Australian Government

Australian Institute of Family Studies

Submission

to the

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

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April 2011

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THE AUSTRALIAN INSTITUTE OF FAMILY STUDIES

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

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The Australian Institute of Family Studies (AIFS) is a statutory authority that originated in the Australian Family Law Act 1975 (Cth). It carries out a wide range of research that is relevant to policy and practice on issues affecting families.

This submission (including attachments) focuses mostly on research that is relevant to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (henceforth called the "Family Violence Bill"). Particular attention is given to: research undertaken for the AIFS Family Law Evaluation (Kaspiew et al. 2009—here referred to as the "Evaluation); the study of allegations of violence and child abuse in family law children's proceedings (Moloney et al. 2007—referred to as the "Allegations Study"); and the AIFS submission on the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010.

This document contains the following four attachments.

- Attachment A: the AIFS submission on the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010;
- Attachment B: an article (published in Family Matters No. 86) that summarises key findings of the Evaluation;
- Attachment C: a summary of results concerning family violence and related matters that emerged from the first wave of the Longitudinal Study of Separated Families (LSSF 2008); and
- Attachment D: an article (published in Family Matters No. 77) summarising findings from the Allegations Study.

Given that many of the results in this submission are based on the LSSF 2008 and the Allegations Study, the nature of these studies is described below.

The Longitudinal Study of Separated Families (Wave 1)

The LSSF 2008 formed a key source of data for the Evaluation.[1] As with the Evaluation itself, the LSSF was funded by the Australian Government Attorney-General's Department

[1] The LSSF is a national survey of 10,002 separated parents who were registered with the Child Support Agency in 2007. The sample had separated between July 2006 and September 2008, on average 15 months prior to interview (held August–September 2008). Almost all (96%) had separated between July 2006 and December 2007. The response rate, defined as interviews completed as a proportion of the total number of interviews and refusals, was 62%. Roughly half the respondents were fathers. Where the former couple had two or more children born of the relationship, many questions focused on one child (the first child listed in the CSA database).

(AGD) and the Department of Families, Housing, Community Services, and Indigenous Affairs (FaHCSIA).

Respondents in the LSSF 2008 were asked to indicate whether they had experienced ten different forms of emotional abuse (taken separately) *at any time before or during the separation*, and whether the other parent had ever hurt them in any way *before* separation. Those who indicated that the other parent had hurt them were also asked if any abuse or violence had ever been seen or heard by the children. The experience of physical hurt was the only aspect of physical violence directly assessed, although there was also a question tapping respondents' safety concerns for themselves or their child relating to ongoing contact with the other parent.

The items tapping emotional abuse were taken from the ABS Personal Safety Survey 2005, with the following exceptions: the ABS item "threatened suicide" was replaced with "threatened to harm themselves", and whereas the ABS included threat of physical assault (directed to the respondent) as a form of physical violence, threats to harm the respondent were treated as a form of emotional abuse in the Evaluation. Attachment C, which summarises relevant results from this study, is included as background information to assist the Inquiry.

Allegations of family violence and child abuse in family law children's proceedings *(Moloney et al. 2007).*

This study, which was based on a sample of court files of cases that had been finalised in 2003, was also funded by AGD. It examined the prevalence and nature of allegations of family violence and child abuse in family law proceedings, provision of supporting evidence, responses to allegations, and court outcomes (Attachment D).

Definitional issues

It is important to point out that any behaviour that is deliberately abusive conveys a message that the perpetrator may behave in a similar way in the future. While some victims may believe that the initial abuse will not be repeated, others may see themselves as "walking on eggshells"—an experience that is likely to be reinforced by any subsequent episode of physical violence. Such behaviour, therefore, may be classified a form of emotional (as well as physical) abuse. However, for the purposes of clarity, physical violence is treated exclusively as physical violence in this submission. As noted above, threats of physical violence were treated as a form of emotional abuse in the LSSF.

In the AIFS submission on the exposure draft of the Family Law Amendment (Family Violence) Bill 2010 (Attachment A), it was noted that, while all forms of violence are potentially damaging, some carry extreme risk and urgency. Very broad definitions increase the chance of drawing into the net very serious and urgent cases, but also carry the difficulty that they may receive less attention than they may warrant owing to the sheer volume of cases in scope on the basis of a wider definition. The submission therefore emphasised the importance of having standardised intake and assessment procedures to discriminate between the more serious and urgent cases where there are ongoing safety issues and other cases.

Among other things, the Family Violence Bill includes as a form of child abuse, behaviour that is "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" (Item 1 sub-section 4(1)(c)). Family violence is defined as follows: "For the purposes of this Act, ***family violence*** means 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" (Item 8, section 4AB(1)).

It seems important to note that coercion, control or generation of fear, represent outcomes of behaviour. Likewise, for child abuse, "serious psychological harm", by definition, focuses on an outcome. On the other hand, the *examples* of family violence provided in the Family Violence Bill focus on behaviour that may have harmful repercussions.

In terms of physical violence, the LSSF restricted attention to an outcome of such violence (being hurt), but in the area of emotional abuse, respondents were asked about the behaviour of the other parent, and in some cases, the apparent associated intention of the other parent.[2]

While respondents' attributions of intentions may not always be correct, a key advantage of defining violence or abuse in terms of behaviours and apparent underlying intentions, rather than in terms of repercussions of the behaviour, lies in the fact that the impact of behaviour varies across individuals. For example, some people will be considerably less prone than others to respond to certain abusive behaviour with fear, and some people will be considerably less prone to be coerced into submission by behaviour that was intended to create this response.

Likewise, the longer-term impact of severe abuse in childhood varies considerably.[3] There can also be so-called "sleeper effects". For instance, *some* adverse outcomes may not become apparent until the children mature and enter intimate relationships themselves, although genetic factors may also play a role (Hines & Saudino 2002; Kwong, et al. 2003).

Given the marked individual differences that are apparent in reactions to events or behaviours that may seem objectively aversive and damaging, research into such issues tends to focus on the extent to which exposure to such events increases *the risks* (i.e., likelihood) of developing certain disorders such as depression, chronically low self-esteem, post-traumatic stress disorder, and conduct disorders including subsequent relationship violence apparently transmitted across the generations.

[2] The survey questions tapping experiences of emotional abuse were: At any time before or during the separation, did (child's other parent) ever: (i) Try to prevent you from contacting family or friends? (ii) Try to prevent you from using the telephone or car? (iii) Try to prevent knowledge of or access to family money? (iv) Insult you with the intent to shame, belittle or humiliate? (v) Threaten to harm the (child/children)? (vi) Threaten to harm other family/friends? (vii) Threaten to harm you? (viii) Damage or destroy property? (ix) Threaten to harm or harm pets? (x) Threaten to harm themselves?

[3] For example, see Barker-Collo & Read (2003) and Najman, Nguyen, & Boyle (2007) for discussions of individual differences in physical or mental health of adults who were exposed to childhood sexual abuse.

The issue of evidence

The literature review provided in the Allegations Report highlights the fact that family violence is often "hidden behind closed doors". Victims may be ashamed to admit their "private family business", and can make excuses for obvious signs of physical abuse. Should they eventually muster the courage to separate, they may have amassed little if any evidence regarding the sometimes gross abuse that they may have experienced. It is not surprising then, that the analyses of court files that formed the basis of the Allegations Report indicated that few allegations were supported by strong evidence and that the allegations most commonly contained no evidence-related information at all (see Attachment D). Furthermore, the most common response to allegations was "no response", and taken together, the allegations and responses most commonly contained low detail. As the authors concluded, these results suggest that legal advice and decision-making was occurring in the context of a great deal of uncertainty.

In seems very unlikely that this situation has changed. Indeed, the Evaluation findings based on data from court files indicates that the proportion of cases in which allegations of violence were made after the reforms remain similar to the proportions prior to the reforms [see Kaspiew et al. 2009, Table 13.7, p. 314]. These results further reinforce the need for an approach to screening and assessment of violence and safety concerns that has high validity and is consistently applied, particularly since the rate of orders for shared time increased significantly after the reforms (see Kaspiew et al. 2009, Tables 6.7-6.9, pp. 132-133).

As indicated in Attachment C, most respondents in the LSSF 2008 (especially mothers) said that they had experienced emotional abuse; physical hurt was almost always accompanied by emotional abuse; and most fathers who expressed safety concerns relating to ongoing contact were concerned about their child's safety, while mothers were equally likely to be concerned about the safety of their child alone or both their child and themselves. While the other parent was most commonly nominated as the source of their concerns, some parents nominated other people, including the other parent's new partner. Fathers were more likely to do this than mothers.

The prevalence of concerns about partners is likely to increase with increasing duration of separation, given the time required for re-partnering. It is also important to point out that a history of violence or abuse was not always associated with current negative inter-parental relationships nor with safety concerns. This again highlights the importance of establishing valid screening and assessment measures to assess the current seriousness and urgency of cases. This issue is discussed in considerable detail in Attachment A.

Children's best interests

Item 17 of the Family Violence Bill proposes the inclusion of a sub-section 60CC(2a) whereby, in determining the best interests of the child, priority would be given to the protection of children from harm than to the child of having a meaningful relationship with both parents. Findings from the LSSF 2008 are clearly relevant here. Children appeared to be at risk of compromised wellbeing not only where there had been a history of family violence, but also where parents held safety concerns relating to ongoing contact with the other parent or where the inter-parental relationship had been highly conflictual or fearful. This applied

regardless of the nature of care-time arrangements, although where mothers held safety concerns, the risks of children experiencing diminished wellbeing appeared to be even greater for those with a shared care-time arrangement than for those who spent most nights with their mother.[4] Other research suggests that children's best interests are served by arrangements that are developmentally appropriate and flexible (see Cashmore et al. 2010; McIntosh et al., 2010). At what point should arrangements that compromise the best interests of the child be seen as abusive to the child?

