey found that "39 per cent of matters settled before judgment and 45 per cent of those respondents said the fear of personal cross-examination by their abuser had been a significant factor in their decision to settle". Some 144 respondents who were personally cross-examined commented on how this affected them and it was evident that many women experienced such personal cross-examination as an extension of the perpetrator's violence against them. Comments by different respondents about their experiences include:

I felt he had the privilege to continue his intimidation and threats, yet in a confined legal space.

I felt as though the court was enabling my ex-husband to re-abuse me but publicly this time. I was so traumatised I lost 20 kilos and lost my hair.

It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing him, yet we are 'thrown to the wolves' when we enter the court room. It made me feel all the feelings over again. It made sick to the core. (Loughman 2016)

In its submission to the 2017 Parliamentary inquiry, *A Better family Law System*, WLSA quoted from a self-represented respondent who was required to cross-examine her abuser personally:

I was so scared because he has a look in his eye that still intimidates me, and I had the future safety of my child in jeopardy. I just wanted to get down on my knees and BEG the judge to allow me to protect my daughter. It's so hard to appear calm and collected when on the inside you have so much hatred for the person who has hurt you and your child, and so much fear for what lies ahead. And also fear that he might show up at your house later and become violent because he's mad at you for standing up to him. (Women's Legal Services Australia 2017)

Research suggests that in matters where there are allegations of violence, some judges have utilised "court craft" (Family Law Council 2016) or "judge craft" (Moorhead 2007) to manage personal cross-examination. That is, judges use some of the protective measures available, relay questions themselves, or rely on intermediaries such as Independent Children's Lawyers (ICL) to cross-examine the parties (Harman 2017). *Stanley and Stanley* [2016] provides an example of such court craft. In that case, the judge expressed concern at the prospect of personal cross-examination of the victim of family violence (mother) by the perpetrator of that violence (father). The judge recorded that after discussion with the parties, the victim indicated that she preferred to give evidence in court rather than by video link. Accordingly:

To manage this process in the cross-examination by the father, the parties agreed that the father would direct each question of the mother to me. I then, if necessary, rephrased and reframed the question and had the father confirm that it reflected that

which he wanted to ask and then I asked that question of the mother. (*Stanley and Stanley* [2016] FamCA 1130 [96])

Interventions of this nature are uncommon however because judicial intervention can conflict with the traditional, passive role of the judge in adversarial legal proceedings (Moorhead 2007). Judges are wary of actively intervening in the questioning of witnesses because doing so might suggest that they are not neutral, that they are assisting one party against the other, that they are biased; judicial impartiality in the conduct of proceedings is fundamental to the legitimacy of adversarial legal processes (Mack and Roach Anleu 2010, Bowden *et al.* 2014). Research reveals that SRLs already challenge the judge's passive role in proceedings (Dewar *et al.* 2000, Moorhead 2007). Judges struggle to assist SRLs in family law proceedings and frequently face a "dilemma" in deciding how to conduct proceedings in a manner that affords "both parties procedural fairness" (Dewar *et al.* 2000, pp. 48-49).

Litigants' entitlement to a "fair hearing" in all legal proceedings whether civil or criminal is well recognised across the globe (for example see article 14 of the *International Covenant on Civil and Political Rights* and article 6 of the *European Convention on Human Rights*). Such an entitlement is certainly a core tenet of adversarial family law proceedings in Australia. In this context, fairness means that parties to a family law matter are entitled to conduct proceedings and test the evidence before an impartial judge according to law. From a traditional adversarial perspective, cross-examination is fundamental to a fair hearing because testing the credibility and the veracity of the witness by an "intense and probing interrogation" is considered the best way to establish the truth or otherwise of an allegation (Henderson 2016). An honest witness is "usually calm and confident in the way they give their evidence" distinguishing them from dishonest witnesses; an honest witness will demonstrate "steadfast resistance to suggestion, coupled with consistent recall of the facts" (Henderson 2016). Measures that deny or constrain a party's entitlement to test the evidence by cross-examination could undermine the fairness or procedural justice of the proceedings (Bowden *et al.* 2014).

