



Australian Government
Australian Institute of
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House of Representatives Standing Committee on Social Policy and Legal Affairs

Inquiry into access to family violence orders for
victim-survivors in the family law system

Submission from the Australian Institute of Family Studies



Introduction

Since its inception in 1980, the Australian Institute of Family Studies (AIFS) has been required to conduct research relevant to the factors affecting family stability in Australia,¹ with our research on separating/separated families, family law and family violence, critical to this core function. This body of research has been central to the development and evaluation of key successive amendments to the *Family Law Act 1975* (Cth) (FLA) and to other legislative and policy measures relevant to separating and separated families.

This submission presents findings from AIFS research, with some reference to other research, that is relevant to the Committee's Terms of Reference for this Inquiry into access to family violence orders (FVOs) for victims/survivors in the family law system.

Specifically, the discussion first presents research findings regarding the nature and experience of family violence by parties who are separating or have separated, including those engaging in family law proceedings (relevant to Term of Reference 1).

The submission then outlines research relevant to obtaining and enforcing FVOs by litigants in the family system, including in relation to the barriers or challenges experienced (Term of Reference 2).

The submission concludes with a discussion of research relevant to improvements to support accessibility of FVOs and safety and fairness for people requiring FVOs (Term of Reference 3 and 4).

Nature and experience of family violence in separating and separated families

- **Family violence has become an increasingly prominent issue in Australia.**

The Australian Institute of Health and Welfare (AIHW, citing ABS Personal Safety Survey, 2021–22) estimates that more than 1 in 4 (27%) of all adult women in Australia and around 1 in 8 (12%) of adult men have experienced intimate partner violence, since the age of 15 (AIHW, 2024).

- **Family violence is very common among separating and separated families and continues post-separation.**

A majority of participating parents in both cohorts of the Experiences of Separated Parents Study reported experiencing either physical or emotional abuse. Approximately 4 in 10 separated parents surveyed reported that they had *not* experienced emotional abuse, physical hurt or both in the period before or during their separation (Kaspiew et al., 2015a Evaluation of the 2012 FV Amendments, Experiences of Separated Parents Study, Table 2.5).

For a substantial minority of families (approximately 45%), family violence continues after separation, and overall, women were more likely than men to report experiencing emotional abuse or physical hurt before/during or after separation (Kaspiew et al., 2015a Evaluation of the 2012 FV Amendments, Experiences of Separated Parents Study, Figure 3.6 and 3.7).

¹ Section 114B(2)(a) *Family Law Act 1975* (Cth)

- **Families who use the more formal family law system pathways – family dispute resolution, lawyers and courts – have a particularly significant concentration of family violence, child safety concerns, mental ill-health and substances misuse issues, including co-occurrence of these issues.**

AIFS research demonstrates that, of the parents who reported using FDR/mediation to resolve parenting arrangements, three-quarters had experienced emotional abuse, and more than one quarter had experienced physical violence. These proportions rose to 86% (emotional abuse) and 39% (physical violence) for those who used lawyers and 85% (emotional abuse) and 54% (physical violence) for those using court to resolve their post-separation arrangements.

The data also show that reports of 4 or more issues and of current safety concerns also increased as the formality of services used increased from FDR through to court (Kaspiew et al., 2015b - Evaluation of the 2012 FV amendments, Synthesis Report), Table 2.2, extracted as Table 1 below).

Table 1: Complex issues and family law pathways, 2014						
Safety concern issue	FDR / mediation (%)	Lawyer (%)	Court (%)	Discussions (%)	Just happened (%)	Other (%)
	2014	2014	2014	2014	2014	2014
Alcohol or drug use	27.5	29.5	41.6	19.0	27.8	32.2
Mental health	45.8	50.5	59.3	32.2	34.4	41.3
Gambling	8.7	6.8	12.0	4.5	9.4	9.9
Internet or social media	26.2	33.1	31.2	19.6	19.8	22.5
Pornography use	13.0	12.7	15.2	6.7	8.3	7.0
Emotional abuse	73.7	86.1	85.3	47.8	58.4	82.5
Physical violence	26.6	38.9	53.7	14.8	21.8	29.8
4+ issues	21.1	26.8	38.1	10.5	16.8	24.4
Mean no. of issues	2.2	2.6	3.0	1.4	1.8	2.3
Current safety concerns	25.6	33.8	46.4	11.5	18.0	27.3
No. of participants	453	282	145	2,778	450	111

Notes: Data have been weighted. Percentages do not sum to 100.0% as multiple responses could be chosen.