Care time and associated change-overs are clearly relevant here—as is the need for supervised change-overs or supervised contact. But research is required to assess the circumstances in which the child's best interests are likely to be served through no contact, supervised contact, and unsupervised contact—and the extent to which the picture regarding children's best interests changes as the circumstances, including the child growing older, change.

The other issues discussed in the submission on the Exposure Draft are clearly relevant to the present Inquiry and are not repeated here (see Attachment A).

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[4] This conclusion was based on mothers' assessments of their child's wellbeing (see Attachment C).

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Attachment A

Australian Institute of Family Studies Submission on the Exposure Draft

of the

Family Law Amendment (Family Violence) Bill 2010

The Australian Institute of Family Studies (AIFS) is a statutory authority that carries out a wide range of research relevant to policy and practice on issues affecting families. Family relationships formation, and family separation and divorce have been a focus of the Institute's work since its inception.

In addressing the proposed amendments to the *Family Law Act 1975* (Cth) (*FLA*) in the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010, this submission draws on relevant findings from the Institute's *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009)—hereafter called "the Evaluation"—as well as relevant findings from a number of other research papers. The Evaluation is the most comprehensive empirical study of separated and divorced parents ever conducted in Australia. It provides a solid evidence base from which to consider a number of issues raised in the Exposure Draft.

The family law system confronts the problem of screening for violence in a manner that increases the probability of detecting cases carrying the greatest risk and urgency, while also acknowledging the potentially deleterious impacts of all forms of violence. Minimising the occurrence of "false negatives" is clearly important. Broad definitions of family violence are likely to draw a greater number of these serious and urgent cases into the net. However, given the volume of cases already in the net, the most urgent ones may not get the attention they require, unless there are effective screening and assessment regimes in place. The proposed legislative change should therefore be implemented in tandem with initiatives to ensure that there are consistent and reliable screening and assessment mechanisms across all parts of the system. Consistency of screening and assessment across the system, along with mechanisms to communicate complementary information about the occurrence of violence and safety concerns, are of key importance.

Defining family violence in the context of separation and divorce: What does the research suggest?

Consistent with findings from a range of other studies in Australia and overseas,[1] the Evaluation highlighted the high prevalence rates of family violence, as broadly defined, among separated parents. Findings from the first wave of the Longitudinal Study of Separated Families (LSSF 2008), reported as part of the Evaluation, are particularly relevant in this regard. This study, conducted in late 2008, involved 10,002 parents who separated after the 2006 reforms had been introduced on 1 July.[2]

In the LSSF 2008, parents' reporting of physical hurt was almost always accompanied by their reporting of emotional abuse.[3] Of the mothers, 65% reported a history of some level and type of violence; 26% reported physical hurt prior to separation and 39% reported emotional abuse alone before during or after separation (Kaspiew et al., 2009, Table 2.2, p. 26). Among fathers, 17% reported physical hurt prior to separation and 36% reported emotional abuse alone, before, during or after separation.

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1 For a critical review of these studies, see Chapters 2 and 3 of the Institute's report into *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings* (Moloney et al., 2007).

2 The sample was drawn from the Child Support Agency's registration database in 2007. Of the total sample, 4,983 were fathers and 5,079 were mothers. The average duration between separation and interview was 15 months. The first child listed in the database for the case in question was selected as the "focus child". Parents in the study were asked to respond to a series of questions about this particular child.

3 The measure of emotional abuse consisted of 10 items covering the other parent: preventing the respondent from contacting friends or family, using the telephone or car, or from knowing about or accessing family money (3 items); insulting the respondent with the intent to shame, belittle or humiliate (1 item); threatening to harm the children, other family members or friends, the respondent, pets, or themselves (5 items); and damaging or destroying property (1 item).

Questions about child abuse were not asked of parents in the LSSF 2008. The Institute's report on *Allegations of Violence and Child Abuse in Family Law Children's Proceedings* (Moloney et al., 2007), based on the analysis of court files, found that allegations of some form of child abuse were made by between 19% and 50% of parents, with the rates depending upon which court had received the application, and whether or not the case had proceeded to full judicial determination. This study found that allegations of spousal violence were considerably more common than allegations of child abuse, and that child abuse allegations largely centred on physical abuse and were almost always accompanied by allegations of adult family violence.

In the LSSF 2008 survey, a majority of the 17% of fathers and 26% of mothers who reported physical hurt before separation also indicated that their children had seen or heard some of the abuse that had occurred (63% of fathers and 72% of mothers; see Kaspiew et al., 2009, p. 26)[4]. In addition, 17% of all fathers and 21% of all mothers reported having concerns for their own safety and/or the safety of their children associated with ongoing contact with the other parent (Kaspiew et al., 2009, Table 2.4, p. 28).

In the LSSF, child wellbeing was assessed via responses to direct questions and to standardised survey instruments. It was found on these measures that children whose parents reported a history of family violence (physical or emotional), or reported the presence of ongoing safety concerns, were also assessed by their parents to have poorer wellbeing compared to children whose families were not affected by these issues (Kaspiew et al., 2009, Table 11.3 p. 268).

In terms of ongoing inter-parental relationships, however, a reported history of either physical hurt or emotional abuse did not preclude a belief by a considerable number of respondents that the post-separation relationship with their former partner was positive (defined as "cooperative" or "friendly"). At the time of the survey, a little more than half the parents who reported having experienced emotional abuse alone (55% of mothers; 50% of fathers) also reported cooperative or friendly post-separation relationships with the focus child's other parent. The remainder who said that they had experienced emotional abuse alone described their inter-parental relationship as distant (23% mothers; 27% fathers), highly conflicted (18% mothers; 20% fathers) or fearful (5% mothers; 4% of fathers). That is, close to one-quarter of parents who reported experiencing emotional abuse alone saw their current relationship as being either highly conflicted or fearful (Kaspiew et al., 2009, p. 32).

Of those parents who reported earlier experiences of physical hurt, more than a third (36% of fathers; 39% mothers) nonetheless suggested at the time of the survey that they had a positive (friendly or cooperative) post-separation relationship with the focus child's other parent. Another 22% of mothers and 25% of fathers reported distant relationships. But 40% of both fathers and mothers spoke of relationships that were clearly negative; that is, highly conflicted (20% mothers; 29% fathers) or fearful (19% mothers; 11% fathers). The findings suggest the need to consider each case on an individual basis when assisting families or making decisions about children and parents in situations in which violence, whatever its form, is alleged or acknowledged.

The broad thrust of a legislative response

Broadly speaking, the above findings support a legislative approach to family violence in cases of parental separation that:

- acknowledges the high prevalence of a history of violence among separated families;

[4] This represents 11% of all fathers and 19% of all mothers. The percentage of separated families in which children witnessed some form of abusive behaviour between their parents would be higher, however, because the question regarding children witnessing any violence or abuse was only asked of parents who had reported that they had been physically hurt.

- assumes that being a member of a family in which violence has occurred is likely to have had or be having a negative impact on the partners and the wellbeing of their children;
- recognises that both emotional abuse and physical violence can have serious consequences, and that a history of violence is often likely to be associated with post-separation relationships that contain a great deal of conflict and/or are characterised by fear;
- accepts that not all pre-separation or separation-related violence is linked to poor post-separation parental relationships;
- takes into account that about a fifth of separated parents whose children have an ongoing relationship with each of them live with the anxiety of safety concerns with respect to their children and/or themselves; and

It is also important to note that clients may be reluctant to speak freely of their concerns about violence and abuse if they believe the legislation might disadvantage them. The Evaluation evidence, consistent with other reports (e.g., Chisholm, 2009), indicated that two specific aspects of the current legislative framework operate to discourage allegations of family violence from being raised: *FLA* s60CC(3)(c) ("friendly parent" provision) and s117AB (costs orders for knowingly made false statements). This evidence supports the repeal of these provisions in the proposed Bill.

The complex dynamics of family violence revealed in the AIFS Evaluation and in other studies, suggest that each disputed parenting case in which violence is alleged or noted must be considered on a case-by-case basis. At the same time, effective responses need to be capable of discriminating between those situations in which violent behaviour is causing ongoing physical or emotional damage to parents or children, and situations in which violent behaviour, while never acceptable, is not continuing to cause such damage.

A key practical consideration, as discussed above, is the need to adopt a consistent approach to screening and assessment of violence and safety concerns that enhances the capacity of professionals to respond to violence in an individualised way, despite being faced with high volumes of clients and general information overload.

In family law cases, information overload, often exacerbated by high levels of emotion, is commonly experienced by professionals such as family dispute resolution practitioners (see, for example, Lundberg & Moloney, 2010). This is an environment in which, nonetheless:

- family relationship practitioners must make decisions on a case-by-case basis about what available services are likely to be most effective;
- lawyers must advise on what applications or other actions are most likely to progress each particular case; and
- judicial officers, having considered the evidence, must make orders that best respond to the particular applications before them.