Both parties have equal status in family legal proceedings and both are entitled to a fair hearing. There is a disjuncture however, between the concerns and interests of parties in family law proceedings where one party is a victim of family violence and the other party is the perpetrator of that violence. According to the concept of a fair hearing, the perpetrator of family violence is entitled to test the evidence by lawful means in order to put forward their case and this includes personally cross-examining the opposing party who is the victim of that violence. From the perspective of the victim however, such personal cross-examination can adversely affect the victim's ability to give evidence, cause significant harms such as trauma and stress, and generate unsafe and disadvantageous outcomes. For many victims of family violence, direct and personal confrontation with the alleged perpetrator of violence in the courtroom is perceived as an extension of the violence and the legal proceedings become a site for further abuse rather than justice (Loughman 2016). In its submission to the recent inquiry into *A Better Family Law System*, WLSA (2017) argues that "procedural justice in legal proceedings should mean that the courts put in place measures to ensure that witnesses can provide their evidence comfortably, and without fear of intimidation". In the family law context a fair hearing for a party who is a victim of family violence is one that utilises practices that aim to reduce victims' potential distress and humiliation in giving evidence and having it tested.

Judicial balancing of these conflicting interests is complicated by the fact that until proven or established as a "fact" by the court, allegations of family violence remain just that – allegations. In these circumstances, Kaspiew argues that, "safety may not be maintained as the process unfolds (...) because until the process is concluded and a judicial decision is made, concerns about safety and family violence issues are treated as untested claims" (Kaspiew *et al.* 2017).

Courts also have a duty to maintain public confidence in the administration of justice and the integrity of their processes (Australian Law Reform Commission 2018, [8.59]). This duty is linked to the “legitimacy” of legal proceedings and under the auspices of procedural justice, the legitimacy of courts is a function of the quality of the procedures that are utilised and the perceptions of those involved in such procedures (Mack and Roach Anleu 2010). Failure to maintain safe processes in the courtroom could have a significant and negative bearing on the perceived fairness of the family law proceedings. In relation to victims of crime more generally, Shapland argues that failure to accommodate the interests and concerns of victims in a manner that maintains public confidence in the administration of justice can threaten the integrity of the legal proceedings (Shapland 2010).

When deciding whether to prohibit or constrain cross-examination and/or order special arrangements to assist victims to give evidence, judges have to balance these competing interests of the parties in a manner that promotes both fairness in and efficient management of the proceedings. Judicial reasoning must take account of on the one hand, the perpetrator’s entitlement to be able to test the evidence; and on the other hand, the court’s duty to minimise the potential harm that may be caused to a victim of family violence giving evidence and disadvantage them as a witness.

From a conventional legal perspective, a key feature of such legal reasoning is said to be its objectivity: decisions are made by applying the law (as stated) to the facts (as found) (Davies 2008, p 127). In this process, the decision-maker’s emotions and personal views do not influence the ultimate conclusion (Davies 2008, p. 127, Bergman Blix and Wettergren 2018, pp. 141-142). Such a notion of objectivity is problematic however. Bergman Blix and Wettergren argue that “the legal positivist notion of objectivity as something abstract, disembodied and unemotional is (...) profoundly problematic (Bergman Blix and Wettergren 2018, p. 141). Feminist scholarship has drawn attention to the “gendered nature of claims to objectivity” (Graycar and Morgan 2002, p. 56). Issues arise regarding which facts are considered relevant in making a decision and according to Graycar and Morgan (2002, p. 56), facts dismissed as irrelevant are “usually those outside the experience of judges”. Davies points out that “knowing” “is not itself neutral since it always exists within a particular social and philosophical context” (Davies 2008, p. 226) and the decision-maker’s subjectivity is an “unavoidable element of knowledge” (Davies 2008, p. 226).

As will be discussed below, contrary to the conventional view of “objective” reasoning, this paper is premised on the view that emotions permeate legal decision-making. In our content, emotions influence judicial responses to litigants, to the process of finding and interpreting facts or having knowledge about a situation, to determining what is “appropriate” and whether appropriate protections should be put in place to assist victims of violence give evidence, and to the conduct of legal proceedings more generally. The next section considers the emotional dimensions of judicial decision-making.

#### **4. Emotional dimensions of judicial decision-making in this context**

Clear tensions underpin judicial decision-making in this intersection between family law processes and family violence, and evidence suggests that in many cases the perpetrators’ justice interests are outweighing victims’ justice interests causing further trauma and distress for victims of family violence in family law proceedings. As noted, the protective measures available to judges are discretionary and a great many judges do not appear to be using these measures to change their approach to legal proceedings involving victims of family violence. Drawing on Henderson’s work, a conventional “culture of judicial passivity” might well underpin lack of judicial resort to protective measures (Henderson 2016); Loughman and colleagues’ work suggests that, it could be that judges do not understand or appreciate the nature of the trauma suffered by victims of family violence (Loughman *et al.* 2016).