- **Women in family law proceedings are more likely to be identified as experiencing violence, including in the absence of reciprocal allegations of violence being made against them**

Consistent with the survey data, data based on a sample of court files in parenting matters subsequent to the introduction of the family violence amendments to the FLA indicate that mothers were more commonly assessed by the research team as being the victim (61%) compared with fathers (9%). Mothers were also more likely to make allegations of family violence in the absence of cross allegations (66%) than fathers (10%) (see Table 3.12, Kaspiew et al., 2015c - Evaluation of the 2012 FV amendments, Court Outcomes Project).

- **Families experiencing issues with compliance with family law parenting orders are an even more complex subset of families in family law matters.**

Although based on an opt-in sample rather than a representative sample, the Survey of Parents and Carers component of the 2022 Compliance with and Enforcement of Family Law Parenting Orders Study, showed that families with non-compliance issues were more commonly characterised by family violence and challenging interpersonal dynamics (Carson et al., 2022a).

The court file data in the AIFS Compliance Study showed that:

- engagement with court proceedings occurred over protracted periods of time, with 30% of matters 5-9 years in duration and 6% 12+ years
 - about one third of the sample had multiple contravention applications and nearly 6 in 10 (58%) involved five or more court applications
 - more than one in 10 matters involved more than 10 court applications and
 - on average, there are six court processes for each matter in this sample (Carson et al., 2022a).
- **The AIFS Compliance Study court file data also showed that high-risk issues characterised almost all families, and mothers were more likely to be identified as experiencing violence.**

The vast majority (92%) of court files contained allegations or evidence in relation to these high-risk issues:

- It was most common for evidence or allegations to have been raised in the primary parenting proceedings (54%), but a sizeable minority of matters (43%) had them raised in both the contravention and primary parenting proceedings.
- It is notable that matters where there were two or more contravention applications, were more likely to involve allegations made in both the primary parenting proceedings and the contravention proceedings (52% cf. 39%) (Carson et al., 2022a).

Consistent with the Evaluation of the 2012 Family Violence Amendments Court Outcomes Study noted above, the data from the AIFS Compliance Study court files shows that mothers were more likely than fathers to be assessed by the research team as experiencing violence (46% cf. 37%), while fathers were more likely than mothers to be assessed as person using violence (70% cf. 61%) (Carson et al., 2022a).

- **Ongoing litigation in circumstances characterised by family violence can provide a mechanism for continuing the violence and abuse**

Cross-allegations are common in these subsequent legal proceedings, reinforcing findings from earlier research (see for example., Wangmann, 2009) that cross-allegations of family violence in subsequent legal proceedings may be used to undermine or counter women's experiences of violence, or to continue to intimidate, control or harass.

- In nearly one third of matters in the AIFS Compliance Study, mothers made allegations in circumstances where fathers did not make a cross-allegation. The converse was the case in only 4 per cent of matters, indicating that fathers' allegations of family violence were most likely to arise in the context of allegations of family violence by mothers.
- Most parents and carers surveyed for this study attributed non-compliance with parenting orders to vindictive, abusive or controlling behaviour on the part of the non-compliant party. (Carson et al., 2022a).
- Qualitative insights of professionals and judicial officers participating in the AIFS Compliance Study indicate problematic interpersonal dynamics of parties involved in contravention proceedings including:
 - intractable conflict and mistrust that had not been addressed adequately by parenting orders
 - abusive and controlling behaviour

- an unwillingness to support the other party's relationship with the child and
- parents behaving in a non-child-focused way (Kaspiew et al., 2022).

The AIFS Evaluation of the Priority Property Pools Program also identified that family violence characterised a substantial proportion of the proceedings for property/financial orders. This finding was made despite the absence of a requirement to file a Notice of Risk or affidavit material in these proceedings, and despite the limited legal parameters in which to raise these allegations in property/financial proceedings:

- There were allegations or evidence of family violence in a quarter of Year 1 PPP500 matters, rising to a 29% for Year 2 files.
- Women were the alleged victim in 19% of Year 1 PPP500 files and 23% of Year 2 PPP500 files (Carson et al., 2022b)

Family violence orders in family law matters

- **Successive AIFS research studies have shown that, consistent with the high levels of family violence characterising family law matters, substantial proportions of litigants in these proceedings lodge evidence of FVOs.**

Between 27% (judicial determination) and 30% (consent during proceedings) of matters involving allegations of family violence/safety concerns in the Court Files Study, had a FVO on file (Kaspiew et al., 2015c - Evaluation of the 2012 FV amendments, Court Outcomes Project, Table 3.18).