A clear undercurrent in the Evaluation's findings was that while difficulties and dilemmas are common across the family law system, these were more prominent in cases in which violence and other dysfunctional behaviours were alleged or suspected. A few examples will suffice:

- Some clients were fearful of their former partners when attending family relationship services, and not all clients felt that these fears had been adequately addressed.
- Lawyers and family relationship practitioners each rated their own capacity to detect and respond appropriately to family violence as being relatively high, but had concerns about the same capacity in their colleagues from the other profession.
- A significant minority (16–20%) of parents, who had expressed safety concerns for themselves and their children, nonetheless reported being in shared time arrangements.

Issues such as these were also reflected in key findings from the Institute's earlier *Allegations of Family Violence* report (discussed above; Moloney et al., 2007). It was found, for example, that while allegations of spousal violence or child abuse accompanied by evidence of strong probative weight appeared to influence court orders, without such evidence (which was most often the case) allegations did not seem to be formally linked to outcomes.

Difficulties and tensions such as those above are likely to be ameliorated by giving legislative priority to issues of parental and child safety when this is in tension with the aim of promoting ongoing meaningful relationships with both parents and, as argued above, by modifying or removing the so-called "friendly parent" provision, which, according to a number of solicitors surveyed, has led to a more conservative approach to raising issues about violence and related matters (Kaspiew et al., p. 250).

At the same time, the accumulated empirical evidence would suggest that the key systemic issue facing family law system professionals with respect to questions of violence and abuse (and other dysfunctional behaviours that put parents and children at risk) is one of timely and accurate discrimination between cases that do and do not represent urgent and serious risk.

The need for discrimination of risk has many parallels with the multiple attempts by state agencies to more generally protect children from abuse. At a state level, the broad definitions of abuse, combined with a mandatory reporting requirement for many professionals, has frequently resulted in unintended consequences, whereby services are swamped with cases and unable to discriminate sufficiently between levels of severity (Bamblett, Bath & Roseby, 2010; Higgins & Katz, 2008).

There is a need to assist practitioners and courts to discern appropriately and to focus primarily on safety and protection. It would seem useful to consider a two-step approach to all potential litigants that has parallels with the approach taken by Family Relationship Centres (FRCs) and a number of other family services. This approach, which makes a formal distinction between a screening component and a risk assessment component, was the subject of a recent Australian Family Relationships Clearinghouse (AFRC) Briefing Paper published by the Institute (Robinson & Moloney, 2010). Below we consider the possible relevance of this briefing paper to more formal legislative change.

Screening

The screening processes currently employed in the family relationships sector are designed to precede any detailed statements about family violence (as well as any other matters such as substance dependency and particular forms of mental illness) that are likely to put the safety of a family member at risk. Depending on the screening question or questions responded to by the client, the process then acts in the risk assessment phase to assist the client and the practitioner to achieve a better understanding of the nature of the concerns and what needs to be done. Screening can be defined as:

> A process by which the identification of victims of family violence occurs, in order to take further action or intervention. Routine screening implies that all clients attending a service should be asked questions related to the existence of family violence. (Robinson & Moloney, 2010, p. 4, adapted from Braff & Sneddon, 2007)

Typically in the family services sector, a series of three or four screening questions, designed to establish whether or not a threshold safety issue is likely to be present, is asked by a trained practitioner on a one-to-one basis. Questions such as the following have been synthesised from a range of instruments developed in Australia and overseas:

- Do you have any reason to be concerned about your own safety or the safety of your children?
- Do you have any other fears about your own or your children's wellbeing at the moment?

- Does your former partner have a history of attempting to prevent you from doing normal things such as visiting friends?
- Do you have any reason to be concerned about the safety of anyone else?
- How do you think your partner/ex-partner would answer these questions?[5]

Rabin, Jennings, Campbell, and Bair-Merritt (2009), who conducted an evaluation of 21 intimate partner violence (IPV) screening tools, found that none had been comprehensively evaluated. The Family Relationship Centre and Family Relationships Advice Line Framework (Winkworth & McArthur, 2008), in line with other frameworks, suggests a "structured judgement" approach to screening, in which the tool is an important but not exclusive source of information.

A history of violent behaviour—including threats; controlling actions; frequent humiliating, insulting and demeaning comments; and physical violence—frames the context and complements the screening process. Of course, the screening questions are likely to elicit examples from past and present experience, as well as perceptions of current and future concerns. As such, the proposed approach uses screening tools in combination with evidence-based practice, collaborative practice with other service providers, and respect for the clients' own knowledge and histories.

But unless all family law clients with parenting disputes are filtered through the services sector with its own screening and assessment processes (which was not the intention of the 2006 reforms), a key question becomes how to permit direct access to courts in appropriate cases, without simultaneously finding that judicial officers and other court staff are drowning in a sea of violence-related allegations and counter allegations? The impacts of violent relationships that are of most concern to family law courts are those that are linked to safety, and to the physical and emotional wellbeing (and on occasions the very survival) of parents and their children. It is suggested, therefore, that the key screening questions that all potential users of the court system should be required to address are questions that respond to these concerns. This may be a more efficient and more effective method of assisting the family law system in general and courts in particular to focus resources where they are most likely to be needed.

At a more practical level, it is suggested that the provision of a written response to one or more broad-based screening questions such as those above could be a necessary part of any child-related application to a family law court in Australia. If such a course of action were to be followed, it would be important that screening questions of the sort noted above be consistent with the core definition of family violence used in the legislation.

As noted above, the Institute's Evaluation found that 21% of separated mothers and 17% of separated fathers had safety concerns either with respect to their children and/or themselves. We would argue that there is an urgent need to develop and implement a screening regime, consistently applied across the family law system, in order to identify and further assess families at risk.

Risk assessment

Risk assessment can be defined as:

> Ongoing efforts to assess the degree of harm or injury likely to occur as a result of past, present or future family violence. (Robinson & Moloney, 2010, p. 4, adapted from Braff & Sneddon, 2007)

[5] These are similar to the commonly used FRC and Family Relationships Advice Line screening questions cited in Robinson and Moloney (2010, p. 8).

The new proposed s67ZBA would require a party to file a Notice of Child Abuse or Family Violence with the court if a party alleges there has been or if there is a risk of family violence by one of the parties to the proceedings. The AIFS evidence suggests that a majority of fathers and mothers would be obliged to file such a notice.

The screening process suggested above is primarily an indicator of the extent to which parents are anxious or fearful about their own and/or their children's present or future safety. The addition of this process is likely to lead to the identification of the subgroup of families who are of most concern (roughly 20%, based on AIFS data).

Concluding comments

The Institute's Evaluation painted a generally positive picture of the 2006 family law reforms, but found that with respect to the question of dealing with family violence, the family law system had some way to go. It seems timely therefore to introduce legislative changes that give priority to assessing and acting upon violence in advance of considerations about the opportunity for ongoing meaningful relationships.

As noted in the Institute's *Allegations of Family Violence* report, and confirmed in the Evaluation, the empirical evidence overwhelmingly suggests that family violence is "core business" in the family law system.

No violence is acceptable, and it is difficult to imagine how any expression of violence between parents would not have a negative impact on children. But increasingly it has become clear that the legislation's primary obligation in this area is to do what it can to protect parents and children from living with the fear associated with violence or threats of violence, often of the sort motivated by the need to exercise continued control over a partner and/or a child. This submission, based on the evidence from the Evaluation and related research, points to the need to complement legislative reform with a consistent approach to screening and assessment of family violence, capable of being applied across a complex family law system.

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Attachment B

The AIFS evaluation of the 2006 family law reforms

A summary

Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team

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In 2006, the Australian Government, through the Attorney-General's Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), commissioned the Australian Institute of Family Studies (AIFS) to undertake an evaluation of the impact of the 2006 changes to the family law system: *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009) (the Evaluation). This article provides a summary of the key findings of the Evaluation.

In 2006, a series of changes to the family law system were introduced. These included changes to the *Family Law Act 1975* (Cth)[1] and increased funding for new and expanded family relationships services, including the establishment of 65 Family Relationship Centres (FRCs) and a national advice line. The aim of the reforms was to bring about "generational change in family law" and a "cultural shift" in the management of separation, "away from litigation and towards cooperative parenting".[2]

The 2006 reforms were partly shaped by the recognition that although the focus must always be on the best interests of the child, many disputes over children following separation are driven by relationship problems rather than legal ones. These disputes are often better suited to community-based interventions that focus on how unresolved relationship issues affect children and assist in reaching parenting agreements that meet the needs of children.

The changes to the family law system followed an inquiry by the House of Representatives Standing Committee on Family and Constitutional Affairs (2003), which recommended changes to the family relationship services system and the legislation. The committee's report, *Every Picture Tells a Story*, made recommendations that aimed to make the family law system "fairer and better for children". The 2006 changes reflected some, but not all, of the recommended changes.

The policy objectives of the 2006 changes to the family law system were to:

- help to build strong healthy relationships and prevent separation;
- encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse;
- help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
- establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.[3]

The policy objectives outlined above encompassed a range of more specific goals. A set of indicators of the success or otherwise of the reforms in achieving these objectives was developed. These were translated into the following evaluation questions:

1. To what extent are the new and expanded relationship services meeting the needs of families?
    a. What help-seeking patterns are apparent among families seeking relationship support?
    b. How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?
2. To what extent does family dispute resolution (FDR) assist parents to manage disputes over parenting arrangements?
3. How are parents exercising parental responsibility, including complying with obligations of financial support?
4. What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?
5. What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?
6. To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?
7. To what extent are children's needs and interests being taken into account when these parenting arrangements are being made?
8. How are the reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (*SPR Act 2006*) working in practice?
9. Have the reforms had any unintended consequences —positive or negative?