During the past two decades, a significant growth in research and scholarship in theories of emotion and connections with law has debunked the myth of dispassionate law and legal processes leading to well-documented intersections between law and emotion (Laster and O'Malley 1996, Bandes 1996, Pilsbury 1999, Roach Anleu and Mack 2005, Feigenson and Park 2006, Maroney 2006, 2011a, 2011b, 2012, Maroney and Gross 2014, Bandes and Salerno 2014, Conway and Stannard 2016, Bergman Blix and Wettergren 2016). Research demonstrates that emotions permeate interpersonal interactions in the courtroom, impact on the conduct of legal proceedings and influence decision-making particularly in the context of criminal laws and processes (see for example Karstedt 2002, 2011, Schuster and Proppen 2010, Booth 2012, Doak and Taylor 2013, Bandes and Salerno 2014, Tata forthcoming 2019 – this issue).

Emotion in family law proceedings has not yet been the subject of empirical work and analysis in the same way it has been in criminal legal processes. Huntington is one of the few scholars in this area and her work has explored the impact of adversarial processes on family law proceedings (Huntington 2007, 2016). She argues that the combative nature of adversarial proceedings exacerbates negative emotions reinforcing acrimonious breakdown of the family rather than supporting the continuation of constructive family relationships post separation (Huntington 2016). For Huntington "It does not take a degree in psychology to understand that divorcing spouses may feel anger and resentment" (Huntington 2016, p. 9). No doubt, fear, trauma and distress are also relevant particularly in matters that involve family violence and Smyth and Moloney (2007) would also include hatred. It seems obvious given that the breakdown of intimate relationships and families, conflict over children and/or money, are the subject of family laws and processes, intense emotions are likely to be a hallmark of family law proceedings. Furthermore, although there has been very little research into judges' emotion work in family law proceedings, undoubtedly management of family law proceedings requires significant effort on the part of judges in this context (Roach Anleu and Mack 2005). Indeed research reveals the frustration, stress and annoyance experienced by many judicial officers in relation to dealing with self-represented litigants in family law proceedings (Dewar *et al.* 2000, pp. 48-51, McLachlin 2007, Henschen 2018).

This section explores emotional dimensions of reasoning that potentially influence judicial decision-making. In particular, it theorises about the impact of emotions on the exercise of judicial discretion in this context, legal reasoning that weighs the conflicting justice interests in order to make a decision about whether to invoke protections for victims of family violence. For this task, the legal rules to be construed "implicate emotion" (Maroney 2011b, p. 643). Judges must consider the emotional impact of cross-examination on a person, anticipate the likely trauma and stress that might be concomitant to the experience of cross-examination, and decide whether this harm is outweighed by the perpetrator's entitlement to test the evidence personally.

Henderson points out that the most important factors in implementing change to legal processes are the attitudes of judges and legal professionals (Henderson 2016). This paper considers the emotional dimensions of judicial decision-making (and attitudes that underpin the process) in this context. According to a cognitive theory of emotions, emotions are affective states that involve an appraisal of given situation, motivate action and help people "choose among and coordinate competing goals and values" (Feigenson and Park 2006, p. 144; see also Maroney 2011b, Ellsworth and Dougherty 2016). Emotions shape decision-making, can bias decision-making and influence information processing in making a decision (Lerner *et al.* 2015, p. 802). Drawing on Damasio's work, Barbalet argues that:

Emotion provides cognitive or decision-making processes with a framework and reference point for reasoning and rationality. Emotions indicate which problems reason has to solve, and they assist in delimiting a set of likely solutions. It is not

necessary and frequently unlikely that the actor will be consciously aware of these emotional sensations. (Barbalet 1998, 43)

The following discussion aims to illuminate emotional aspects of legal reasoning in family law proceedings. It takes capacity for empathy as its starting point and explores the emotions – fear, anger, and “background emotions” – that might motivate judges to avoid or downplay empathic responses to victims of family violence (Maroney and Gross 2014, p. 144, Zaki 2014).