Since the 2006 family law reforms, there has been an obligation to inform courts about *relevant* FVOs (FLA, s 60CF). However, the 2012 family violence amendments changed the approach to the consideration of FVOs under s 60CC(3)(k) when applying the 'best Interests of the child' considerations. These amendments allowed inferences to be drawn from *any* FVO rather than only FVOs made on a final or contested basis.

This change meant that the Court in family law proceedings could consider:

- the nature of any FVO
- the circumstances in which it was made
- any evidence admitted in the proceedings in relation to the order and
- any findings made by the court that made the FVO.

The effects of this change are illustrated in the Evaluation of the 2012 Family Violence Amendments – Court Outcomes Study by the:

- rise in the proportion of cases in which information about FVOs were included on the family law court file (from 17% to a quarter after the reforms, representing a statistically significant change) and
 - the increase in consideration of interim FVOs in these family law proceedings.
- **These data also show the characteristics of the FVOs in family law matters:**
 - FVOs made by court determination were most common in the Court Outcomes Study sample (42-45%), followed by those made by consent (18-23%) and then matters settled by undertaking without admission in relation to the allegations of violence (7%).

- Limitations on physical proximity were made in 37-45% of the sample and limitations on communication were made in 38-43%.
 - A significantly lower proportion of post-reform FVOs provided that contact with children was an exception to the restraint imposed by the order (17% cf. 34%).
 - Only a small proportion of FVOs varied or suspended an existing parenting order (2-3%).
 - Most commonly, the protected person was the mother, and this proportion rose to a statistically significant extent after the reforms (from 60% to 77%). Children were the protected persons in about three in ten cases. Fathers were protected persons in just over one in ten cases.
 - Consistent with this, other Australian research indicates that most FVO respondents are men, and in circumstances where the respondent is a woman, there are often mutual orders in place (Hulme et al, 2019).
 - Breaches of FVOs were referred to in 8-9% of the Court Outcomes Study sample (Kaspiew et al., 2015).
- **More recent insights from the Compliance with and Enforcement of Family Law Parenting Orders Project showed that half of all contravention matters were identified as having a current or FVO on their court file.**

More than one quarter of these cases (27%) involved FVOs that had been in place in the past. Current FVOs were on file in 17% of the sample and 6% of matters involved both past and current FVOs (Carson et al., 2022a, Table A18, Appendix A).

- A slightly higher proportion (55%) of cases involving allegations of family violence, child abuse or safety concerns had a FVO, with 19% having current FVOs.
 - One third (33%) of the most recent FVOs were final orders and just over half (51%) were interim orders, with the status of most of the remaining orders unclear.
 - The children and the parent who was the respondent in the contravention application were most likely to be nominated as the protected party (55% and 57% respectively), with mothers the protected party in 79% of FVOs.
 - In most matters (69%), the FVO did not operate in such a way as to vary or suspend the existing parenting arrangements.
- **Breaches of FVOs were substantially higher in family law proceedings involving issues with compliance, as compared to the representative sample of family law proceedings in parenting matters.**

Where data were available on the court files in the AIFS compliance Study, nearly a quarter (24%) involved a breach of the FVO (Carson et al., 2022a). This is substantially higher than the representative sample of court files in the Court Outcomes Study.

Improvements to support accessibility, safety and fairness

- **Successive reviews and research commentary have identified the challenges for families navigating a ‘fragmented system’ arising from state/territory jurisdiction for FVOs and the overriding Commonwealth jurisdiction for family law matters** (for eg., Australian Law Reform Commission and NSW Law Reform Commission, 2010; Higgins and Kaspiew, 2011; Croucher, 2007).

Croucher (2007) provided a helpful example of the challenges for victim-survivors who may experience somewhat contradictory messages from different components in a fragmented system. A litigant may obtain a FVO having regard to act protectively following engagement with the State/Territory Child Safety Department while their family law proceedings may involve arrangements that facilitate parenting time.

There are measures that have enhanced the sharing of FVO risk information (including FVOs) to better inform safe family law decision-making including:

- the co-location of state/territory officials (including police officials) in the FCFCoA registries
- the *National Strategic Framework for Information Sharing between Family Law and Family Violence and Child Protection Systems* and
- the Family Law Amendment (Information Sharing) Act 2023 which commenced on 6 May 2024

The National Strategic Framework seeks to build on the co-location program by removing barriers to information sharing and to address gaps in the intersecting systems.