The AIFS *Evaluation of the 2006 Family Law Reforms* was based on an extensive research program and provides a comprehensive evidence base on the operation of the family law system. The Evaluation included three main projects: the Legislation and Courts Project, the Service Provision Project and the Families Project. Each of these projects comprised a number of sub-studies, with 17 separate studies contributing to the Evaluation overall (see the text box at top right and Appendix for further information). The research design focused on examining the extent to which key aspects of the objectives underpinning the reforms had been achieved. The Evaluation involved the collection of data from 28,000 people involved in the family law system, including parents, grandparents, family relationship services staff, clients of family relationship services, lawyers, court professionals and judicial officers. It also involved the analysis of administrative data and court files. This article outlines the key research questions and findings from the Evaluation—references in parentheses throughout are to tables, figures and sections in the full Evaluation report. The full Evaluation report (Kaspiew et al., 2009) is available from the AIFS website <www.aifs.gov.au>.

A point that transcends the specific evaluation questions and has implications for the findings across all of the evaluation questions arises from the new empirical evidence from the Evaluation about the characteristics of separated families, particularly those who access services across the system. A significant proportion of families who actively engage with the family law system have complex needs, involving issues such as family violence, child abuse, mental health problems and substance abuse. For example, 26% of mothers and 18% of fathers reported experiencing physical hurt prior to separation, and 39% of mothers and 47% of fathers reported experiencing emotional abuse before, during and after separation (LSSF W1 2008; Table 2.2). Families with complex needs are the predominant clients both of post-separation services and the legal sector; however, there is also a proportion of families who do not engage with the system to any significant extent. While some of these families appear not to be characterised by any significant complexity in terms of family violence, mental health issues or substance abuse issues, there is a sub-group of non-users of the system for whom these issues are relevant.

Key studies referred to in this article

Legislation and Courts Project (LCP; see also Appendix)

Qualitative Study of Legal System Professionals 2008 (QSLSP 2008)

Family Lawyers Survey 2006 and 2008 (FLS 2006 and FLS 2008)

Quantitative Study of Family Court of Australia, Federal Magistrates Court and Family Court of Western Australia Files 2009 (QSCF 2009)

Service Provision Project (SPP; see also Appendix)

Qualitative Study of Family Relationship Services Program (FRSP) Staff 2008–09

Online Survey of FRSP Staff 2009

Survey of FRSP Clients 2009 (Survey of FRSP Clients 2009)

Families Project (see also Appendix)

General Population of Parents Survey 2006 (GPPS 2006)

General Population of Parents Survey 2009 (GPPS 2009)

Family Pathways: The Longitudinal Study of Separated Families (LSSF W1 2008)

Family Pathways: Looking Back Survey (LBS 2009)

Family Pathways: The Grandparents in Separated Families Study 2009 (GSFS 2009)

Evaluation question 1: To what extent are the new and expanded relationship services meeting the needs of families?

a. What help-seeking patterns are apparent among families seeking relationship support?

b. How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?

There is evidence of fewer post-separation disputes being responded to primarily via the use of legal services and more being responded to primarily via the use of family relationship services. This suggests a cultural shift whereby a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms.

About half of the parents in non-separated families who had serious relationship problems used early intervention services to assist in resolving those problems (GPPS 2009; Table 3.13). There was less use of these services to support relationships by couples who had not faced serious problems (about 10%) (GPPS 2009; Table 3.12). Client satisfaction with early intervention services (funded as part of the federal Family Relationships Services Program) was high, with upwards of 88% of clients providing positive ratings for the "overall quality" of early intervention services. Favourable assessments for overall quality were made by 91% of Specialised Family Violence Service clients, 86% of Men and Family Relationships Services clients, 88% of counselling service clients and 95% of the Education and Skills Training service clients (Survey of FRSP Clients 2009; Table 3.28).

The AIFS Evaluation of the 2006 family law reforms was based on an extensive research program and provides a comprehensive evidence base on the operation of the family law system.

Overall, clients of post-separation services also provided favourable ratings. More than 70% of FRC and FDR clients said that the service treated everyone fairly (i.e., practitioners did not take sides) and more than half said that the services provided them with the help they needed (Survey of FRSP Clients 2009; Table 3.28). This rate can be considered to be quite high, given the strong emotions, high levels of conflict and lack of easy solutions that these matters often entail.

Family relationship service professionals generally rated their own capacity to assist clients as high (Online Survey of FRSP Staff 2009; Tables 3.21 & 3.22). They also spoke of considerable challenges associated with the complexity of many of the cases they are handling and of waiting times linked largely to resourcing and recruitment issues, especially in some of the FRCs.

Consistent with an important aim of the reforms, family relationship service professionals generally placed considerable emphasis on referrals to appropriate services. At the same time, ensuring that families are able to access the right services at the right time represents one important area where there is a need for ongoing improvement. Pathways through the system need to be more clearly defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. For example, compared with parents who did not report family violence, parents who reported family violence were much less likely to report that their parenting arrangements had been sorted out some 18 months after separation (LSSF W1 2008; Table 4.14) and were more likely to report using multiple services. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.

There is a need for more proactive engagement and coordination between family relationship service professionals and family lawyers and between family law system professionals and the courts. This need is especially important when dealing with complex cases.

Evaluation question 2: To what extent does FDR assist parents to manage disputes over parenting arrangements?

The use of FDR post-reform was broadly meeting the objectives of requiring parents to attempt to resolve their disputes with the help of non-court dispute resolution processes and services.

About two-fifths of parents who used FDR reached agreement and did not proceed to court (LSSF W1 2008; section 5.3.3). Almost a third did not reach agreement and did not have a certificate issued (under s60I(8) of the *SPR Act 2006*, family dispute resolution practitioners may issue these certificates to indicate that one or both parties has attempted to resolve a matter through FDR). However, most of these parents reported going on to sort things out mainly via discussions between themselves. About one-fifth were given certificates from a registered family dispute practitioner that permitted them to access the court system. Most of these parents mainly used courts and lawyers and approximately a year after separation most had neither resolved matters nor had decisions made.

Family Relationship Centres have also become a first point of contact for a significant number of parents whose capacity to mediate is severely compromised by fear and abuse, and there is evidence that FDR is occurring in some of these cases (Survey of FRSP Clients 2009; Tables 5.8 & 10.3), even though matters where there are concerns about family violence or child abuse are exceptions to the requirement to attend FDR (*SPR Act 2006*, s60I(9)). This may reflect an inadequate understanding of the exceptions

About half of the parents in non-separated families who had serious relationship problems used early intervention services to assist in resolving those problems.

to FDR by those making referrals. At the same time, the complexities of this process need to be acknowledged. There are decisions that need to be made on a case-by-case basis, including decisions about who is best placed to make a judgment concerning whether there are grounds for an exception and the extent to which professionals should respect the wishes of those who qualify as an "exception" but nonetheless opt for FDR.

Clearer inter-professional communication (between FDR professionals, lawyers and courts) will not provide prescriptive answers to such questions but would assist in developing strategies to ensure that there is a more effective process of sifting out matters that should proceed as quickly as possible into the court system. Progress on this front, however, also requires earlier access to courts and greater confidence on the part of lawyers and service professionals that clients will not get "lost in the family law system".

Evaluation question 3: How are parents exercising parental responsibility, including complying with obligations of financial support?

In lay terms, parental responsibility has a number of dimensions, including care time, decision-making about issues affecting the child, and financial support for the child. Shared decision-making is most likely to occur where there is shared care time.

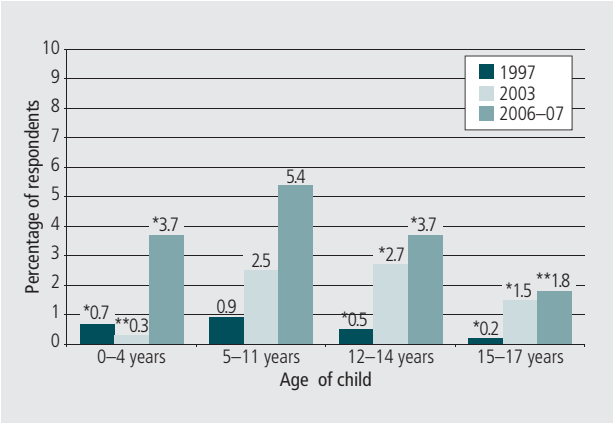
Shared decision-making was much less common among parents who reported a history of family violence or had ongoing safety concerns for their children (LSSF W1 2008; section 8.1.3). Nonetheless, the exercise of shared decision-making was reported by a substantial proportion of parents with a history of violence. For example, shared decision-making about the child's education was reported by 25% of fathers and 15% of mothers who said that their child's other parent had hurt them physically and whose child was in a care arrangement involving most or all nights with the mother. Where a history of physical hurt was reported and the child was in a shared care arrangement, 54% of fathers and 42% of mothers reported shared decision-making over education.