#### 4.1. Empathy

It is likely to be uncontroversial that empathy is key in this context. For this purpose, empathy is conceptualised as follows:

Empathy is a capacity for understanding the desires, goals and intentions of others. It requires a desire to see things from the vantage point of another, but it is really about perspective taking. It does not require an empathic person to take sides among the competing viewpoints, and it does not require any actions to aid a particular target in achieving her goals. Judges may feel empathy for all litigants before her. It is her job to understand what is at stake for the parties. Once she has done so, she must make a legal determination about which side prevails. (Bandes 2017, p. 185)

In order to recognise and address the issue of protections against personal cross-examination, judges need to understand the position of both the victim of family violence and the perpetrator of that violence in the legal proceedings. Empathy is central to such understanding. Experience and/or education are major sources of empathy (Abrams 2010, 268). The sources of judicial empathy for a perpetrator of violence as a litigant are most likely experience as a legal practitioner and expert knowledge of trial process. The source of judicial empathy for victims' experiences is more problematic. While no doubt, some family law judges will gain understanding about family violence from either personal experience or professional experience as a legal practitioner before coming on the bench, the only opportunity for many judges to gain knowledge will be education and training designed for this purpose.

An empathic response requires the judge to consider the perspective of a victim of family violence; to understand broadly the nature and impact of what that victim has experienced; and to engage with the victim's emotional predicament in the proceedings – their fear and distress at confronting, or being confronted by, their abuser in courtroom proceedings –. In order to appreciate what is at stake, it is necessary for the judge to understand how the victim's emotions affect both the victim's ability to give evidence (the extent to which the victim will be disadvantaged as a witness and party) and the victim's wellbeing (the potential nature and extent of the harm suffered by the victim in the courtroom).

Similarly, the judge is required to consider the perspective of the perpetrator of family violence. Parties to legal proceedings are entitled to be self-represented and the law requires them to make their case before the court according to the rules of evidence. As already noted, in circumstances where a party (perpetrator of family violence) intends to make a case that will contradict evidence given by a witness (for the other party, victim of that violence), the law requires the party (perpetrator) to put their case to that witness (victim) in cross-examination. Constraints on their ability to present their case would likely generate negative emotional responses in perpetrators as well as potentially jeopardise their legal position.

While feeling empathy for a victim of family violence does not mean that the judge has to make a decision that invokes protective measures, research reveals concern that judicial decision-making in this area takes insufficient account of potential harm caused to victims and exacerbate victims' trauma and distress. Although research as to judicial perspectives in this area is particularly sparse, it is likely that most judges view their conservative response as necessary for the conduct of a “fair hearing”, to preserve the legal entitlements of parties to the proceedings. However, even if judges are reluctant to constrain cross-examination for this reason, it is arguable that

implementing alternative arrangements to give evidence – video-link, screens, support persons etc. – would not necessarily encroach on the perpetrator’s ability to present their case.

#### 4.2. Avoid or downplay empathy

The judicial passivity in this context raises the issue of whether judges avoid or downplay empathy for victims of family violence in family law proceedings. Zaki argues that empathy is context-dependent, a “motivated phenomenon” (Zaki 2014, p. 1611). People are motivated “to engage or not engage with others’ emotions because empathy is consistent with some social goals and inconsistent with others” (Zaki 2014, p. 1612).

A motivated model of empathy holds that observers’ motives to experience or avoid empathy can manifest as a *reduction of intensification* of empathy that has already occurred and also as a *prevention, initiation or modulation* of the initial experience of empathy. (Zaki 2014, p. 1613)

According to this model, family court judges could be motivated to avoid or downplay empathy in order to “avoid pain”, such as fear or anger as to the consequences of their decision (Zaki 2014, p. 1612). Emotions that are “backgrounded and subconscious” might also motivate judges to avoid empathy (Bergman Blix and Wettergren 2016, p. 43).

##### 4.2.1. Fear and Anger

A common judicial fear is appellate criticism of their ruling; that they have not exercised their discretion according to law. Judges might also fear a perception that they are biased, against one party or in favour of another. As already noted, fairness and impartiality are key judicial values (Roach Anleu and Mack 2017). A well-documented concern is that judicial empathy carries the risk of bias (rather than clarity) in decision-making (Abrams 2010, Maroney 2011, Wettergren and Bergman Blix 2016, Bandes 2017). A decision to invoke protective measures in order to alleviate the harms caused to a victim in giving evidence could be perceived as biased in favour of the victim. Given the importance of judicial impartiality and fairness to the legitimacy of legal proceedings, judges might fear the impact of a perception of bias not only on the specific proceedings, but also on public confidence in justice processes more generally.