The information sharing legislative amendments introduce a new order for particulars of documents and broadens the order for the court to require information sharing agencies to produce documents.

- **Challenges remain for parties experiencing family violence when navigating the state/territory based FVO systems and the federal family law system.**

Australian and international research has identified the barriers that women who experience family violence encounter when they need to use legal processes in a range of contexts (e.g. Easteal et al., 2018; Fitch & Easteal, 2017; Kaye et al., 2021; Douglas, 2021). These include:

- legal processes can be confusing/overwhelming to navigate, retraumatising for victims of family violence and financially prohibitive (e.g. Carson et al., 2018; Carson et al., 2022a; Domestic Abuse Commissioner UK, 2023; Douglas, 2021; Kaspiew et al., 2015, 2017; Salter et al., 2020)
- a ‘pro-contract’ culture may still prevail, whereby time spent with both parents may be prioritised ahead of family violence and a DFV- and trauma-informed assessment of safe and workable parenting arrangements (Carson et al., 2022a; Kaspiew et al., 2015; Kaspiew et al., 2022; Ministry of Justice UK, 2020)
- a lack of understanding about the nature, dynamics and different forms of family violence, a culture of disbelief and dismissal of safety concerns and inability to identify ‘systems abuse’ (Douglas, 2021; Salter et al., 2020) and an absence of children’s voices (e.g.

ALRC, 2019; Carson et al., 2023; Carson et al., 2022a; Domestic Abuse Commissioner UK, 2023; Kaspiew et al., 2015; Ministry of Justice UK, 2020).

Specifically in relation to FVO proceedings, complexities have also been identified as arising from:

- variations in the names used for FVOs across Australian jurisdictions (Ross and Aitken, 2022)
- their operation in a ‘quasi-criminal’ system (Reeves, 2022) whereby they are created through the civil system, while breaches may comprise a criminal offence (Meyer and Stambe, 2022; Ross and Aitken, 2022).

Consistent with reports in relation to experiences of family law proceedings (see for eg., Carson et al., 2022), victim-survivors and specialist support services have noted the court process in FVO matters ‘can be intimidating, confusing and unsafe’ (Ross and Aitken, 2022, citing the State of Victoria 2016).

The terms of FVOs are commonly made by consent, often due to significant time and resource constraints in the legal sector, and/or a desire (by lawyer, client, or both) to avoid the danger, delay and trauma that may be associated with court proceedings (Reeves, 2023).

However, this consent negotiation process may be unsafe and/or undermined by a lack of access to independent legal advice and pre-court service engagement (Reeves, 2023).

- **Improvements have been identified to better support accessibility, safety and fairness, including:**
 - **professional development to support DFV-informed and trauma-informed practice**
 - **coordination between system services**
 - **case management and triage for families endeavouring to navigate the post-separation service system.**

Findings from the Evaluation of the 2012 Family Violence Amendments emphasised the need for improvements in the identification and assessment of, and response to family violence in family law matters (Kaspiew et al., 2015b).

Training and professional development has been identified as a key requirement for improvements in identifying, assessing and responding to family violence. Data from professionals participating in the Responding to Family Violence Component of the Evaluation of the 2012 FV amendments identified that some professionals held the view that women make false or exaggerated allegations of family violence (for example through the use of FVOs) in order to gain a tactical advantage in their family law proceedings (Kaspiew et al., 2015d).

Perspectives of this nature have been identified as ‘perpetuat(ing) violence minimisation and blame-shifting attitudes’ (Tosto & Bonnes, 2022) or misidentification of predominant aggressors (Kaspiew et al., 2022 and Carson et al., 2022a).

It is notable that these concerns were most likely to be raised by lawyers in private practice, who were more likely to report not having undertaken relevant family violence training and professional development (Kaspiew et al., 2015d)

Data from the Survey of Parents and Carers component of the Compliance with and Enforcement of Family Law Parenting Orders Project (Carson et al., 2022a), also identified deficiencies in the consideration of family violence in decision-making in contravention proceedings:

- Some parents and carers sought increased knowledge and expertise in relation to (and acknowledgement of) family violence by professionals in the family law system, describing the inability of the system to identify and respond in a timely, effective and trauma-informed way to family violence. This deficiency was seen as not encouraging compliance with parenting orders.
- Some parents and carers also considered that the compliance and enforcement regime did not accommodate the changing phases of family violence, including use of litigation by parties to perpetuate or to continue to family violence through a form of systems abuse. A key concern was the making of orders for shared parental responsibility or for significant parenting time, in circumstances characterised by family violence. These orders were identified as a means by which a person could continue to perpetrate family violence.