In contrast to the systematic variation in decision-making practices reported by parents with different care-time arrangements, legal orders concerning parental responsibility demonstrated a strong trend, pre-dating the reforms, for decision-making power to be allocated to both parents. Prior to the reforms, court orders provided for shared parental responsibility in 76% of cases, compared with 87% after the reforms (QSCF 2009; Table 8.2). Generally, fathers' compliance with their child support liability did not vary according to care-time arrangements. The only exception is that fathers who never saw their child were less likely to comply with their child support obligations. (LSSF W1 2008; Figures 8.17 & 8.18). Father payers with equal care time and those who never saw their child were more inclined to believe that child support payments were unfair, compared to father payers with other care-time arrangements (LSSF W1 2008; Figure 8.23). Child support compliance among fathers and mothers was higher where there was shared decision-making compared to where one parent had all of the decision-making responsibilities (LSSF W1 2008; Figure 8.19).

Evaluation question 4: What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?

Although only a minority of children were in shared care-time arrangements, the proportion of children with these arrangements has increased; a trend that appears to pre-date the reforms. In the LSSF W1 2008, 16% of focus children were in shared care arrangements (applying a definition based on a 35–65% night split between parents). A near equal time split (48–52% of nights) applied to 7% of children, with another 8% spending more time with their mother than their father and 1% spending more time with their father than their mother (LSSF W1 2008; section 6.5.1) Incremental increases in shared care are part of a longer term trend in Australia and internationally. Australian Bureau of Statistics data show increases in shared care arrangements across age groups between 1997 and 2006–07 (Figure 1 below). Shared care for children in the 5–11 year age group rose from 1% in 1997 to 5% in 2006–07. Increases were less marked for children in other age groups, although estimates for these age groups should be used with caution due to small sample sizes. In relation to 12–14 year olds, for example, less than 1% of children were in shared care arrangements in 1997, compared with 3.7% in 2006–07.

Judicially determined orders for shared care time increased post-reform, as did shared care time in cases where parents reached agreement by consent. Data from the QSCF 2009 show that orders for shared care in matters decided by judges (again applying a definition based on a 35–65% night split) rose from 2% prior to the reforms to 13% after the reforms (Table 6.8). A less significant increase was evident among cases in which the parties reached agreement, with a pre-reform proportion of 10% compared with 15% post reform (Table 6.9).



Notes: Omitted from analysis are data for children who lived with grandparents or guardians and for those whose overnights stays were not stated. * These estimates had a relative standard error of 25% to 50% and should be used with caution. ** These estimates have a relative standard error greater than 50% and are considered to be too unreliable for general use.

Source: ABS FCS 1997 and 2003, ABS FCTS 2006–07

Figure 1 Proportion of children in different age groups who experienced equal care-time arrangements, by age of child, 1997, 2003 and 2006–07

The majority of parents with shared care-time arrangements thought that the parenting arrangements were working well both for parents and the child (LSSF W1 2008; Figure 7.21). While, on average, parents with shared care time had better quality inter-parental relationships, violence and dysfunctional behaviours were present for some. For example, 16% of mothers and 10% of fathers with shared care (more nights with mother) reported relationships with "lots of conflict", and 8.4% of mothers and 3.5% of fathers with such arrangements reported relationships that were fearful (LSSF W1 2008; Figures 7.27 & 7.28).

Generally, shared care time did not appear to have a negative impact on the wellbeing of children. Irrespective of care-time arrangements, mothers and fathers who expressed safety concerns described their child's wellbeing less favourably than those who did not hold such concerns (LSSF W1 2008; section 11.3.2). However, the reports of mothers suggest that the negative impact of safety concerns on children's wellbeing is exacerbated where they experience shared care-time arrangements (LSSF W1 2008; Figure 11.11 & 11.12).

Evaluation question 5: What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?

Just more than half of the parents who separated after the 2006 changes to the family law system felt that time with grandparents had been taken into account when developing parenting arrangements, and just over half the grandparents confirmed this view. Parents who separated prior to the 2006 changes to the family law system were less likely to recall having taken into account grandparents when developing parenting arrangements (LSSF W1 2008; LBS 2009; Figure 12.12).

Nevertheless, the reports of both parents and grandparents suggest that relationships between children and their paternal grandparents often become more distant when the child lives mostly with the mother (reflecting the most common care-time arrangement) (GPPS 2006; GPPS 2009; Figures 12.7 & 12.8). The parents in most families in the studies would have separated before the reforms were introduced. The level of impact of the reforms on the evolution of grandparent–grandchild relationships is an important area for future research.

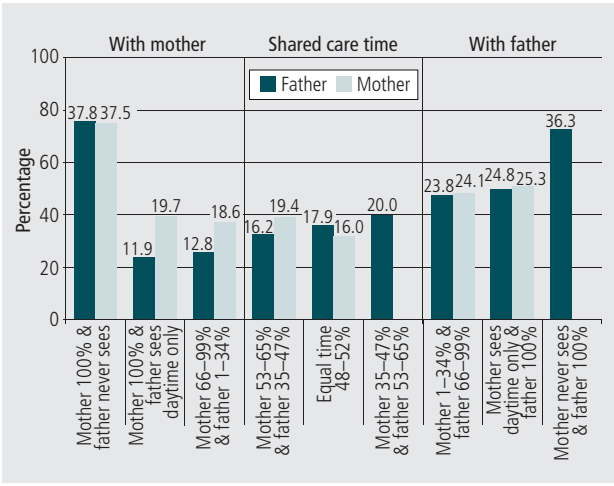
There appeared to be a growing awareness among both family relationship service staff and family lawyers of the potential value and importance to children of taking into account grandparents when developing parenting arrangements. While grandparents were seen, in most cases, to have the potential to contribute much to the wellbeing of children, there was also an appreciation by family relationship service professionals of the complexity of many extended family situations (Qualitative Study of FRSP Staff 2008–09; section 12.7.2). This was associated with recognition that, in some cases, too great a focus on grandparents when developing parenting arrangements might be counter-productive.

The overall picture, however, is of grandparents being very important in the lives of many children and their families, with some evidence that the legislation has contributed to reinforcing this message. Clearly, grandparents can also be an important resource when families are struggling during separation and at other times. But as complexities increase, dispute resolution and decision-making in cases involving grandparents are likely to prove to be more difficult and time-consuming.

Evaluation question 6: To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?[4]

For a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drug misuse are relevant. The evaluation provides evidence that the family law system has some way to go in being able to respond effectively to these issues. However, there is also evidence of the 2006 changes having improved the way in which the system is identifying families where there are concerns about family violence and child abuse. In particular, systematic attempts to screen such families in the family relationship service sector and in some parts of the legal sector appear to have improved identification of such issues.

Families where violence had occurred, however, were no less likely to have shared care-time arrangements than those where violence had not occurred (LSSF W1 2008; Figures 7.29 & 7.30). Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns (16–20% of families with shared care time had safety concerns). Safety concerns were also evident in similar proportions of families with arrangements involving children spending most nights with the mothers and having daytime-only contact with the father (LSSF W1 2008; Figure 7.31 [see Figure 2 below]). The pathways to these arrangements included decisions made without the use of services and decisions made with the assistance of family relationship services, lawyers and courts (Kaspiew et al., 2009, pp. 232–233).



Source: LSSF W1 2008

Figure 2 Safety concerns associated with ongoing contact, by care-time arrangements, fathers and mothers, 2008

Mothers and fathers who reported safety concerns tended to provide less favourable evaluations of their child's wellbeing compared to other parents (LSSF W1 2008; section 11.3.2). This was apparent for parents with all care-time arrangements, including the most common arrangement. where the child lives mainly with mother. But the poorer reported outcomes for children whose mothers expressed safety concerns were considerably more marked for those children who were in shared care-time arrangements.

There is also evidence that encouraging the use of non-legal solutions, and particularly the expectation that most parents will attempt FDR, has meant that FDR is occurring in some cases where there are very significant concerns about violence and safety (Survey of FRSP Clients 2009; Table 10.3).

Significant concerns were expressed by substantial minorities of lawyers and family relationship service professionals who expressed the view that the system had scope for improvement in achieving an effective response to family violence and child abuse (FLS 2008; Online Survey of FRSP Staff 2009; e.g., Figure 10.3). Some problems referred to were evident before the reforms, such as difficulties arising from a lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents (FLS 2008; QSLSP 2008; section 10.4.1). While the legislation (*SPR Act*) sought to place more emphasis on the importance of identifying concerns about family violence and child abuse (e.g., s60B(1)(b); 60CC(2)(b)), other aspects of the legislation were seen to contribute to a reticence among some lawyers and their clients about raising such concerns; for example, s117AB, which obligates courts to make a costs order against a party found to have "knowingly made a false allegation or statement" in proceedings, and s60CC(3)(c), which requires courts to consider the extent to which a parent has facilitated the other parent's relationship with the child.

The link between safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need to make changes to practice models in the family relationship services and legal sectors. In particular, these sectors need to have a more explicit focus on effectively identifying families where concerns about child or parental safety need to inform decisions about care-time arrangements.

These findings point to a need for professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals. Protocols for working constructively and effectively with state-based

Relationships between children and their paternal grandparents often become more distant when the child lives mostly with the mother.

systems and services (such as child protection systems) also need further work. Clearly, however, the progress that continues to be made on improved screening practices will go only part of the way towards assisting victims of violence and abuse.

Evaluation question 7: To what extent are children's needs and interests being taken into account when parenting arrangements are being made?

This question is central to the objectives of the reforms and therefore a number of the evaluation questions are relevant to assessing the extent to which children's needs and interests are being taken into account. Particularly relevant is the question of the extent to which issues relating to family violence and child abuse are taken into account when making arrangements regarding parenting responsibility and care time.