In addition, judges might fear scrutiny and censure if invoking protective measures causes delays in proceedings and prevents family courts from delivering outcomes in a timely manner. The Australian family law system has come under fire in recent years for the extensive delays and high costs involved in legal processes and proceedings (Australian Law Reform Commission 2018, [3.1]). If the integration of protective measures lengthens court proceedings on foot, or the matter needs to be adjourned, the result could be further pressure on court lists and greater delays for all families involved in the family law system.

Anger is another reason why judges might avoid empathy (Maroney 2012); and, there are so many reasons why a judge, managing highly emotional family law proceedings, might be angry. Judges could be angered at having to deal with self-represented parties in the first place. Self-represented parties pose particular challenges for judges including difficult court management issues and onerous emotion work (Moorhead 2007, Roach Anleu *et al.* 2016). Second and more specifically, the suggestion that processes in “their courtroom” will traumatise and/or disadvantage victims could anger judges. In this scenario, judges might construe victims’ applications as a challenge to their judicial authority, a negative reflection on judicial management skills, and/or an implication that the judge cannot facilitate a fair hearing for both parties.

#### 4.2.2. Background emotions

Drawing on the work of Barbalet (1998), and Bergman Blix and Wettergren (2016, 2018), “background emotions” – judicial emotions that are “backgrounded and subconscious” (Bergman Blix and Wettergren 2016, 34) – might also motivate judges to avoid or downplay empathy for victims. While such emotions are “intrinsic to the pursuit of instrument goals”, they are backgrounded and subconscious and “not associated with being emotional” (Bergman Blix and Wettergren 2016, p. 34). It is posited that background emotions to judging in the context of the impact of family violence on the presentation of evidence in legal proceedings include a belief in traditional concepts of adversarial justice and commitment to the processes and rituals of justice.

According to the “objective” approach to the conduct of legal proceedings, conventional adversarial justice processes are the default. From a legal perspective, it is well-documented that cross-examination is regarded as fundamental to a fair trial and measures that constrain cross-examination, or disguise victims’ demeanour (such as a video link) or are otherwise perceived to advantage victims (such as a support person or screens) undermine the traditional rules of procedural justice (Burton *et al.* 2007). Submissions to the 2017 Senate Inquiry, *A Better Family Law System*, exemplify this approach. According to submission by the Justice Bryant, then Chief Justice of the Family Court of Australia:

The capacity to challenge evidence where it is contested is a fundamental part of our legal system and integral to the capacity of the judge to make findings where evidence is in dispute. (Bryant 2017)

Similarly, the Law Council of Australia submitted:

Proposals that preclude or constrain cross-examination are inimical to:

- The interests and rights of litigants;
- Ability of the court to properly determine the issues;
- Efficient delivery of justice.

Fundamental to any adversarial system of justice and the right of a party to fair trial is the right to cross-examine the other party (...). It is only through cross-examination and the testing of the evidence that findings may be made as to such matters as the best interests of the child, factual issues relevant the assessment each party’s contribution or future needs to determine a just and equitable property division or the truth of allegations of family violence. (Law Council of Australia 2017)

In a recent publication, Judge Harmon of the FCCA, expressed his concerns at the impact of the increasing number of self-represented litigants in matters involving family violence and, in particular, the problem of direct and personal cross-examination. For him “a fair trial is one in which the rules of evidence are honoured (...) and the judge enforces proper courtroom procedures – a trial at which every assumption can be challenged”. Indeed, his honour of these rules went so far as to say: “[I]t is not possible within a judicial process to restrain a self-represented party from cross-examining the other at trial because the judicial process must afford due process to each party” (Harman 2017, p. 16). According to this judge, “provisions intended to assist victims of violence have muddied the water and made presentation of evidence more complex” (Harman 2017, p. 16).

While the Family Court of Australia, the Law Council of Australia and Judge Harman might interpret their statements as reflecting rational, objective, legal, “due process”, ‘unemotional’ realities of justice, it might also be argued that this reasoning is constituted in particular background emotions – pride, satisfaction and loyalty – and an emotional commitment to facilitating and enforcing conventional justice processes. These emotions underpin an emotional attachment to conventional trial processes in which fairness, impartiality and objectivity are core values of justice. In other words, judges have an emotional investment in traditional justice procedures

that relate to giving and receiving evidence. Such an emotional investment might cause judges to avoid or downplay their empathic responses to victims' emotional predicaments. According to Barbalet, "in order to perform instrumental tasks effectively, human actors must not only be committed to the purposes intrinsic to them, but also committed to avoiding extrinsic and distracting purposes" (Barbalet 1998, p. 60).