Participating professionals similarly emphasised the prevalence of abusive, controlling and vindictive behaviour in cases involving non-compliance with parenting orders (see Figure 7, Kaspiew, et al., 2022).

Misidentification may be more likely for women victim-survivors from disadvantaged and/or marginalised backgrounds (Reeves, 2022; Reeves, 2023; Victorian Royal Commission into Family Violence 2016 *Report and Recommendations, Parl Paper No 132*).

More specifically, factors that may lead to the misidentification of predominant aggressors include:

- inadequate understandings of family violence victimisation, and presentations of trauma (Reeves, 2022)
- mandatory arrest policies which adopt an incident-based approach to family violence that can overlook the nuances of self-defence, defence of children, or retaliatory violence (Reeves, 2023)
- gendered assumptions about women's credibility, and presentations of victimisation (Reeves, 2022)
- perpetrators engaging in 'systems abuse' (Reeves, 2022; Reeves, 2023).

DFV-informed and trauma-informed approaches to decision-making and extensive family violence training were identified as critical to ensuring that people experiencing family violence were not 'misidentified as perpetrators', that protective behaviour was not penalised and supporting the identification of systems abuse (Carson et al., 2022a).

Research relating specifically to FVOs has also identified a lack of holistic responses to a range of needs and risks that can undermine compliance – for example including mental health problems, problematic alcohol and drug use, or financial and housing stress (Meyer and Stambe, 2022).

These factors point to the need for more scaffolding and sustained support to guide respondents away from recidivism. Meyer and Stambe (2022) note some key examples of the kinds of guidance that may be useful in this regard.

Consistent with this research, the need for coordinated and holistic service provision that supports families to address underlying issues giving rise to the need for protracted family law proceedings was also identified in the AIFS research, including the AIFS Compliance Study (Kaspiew et al., 2022 and Carson et al., 2022a).

- **Recent Australian research highlights the need for services for separated families to be DFV-informed and trauma-informed and to be designed to respond appropriately to family violence.**

Research has emphasised the need to establish professional competencies for lawyers working in family violence contexts (Wangmann et al., 2023; Carson et al., 2022a; Douglas, 2021). Their recent research shows that DFV legal services require specific knowledge and skills to understand DFV and how it may present, to understand the impacts of DFV and trauma in those circumstances, how to describe and document DFV as well as cross-jurisdictional knowledge.

Opportunities to apply for FVOs online have been identified as offering victim-survivors:

- ‘a pathway to a protection order that provides safety without sacrificing autonomy, and that is also less stressful to use, and more flexible and convenient’
- an option to overcome practical barriers to access, including the need to make arrangements with work and childcare, and/or manage illness (Ross and Aitken, 2022).

Online accessibility issues may also be managed by having a support person or service provider guide a victim-survivor through the process of applying online (Ross and Aitken, 2022).

The delivery of court services through effective risk screening and assessments² and through improved and cost-effective case managed approaches³ that are implemented by DFV-informed and trauma-informed professionals, may better support families experiencing family violence to have more timely and effective identification and assessment of risk and the receipt of service responses.

Conclusion

This submission draws on AIFS research, with some reference to other research, relevant to the Committee’s Terms of Reference for this Inquiry into access to family violence orders (FVOs) for victims/survivors in the family law system.

Specifically, the submission presents research findings regarding the nature and experience of family violence by parties who are separating or have separated, including those engaging in family law proceedings (relevant to Term of Reference 1).

These data showed the complexity of families engaging with the family law and FVO system and how ongoing litigation in circumstances characterised by family violence can provide a mechanism for continuing violence and abuse.

The submission considers the barriers and challenges experienced by families, and particularly by women, engaging with these systems (Term of Reference 2) and relevant improvements to support the accessibility of FVOs and safety and fairness for people requiring FVOs (Term of Reference 3 and 4).

Identified areas of improvement included professional development to support DFV-informed and trauma-informed practice, improvements in coordination between system services and case management and triage and cost-effective support services for families endeavouring to safely navigate the post-separation service system.

² E.g., those facilitated by the Federal Circuit and Family Court of Australia (FCFCoA) Lighthouse Program.

³ E.g., those facilitated by the FCFCoA Contravention List, Central Practice Directions and referral support provided by family law system service providers.

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