This is an area where the evaluation evidence points to some encouraging developments, but also highlights some difficulties. Many parents are using the relationship services available and there is evidence from clients and service professionals that this is resulting in arrangements that are more focused on the needs of children than in the past. Nonetheless, in a proportion of cases this is not occurring as well as it could.

There is evidence that many parents misconstrue equal shared parental responsibility as allowing for "equal" shared care time (FLS 2008; QSLSP 2008; Qualitative Study of FRSP Staff 2008–09; section 9.3). In cases in which equal or shared care time would be inappropriate, this can make it more difficult for relationship service professionals, lawyers and courts to encourage parents to focus on the best interests of the child (discussed further below).

The SPR Act 2006 introduced Division 12A of Part VII—Principles for conducting child related proceedings—which was supported by new case management practices in the Family Court of Western Australia (FCoWA) and the Family Court of Australia (FCoA). The court that handles most children's matters, the Federal Magistrates' Court (FMC) had largely retained it own case management regime based on the "docket" system.

Evaluation question 8: How are the reforms introduced by the *SPR Act 2006* working in practice?

The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals (LSSF W1 2008; FLS 2008; Figures 6.1, 6.2 & 9.1). However, many parents and some professionals do not understand the distinction between shared parental responsibility and shared care time, or the rebuttable (or non-applicable) presumption of shared parental responsibility (FLS 2006; QSLSP 2008; section 9.2). A common misunderstanding is that shared parental responsibility allows for "equal" shared care time, and that if there is shared parental responsibility, then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and care time is expressed in the legislation. This confusion has resulted in disillusionment among some fathers, who find that the law does not provide for 50–50 "custody". This in turn can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents' rights rather than children's needs, obscuring to some extent the primacy of the "best interests" principle (s60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

However, the changes have also encouraged more creativity in making arrangements, either by negotiation or litigation, that involve fathers in children's everyday routines, as well as special activities. Advice-giving practices consistent with the informal "80–20" rule (i.e., what was seen as the typical arrangement where the child spends 80% of the time with the mother and 20% of the time with the father post-separation) have declined markedly since the reforms (FLS 2006 & 2009; section 9.4.2). For example, lawyers indicated that advice that "mothers who have had major child care responsibilities would normally obtain residence of their children" was given much less frequently in 2008 than in 2006: pre-reform, 82% of participants in the FLS 2006 said they gave this advice almost always or often, compared with 44% in 2006. Similarly, advice indicating that a normal contact pattern was "alternate weekends and half school holidays" was given much less frequently after the reforms: pre-reform, 26% of the FLS 2006 sample said they "rarely or never" gave such advice, compared with 64% in 2008.

In an indication of the impact of the measures designed to reduce reliance on legal mechanisms to resolve disputes, total court filings in children's matters have declined by 22%; and a pre-reform trend for filings to increase in the FMC, with a corresponding decrease in the FCoA, has gathered pace (QSCF 2009; section 13.2).

Legal sector professionals had concerns arising from the parallel operation of the FMC and FCoA, including the application of inconsistent legal and procedural approaches and concerns about whether the right cases are being heard in the most appropriate forum (FLS 2006; QSLSP 2008; section 14.1). The FCoA, the FMC and the FCoWA have each adopted a different approach to the implementation of Division 12A of Part VII (FLS 2006; QSLSP 2008; section 13.1). FMC processes have changed little (although this court is perceived to have an active case management approach pre-dating the reforms) and the FCoA and FCoWA have implemented models with some similarities, including limits on the filing of affidavits and roles for family consultants that are based on pre-trial family assessments and involvement throughout the proceedings where necessary. Excluding WA, the more child-focused process available in the FCoA is only applied to a small proportion of children's matters, with the majority of such cases being dealt with under the FMC's more traditional adversarial procedures.

While family consultants and most judges believed the FCoA's model is an improvement, particularly in the area of child focus, lawyers' views were divided, with many expressing hesitancy in endorsing the changes (QSLSP 2008; FLS 2006; FLS 2008; section 14.3). Concerns include

a lack of resources in the FCoA leading to delays, more protracted and drawn-out processes, and inconsistencies in judicial approaches to case management. Similar concerns were evident to a lesser extent about the WA model. It appears that while these models have significant advantages, some fine-tuning is required. This is an area where the Evaluation provided only a partial picture, as these issues were considered as part of a much larger set of evaluation questions.

The new substantive parenting provisions introduced into Part VII of the *FLA* by the *SPR Act 2006* tended to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice (QSLSP 2008; FLS 2006; section 15.1). Because of the complexity of key provisions, and the number of provisions that have to be considered or explained, judgment-writing and advice-giving have become more difficult and protracted. There is concern that legislation that should be comprehensible to its users—parents—has become more difficult to understand, even for some professionals.

Evaluation question 9: Have the reforms had any unintended consequences—positive or negative?

The majority of parents in shared care-time arrangements reported that the reforms worked well for them and for their children. But up to one-fifth of separating parents had safety concerns that were linked to parenting arrangements; and the data on child wellbeing from the LSSF W1 2008 show that shared care time in cases where there are safety concerns expressed by mothers correlates with poorer outcomes for children (Figures 11.11 & 11.12).

Similarly, the majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway. But many FDR clients had concerns about violence, abuse, safety, mental health or substance misuse. Some of these parents appeared to attempt FDR where the level of their concerns was such that they were unlikely to be able to represent their own needs or their children's needs adequately. It is also important to recognise that FDR can be appropriate in some circumstances in which violence has occurred (section 5.3.2).

Further unintended consequences are also evident. A majority of lawyers perceived that the reforms have favoured fathers over mothers (FLS 2006; FLS 2008; Figure 9.8) and parents over children (FLS 2006; FLS 2008; Figure 9.9). There was concern among a range of family law system professionals that mothers have been disadvantaged in a number ways, including in relation to negotiations over property settlements (FLS 2008; QSLSP 2008; section 9.6.2). There was an indication from lawyers that there may have been a reduction in the average property

The majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway.

settlements allocated to mothers. Financial concerns, including child support liability and property settlement entitlements, were perceived by many lawyers and some family relationship professionals to have influenced the care-time arrangements some parents sought to negotiate (FLS 2006; QSLSP 2008; Qualitative Study of FRSP Staff 2008–09; section 9.6). The extent to which these concerns are generally pertinent to separated parents is uncertain. The evaluation indicates that a majority of parents are able to sort out their post-separation parenting arrangements quickly and expeditiously; however, there is also a proportion whose post-separation arrangements appear to have been informed by a "bargaining" rather than "agreeing" dynamic. For these parents, it appears the reforms have contributed to a shift in the bargaining dynamics. This is an area where further research is required.

Many separated families are affected by issues such as family violence, safety concerns, mental health problems and substance misuse issues, and these families are the predominant users of the service and legal sectors.

Conclusion

The evaluation evidence indicates that the 2006 reforms to the family law system have had a positive impact in some areas and have had a less positive impact in others. Overall, there has been more use of relationship services, a decline in filings in the courts in children's cases, and some evidence of a shift away from an automatic recourse to legal solutions in response to post-separation relationship difficulties.

A significant proportion of separated parents are able to sort out their post-separation arrangements with minimal engagement with the formal system. There is also evidence that FDR is assisting parents to work out their parenting arrangements.

A central point, however, is that many separated families are affected by issues such as family violence, safety concerns, mental health problems and substance misuse issues, and these families are the predominant users of the service and legal sectors. In relation to these families, resolution of post-separation disputes presents some complex issues for the family law system as whole, and the evaluation has identified ongoing challenges in this area. In particular, professional practices and understandings in relation to identifying matters where FDR should not be attempted require continuing development. This is an area where collaboration between relationship service professionals, family law system professionals and courts needs to be facilitated so that shared understandings about the types of matters that are not suitable for FDR can be developed and so that other options can be better facilitated.

Beyond effective screening, possible ways forward include:

- continued development of protocols for the sharing of information within the family relationship service sector and between the sector and other critical areas, such as child protection;
- development of protocols for cooperation between family relationship service professionals and independent children's lawyers;
- development of protocols for cooperation between family relationship service professionals and lawyers acting as advocates for individual parents;
- a considerably improved capacity in courts to solicit or provide high-quality assessments that will assist them to make safe, timely and child-focused decisions, especially at the interim stage; and
- consideration of whether (and, if so, how) information already gained via sometimes extensive screening procedures within the family relationship service sector can be used by judicial officers or by those providing court assessments to assist in the process of judicial determination.

While communication in relation to privileged and confidential disclosures made during assessment and FDR processes raises some complex questions, investigation of how such communication could potentially occur may be an avenue for achieving greater coordination and ensuring expeditious handling of these matters. Currently, much relevant information may be collected by family relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance. Effectively, families who move from one part of the system to the other often have to start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.

Effective responses to families where complex issues exist mean ensuring such families have access to appropriate services to not only resolve their parenting issues but also deal with the wider issues affecting the family. Such responses involve identifying concerns and assisting parents to use the dispute resolution mechanism that is most appropriate for their circumstances.

Effective responses should ensure that the parenting arrangements put in place for children in families with complex issues are appropriate to the children's needs and do not put their short- or long-term wellbeing at risk. Further examination of the needs and trajectories of families who are unsuitable for FDR would assist in identifying the measures required to assist these families (to some extent, LSSF W2 2009 [forthcoming] may assist with this). A key question is the extent to which such families then access the legal/court system and whether there are barriers or impediments (e.g., financial or personal) to them doing so.