Importantly, judges may not even be aware that these emotions underpin their decision-making (Barbalet 1998, p. 43). If acknowledged however, Barbalet argues that these emotions may not be regarded as emotions because that "category" is "already conceptualised as disruptive"; instead they may be described as "attitudes, components of culture and so on" (Barbalet 1998, p. 59).

#### 4.3. Information processing

Research indicates that the effect of emotions such as fear or anger and/or background emotions such as pride or loyalty on the depth of information processing can lead to judges avoiding or downplaying empathy for victims of family violence in legal proceedings (Lerner *et al.* 2015, p. 802, see also Feigenson and Park 2006, Maroney and Gross 2014, Ellsworth and Dougherty 2016).

Judges might *appraise* or interpret victims' narratives in a manner that downplays or even negates victims' emotions (Zaki 2014). Lack of adequate knowledge of the issues and/or scepticism about the credibility of the alleged victims of violence may allow judges to avoid or downplay an empathic response to the victims' stories. Judicial understanding of and response to victims of family violence has long been a concern for scholars and practitioners in the field (Meier and Dickson 2017, Douglas 2018, Epstein and Goodman 2018). Scholars and practitioners have noted the endurance of such tropes in family law as women being: "vengeful liars"; "grasping system-gaming women on the make" (Epstein and Goodman 2018, p. 25); making false allegations of violence and unmeritorious applications for protection orders; and generally untrustworthy (Parkinson *et al.* 2010, Meier and Dickson 2015).

Judicial certainty in relation to the relevant issues might also enable judges to avoid or downplay empathy. Feigenson and Park (2016, p. 148) argue that the "more certain people feel the less inclined they are to process information systematically, because they are more confident that they already know what they need to know to address the task in hand". The more certain a family court judge is about the relevant issue, the more quickly that judge makes decisions and the more easily is evidence of victims' emotional states discounted. Maroney (2012) has noted that certainty is a characteristic associated with anger. It is also arguable that emotional commitment to conventional justice processes brings with it a certainty as to the rightness or just nature of these processes. In the same way as anger (Maroney 2012), if judges are "certain" that the conventional approach is the right approach, then their information processing might be biased (Zaki 2014, p. 1612): "... the heightened sense of certainty makes one feel confident in the correctness of their decision at a relatively early stage discouraging consideration of alternatives" (Maroney 2012, p. 1266).

## 5. Conclusion

This paper stems from concern that victims of family violence are traumatised, distressed and intimidated by family legal processes that enable and facilitate direct and personal confrontation with the perpetrator of that violence. Not only do legal processes exacerbate trauma or cause further harm to victims of family violence, but also the outcomes reached may be disadvantageous at best and unsafe at worst.

Currently in family law proceedings, a self-represented perpetrator of family violence can directly cross-examine a victim of that violence; if the victim is self-represented, they might have to cross-examine the perpetrator directly. The entitlement to cross-examine is not absolute however, and it can be constrained or modified in a number

of ways in family law proceedings by a range of protective measures. However, although these measures are available to the trial judge in order to reduce trauma and stress for victims of family violence their use is inconsistent and unpredictable in family law proceedings. Importantly, the new legislation coming into force in the second half of 2019 will only prohibit such person cross-examination under certain conditions and many victims of family violence will continue to be exposed to direct confrontation with perpetrators of that violence.

The detrimental impact of direct cross-examination on the wellbeing of victims of family violence is not a new concern and it has been the subject of discussion in a range of inquiries, particularly over the last decade. Despite the introduction of judicial education and training programs in relation to family violence, the evidence indicates that there has been little shift in the conduct of legal proceedings. This suggests that by itself, knowledge of the nature and impact of family violence may not be sufficient to bring about change in judicial attitudes and legal processes. Drawing on the emotion and law literature, this paper directs attention to the emotional aspects of judicial decision-making in family law proceedings. In particular, it posits that the capacity for empathy is fundamental to making decisions about protective measures, and it has theorised that particular emotions such as anger, fear and background emotions, could enable judges to avoid or downplay emotion as they exercise their discretion. The next stage of this study is to explore these ideas through qualitative fieldwork, observation of family law proceedings and in-depth interviews with judges and other court perspectives. In the words of Terry Maroney, "[e]motion is educable" (Maroney 2011b, p. 648). It is hoped that ultimately, analysis and evaluation of the research findings will inform the development of targeted judicial education and training that integrates development of emotion regulation strategies (Maroney and Gross 2014).

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