The evidence of poorer wellbeing for children where there are safety concerns—across the range of parenting arrangements, but particularly acutely in shared care-time arrangements—highlights the importance of identifying families where safety concerns are pertinent and assisting them in making arrangements that promote the wellbeing of their children.

This evaluation has highlighted the complex and varied issues faced by separating parents and their children and the diverse range of services required in order to ensure the best possible outcomes for children. Ultimately, while

there are many perspectives within the family law system, and many conflicting needs, it is important to maintain the primacy of focusing on the best interests of children and protecting all family members from harm.

Endnotes

1 The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*SPR Act 2006*) amended the *Family Law Act 1975* (Cth) (*FLA 1975*). As this report is oriented toward a broad audience rather than a specifically legal one, references to provisions introduced by the SPR Act will be preceded by "*SPR Act*", for the sake of simplicity and clarity. Technically, of course, such provisions are FLA provisions.

2 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p. 1.

3 For further details, see the 2007 Evaluation Framework, reproduced in the full evaluation report (Kaspiew et al., 2009).

4 A detailed summary of the AIFS Evaluation findings on family violence and child abuse appeared in Kaspiew R., Gray, M., Weston, R., Moloney, L., Hand, K., and Qu L. (2010). Family violence: Key findings from the AIFS *Evaluation of the 2006 Family Law Reforms*. *Family Matters*, *85*, 38.

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Appendix

The Legislation and Courts Project

The LCP was designed to gather data on the impact that the legislative changes have had on: (a) advice-giving practices; (b) negotiation and bargaining among those who sought the advice and assistance of lawyers; (c) how the main new legislative provisions were applied in court decisions; and (d) how court filings were affected by the reforms. A further priority was to examine what, if any, unintended consequences may have arisen as a result of the changes.

The LCP encompassed five components:

1. the Qualitative Study of Legal System Professionals (QSLSP) 2008;
2. the Family Lawyers Surveys (FLS) 2006 and 2008;
3. analysis of FCoA, FMC and FCoWA judgments, 2006–09;
4. analysis of FCoA, FMC and FCoWA court files, pre- and post-1 July 2006; and
5. analysis of FCoA, FMC and FCoWA administrative data, 2004–05 to 2007–08.

Qualitative Study of Legal System Professionals 2008

The QSLSP 2008 involved interviews and focus groups with family law system professionals in order to gather data on professionals' experiences of the reforms. A total of 184 professionals participated in interviews and/or focus groups between April and October 2008. In order to gain insights from as many angles on the legal system and court process as possible, participants were drawn from the following professional groupings: FCoA judges; federal magistrates; FCoWA judges and magistrates; FCoA registrars; family consultants operating in the FMC, FCoA and FCoWA; barristers; and solicitors from private practice, legal aid and community legal centres.

The Family Lawyers Surveys

The purpose of the FLS 2006 was to provide baseline (pre-reform data) about lawyer practices and attitudes at the time of the implementation of the reforms. The FLS 2008 substantially repeated and extended the FLS 2006, thereby allowing pre- and post-reform shifts to be gauged. The FLS 2008 allowed important insights from the QSLSP 2008 to be tested in a quantitative format.

The two surveys were conducted online, with the first taking place in mid-2006 and the second from mid-November 2008 to early February 2009. Both samples were recruited with the assistance of the Family Law Section of the Law Council of Australia. The first comprised 367 participants. The second comprised 319 participants.

FCoA, FMC and FCoWA court files

The aim of this component was to gather systematic quantitative data from court files (FCoA, FMC and FCoWA). Part 1 involved the collection of data from matters initiated and finalised after the reforms (total of 985 files), including matters finalised by consent (752 files) and judicial determination (233 files) in the FCoWA and the Melbourne, Sydney and Brisbane registries of the FMC and the FCoA. Part 2 involved the collection of data from matters initiated and finalised prior to the reforms (739 files: 188 judicial determination files and 551 consent files) in the FCoWA and the Melbourne Registry of the FCoA and the FMC.

The Service Provision Project

This part of the evaluation provided information on the operation and effectiveness of the delivery of family relationship services, including the Family Relationships Advice Line (FRAL), FRCs, and early intervention and post-separation services that were funded as part of the reform package. Information on services was obtained from service providers and clients.

The services included in the evaluation can be categorised as early intervention services (EIS) or post-separation services (PSS). The early intervention services are: Specialised Family Violence Services, Men and Family Relationships Services, family relationship counselling, Mensline, and Family Relationship Education and Skills Training. The post-separation services are: FRCs, FDR, Children's Contact Services, the Parenting Orders Program, FRAL, and the Telephone Dispute Resolution Service (TDRS; a component of FRAL).

The components of the Service Provision Project were: the Qualitative Study of FRSP Staff; the Online Survey of FRSP Staff; the Survey of FRSP Clients; and analyses of administrative program data (FRSP Online, FRAL, TDRS and Mensline).

Qualitative Study of FRSP Staff

This component of the SPP collected information via in-depth interviews with managers and staff of family relationship services funded under the new and expanded service delivery system. The purpose of this aspect of the evaluation was to evaluate the roll-out of the new and expanded services. It also helped to identify any other issues that needed to be explored by other components of the evaluation.

Two data collections were undertaken. The first was undertaken between August 2007 and April 2008 and the second took place from February to November 2009. These studies provide information about the extent to which changes have occurred in the operation and performance of the service sector during the roll-out period.

The Qualitative Study of FRSP Staff 2007–08 involved interviews with organisational Chief Executive Officers, managers and staff (137 participants in 57 interviews) from the first 15 FRCs, 8 early intervention services, 8 post-separation services, Mensline and FRAL. The Qualitative Study of FRSP Staff 2008–09 involved interviews with managers and staff from all of these services, with the addition of staff from a further 10 FRCs, a further 10 post-separation services and the TDRS.

The Families Project

The Families Project comprised a number of studies of families (both cross-sectional and longitudinal):

- the General Population of Parents Survey 2006 and 2009;
- Family Pathways: The Longitudinal Study of Separated Families Wave 1 2008 and Wave 2 2009;
- Family Pathways: Looking Back Survey 2009; and
- Family Pathways: The Grandparents in Separated Families Study 2009.

This series of individual studies included surveys of parents in general and of parents who had experienced separation. Other components focused on grandparents with a grandchild living in a separated family. Together, this suite of studies sought to understand how changes to the family law system and changes to the Child Support Scheme affected the lives of families, particularly separated parents and their children.

Family Pathways: The Longitudinal Study of Separated Families

The LSSF is a national study of 10,000 parents (with at least one child less than 18 years old) who separated after the introduction of the reforms in July 2006. The study involves the collection of data from the same group of parents over time. These parents had: (a) separated from the child's other parent between July 2006 and September 2008; (b) registered with the Child Support Agency (CSA) in 2007; and (c) were still separated from the other parent at the time of the first survey. Where the separated couple had more than one child together who was less than 18 years old at the time of the survey, most of the child-related questions that were asked focused on only one of these children (here called the "focus child").

The LSSF W1 2008 took place between August and October 2008, up to 26 months after the time of parental separation. The final overall response rate for LSSF W1 2008 was 60.2%. An equal gender split was achieved. The majority of participants were aged between 25 and 44 years (74%) and were born in Australia (83%).

Family Pathways: Looking Back Survey

The LBS 2009 is a national study of 2,000 parents with at least one child under 18 years old, who separated from their partner between January 2004 and June 2005, prior to the introduction of the reforms. The study involved a one-off interview with parents who were registered with the CSA in 2007.

Parents were interviewed for this study between March and May 2009; 3.7 to 5.2 years after separation. The final overall response rate was 69% and an almost equal gender split was achieved. The majority of participants were aged between 25 and 44 years (72%) and were born in Australia (83%).

The cross-sectional study design provided a snapshot of the reflections of separated parents about what life was like for them during and after separating in the pre-reform period and about the pathways they followed.

Attachment C

Selected findings from the Longitudinal Study of Separated Families (LSSF) 2008

The following results were outlined in the Evaluation report (Kaspiew et al. 2009), and provide background information that is relevant to the Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

Emotional and physical abuse

In total, two-thirds (65%) of mothers and just over half of fathers (53%) said that their child's other parent had hurt or emotionally abused them in some way.[1] A higher proportion of mothers than fathers indicated that they had experienced the forms of abuse listed (taken separately), although for two of these experiences, the difference in the proportions of mothers and fathers reporting such experiences was only 2–3 percentage points.

The experience of at least one form of *emotional* abuse was reported by 64% of mothers and 52% of fathers, with the most commonly mentioned experience being insults "with the intent to shame, belittle or humiliate" (here called "humiliating insults": reported by 51% of mothers and 41% of fathers). However, most parents who said that they had experienced such insults also indicated that the other parent had engaged in one or more of the other nine forms of emotional abuse listed (84% of mothers and 75% of fathers). In other words, 43% of all mothers and 31% of all fathers indicated that they had experienced both humiliating insults and at least one other type of emotional abuse listed.

Around 30% of mothers and just under 20% of fathers indicated that the other parent had damaged or destroyed property (31% and 18% respectively) or threatened to harm the respondent (29% and 19% respectively), while 25% of mothers and 15% of fathers said that the other parent had threatened to hurt him/herself. The other targets of threatened harm in the list were family or friends (with 13% of mothers and 6% of fathers indicating that they had experienced such threats), the children (experienced by 9% of mothers and 6% of fathers) and pets (experienced by 8% of mothers and only 2% of fathers). Overall, 19–23% of mothers and 10–18% of fathers indicated that their child's other parent had attempted to prevent them from the following: knowing about or accessing family money (23% of mothers and 15% of fathers), contacting family or friends (20% and 18% respectively), or using the telephone or car (19% and 10% respectively).

It is hardly surprising that emotional abuse was commonly reported. Such experiences often accompany and reinforce the breakdown of relationships. Overall one in four mothers (26%) and 17% of fathers said that their child's other parent had hurt them physically prior to

[1] It should be noted, however, that the question about emotional abuse covered the period before and during separation, and the question about physical hurt only covered the period before separation.

separation. While most parents who said that they had been physically hurt also reported that the other parent had inflicted emotional abuse, 39% of mothers and 36% of fathers indicated that their child's other parent had engaged in emotional abuse alone. In total, only one-third of mothers (35%) and close to half the fathers (47%) said that they had neither experienced emotional abuse nor physical hurt.

It is noteworthy that 75% of mothers and 64% of fathers who had been physically hurt, and 58% of mothers and 44% of fathers who reported a history of emotional abuse alone, indicated that mental health problems, or alcohol or substance misuse or addictions were issues in the relationship prior to separation. Such issues were reported by only 18–22% of mothers and fathers who did not report physical hurt or emotional abuse.[2]

Parents who had been physically hurt were asked if the children had ever seen or heard any of the abuse or violence. Most of these parents indicated that their children had witnessed such behaviour, with the mothers being more likely to report this than the fathers (72% and 63% respectively).

Safety concerns

In total, 21% of mothers and 17% of fathers expressed safety concerns relating to ongoing contact with the other parent. Fathers tended to be concerned about their child alone (reported by 12% of all fathers), while mothers were equally likely to express safety concerns for their child alone (9% of all mothers) or for both themselves and their child (8% of all mothers). Only 2% of all fathers and 4% of all mothers indicated that they held concerns for themselves but not for their child.

The parents who expressed safety concerns were asked to indicate the person(s) who were the source of these concerns. Whereas 92% of mothers who expressed safety concerns saw their child's father as a source of their concerns, only 68% of the fathers nominated the child's mother as the reason for their concerns. On the other hand, fathers were more likely than mothers to express concerns about the other parent's new partner (mentioned by 18% and 8% respectively) or about another adult (mentioned by 28% and 11% respectively). Only 6% of fathers and 3% of mothers nominated another child as a source of their safety concerns, and 4% of fathers and 2% of mothers expressed uncertainty about the person(s) behind such worries.

In relation to safety concerns linked with the other parent's new partner, it is important to emphasise that the average duration of the separation period was only 15 months, with 95% of the respondents having been separated for no more than two years. It is therefore likely that the number of parents expressing safety concerns relating to the other parent's new partner would increase as further time elapses. (Among the respondents themselves, only

[2] Given that respondents may have been reluctant to acknowledge that they themselves were prone to such problems, they were not asked about which member(s) exhibited such difficulties. That is, the question was designed to maximise the chance that any such issues prevailing in the relationship would be acknowledged.

14% of fathers and 6% of mothers were living with a new partner.) Only one other wave of this survey has been conducted (held around 12 months after the initial survey), the results of which have not yet been released. If more waves were to be funded, then it would be possible to examine, among other issues, the extent to which re-partnering is a trigger for safety concerns and the extent to which these particular safety concerns pose threats to the children's wellbeing.

Not surprisingly, those who expressed safety concerns were more likely than other parents to report a history of physical hurt or emotional abuse. Such abuse was reported by 90% of fathers who expressed safety concerns and 46% of fathers who did not express such concerns. Among mothers, the respective proportions were 95% and 57%. This is not to suggest that the safety concerns *necessarily* suggested that the children were themselves at risk of being targets of abuse. In some cases, the concerns may have related to the other parent or co-residents behaving in unknown and possibly irresponsible ways.

Current quality of the inter-parental relationship

At the time of the survey, most parents described their relationship with the other parent as either friendly or cooperative (62% of mothers and 64% of fathers). However, 13–14% considered it to be highly conflictual and 3% of fathers and 7% of mothers described it as fearful. The remainder (around 19% of fathers and mothers) said that the relationship was distant.

A history of family violence did not necessarily preclude parents from seeing their current relationship as friendly or cooperative. In fact, 36% of fathers and 39% of mothers who said that they had been physically hurt described their relationship in these somewhat favourable terms, as did 50% of fathers and 55% of mothers who reported a history of emotional abuse alone. Nevertheless, those who recalled neither form of violence or abuse were the most likely to see their current relationship as friendly or cooperative (84–85%). Even 23–24% of fathers and mothers who expressed contact-related safety concerns described their current relationship in these terms.

The following proportions of parents described their current inter-parental relationship as either highly conflictual or fearful: 39–40% of fathers and mothers who had been physically hurt; 22–24% who said that they had experienced emotional abuse alone; only 3–4% of those who reported neither type of abuse or violence; 49% of fathers and 54% of mothers who expressed safety concerns; and 11% of fathers and mothers who did not express such concerns.

Care-time arrangements

Consistent with the Child Support Agency's cut-offs, children with 35–65% of nights with each parent were considered to have a shared care-time arrangement. In the Evaluation, this arrangement was further divided into equal time (48–52% of nights with each parent), more time with the mother (i.e., 53–65% of nights with the mother and 35–47% of nights with the

father) or more time with the father than mother (i.e., 53–65% of nights with the father and 35–47% of nights with the mother).

Overall, 16% of children experienced a shared care-time arrangement, and similar proportions of children (7–8%) had either equal care time or shared care time involving more nights with their mother. Only 1% of all the children experienced shared care time involving more nights with their father than mother.

The prevalence of the different care-time arrangements varied considerably according to the child's age. Although most children in all age groups spent more time with their mother than father, shared care time was most commonly experienced by children aged 5–11 years (26% compared to 8–20%), and the proportion who spent most or all nights with their father increased progressively with age (from 3% of those aged under 3 years to 17% of those aged 15–17 years).

Parents with a shared care-time arrangement were as likely as, or more likely than, parents with some of the other care-time arrangements examined to report a history of family violence and to express safety concerns. However, the respondents whose child never saw one parent were the most likely of all groups examined to report such problems.

In total, 70% of mothers and close to 60% of fathers with shared care time indicated that they had experienced physical hurt and/or emotional abuse.[3] Expressions of concerns about safety were also relatively common among parents with a shared arrangement (reported by 16–20% of fathers and 16–19% of mothers). Those least likely to report such concerns were fathers who saw their child during the daytime only or spent 1–34% of nights with their child (12–13%), while those most likely to express such concerns were respondents whose child never saw one parent (36–38%).

On the other hand, only 12–15% of fathers with a shared arrangement saw their current inter-parental relationship as highly conflictual or fearful. This rate was among the lowest of all groups of fathers. Among mothers, this negative description was provided by a higher proportion who had a shared care-time arrangement than by mothers who cared for the child for 66–99% of nights or whose child saw the father during the daytime only (22–24% vs 15–16%).

Reports of mental health problems or issues relating to alcohol, drugs or addictions were mentioned by much the same proportions of mothers with a shared care-time arrangement, mothers who cared for their child most nights (i.e., 66–99% of nights) and those whose child was with the father during the daytime only (47–50% mentioned such issues). On the other hand, fathers who cared for their child for a minority of nights (1–34% of nights) and those

[3] Those most likely to report that they had been physically hurt before separation or emotionally abused before or during separation were parents whose child never saw the father (70% of fathers and 75% of mothers), and fathers whose child never saw the mother (74%). (There were few mothers in the sample of respondents who never saw their child.) Those least likely to report such a history were parents whose child saw his or her father during the daytime only (44% of fathers and 58% of mothers).

who looked after their child during the daytime only were marginally or substantially less likely than those with a shared time arrangement to report such issues (32% vs 36–47%).

It should also be pointed out that most parents with a shared care-time arrangement believed that their parenting arrangements were working well (i.e., "really well" or "fairly well"), although some respondents were unable to provide an assessment about the workability of arrangements for the other parent. Of those with a shared care-time arrangement who provided assessments, 83–90% of fathers and 90–93% of mothers believed that the arrangements working well for the father; 85–92% of fathers and 78–79% of mothers said that the arrangements were working well for the mother; and 86–90% of fathers and 80–81% of mothers said that their arrangements were working well for their child. Of those who provided assessments about how well the arrangements were working for all three parties, most fathers and mothers in all care-time groups except those whose child never saw one parent believed that the arrangements were working for all three parties, with those with shared care time being the most likely to believe this. These favourable views became less prevalent as care time was less equally shared.

Children's wellbeing

The following summary of findings regarding children's wellbeing represents an extract from an article prepared by Weston et al. (2011).

A central issue behind investigations of care-time patterns, and family diversity more generally, concerns the implications they have for the wellbeing of children. Parents' assessments of different aspects of their child's wellbeing were derived. Most of the questions that were asked varied according to whether the child was aged under four years or at least four years, but in general they covered overall health, learning, getting along with other children, general progress, and behavioural and emotional problems (see Kaspiew et al. 2009, p.266 for details).

The analysis compared assessments of the child's wellbeing made by parents with the most common arrangement (where the child spent 66–99% of nights with the mother and 1–34% of nights with the father)—here called the "reference group"—with the assessments provided by the following groups: (a) parents whose child never saw the father; (b) those whose child was with the father in the daytime only; (c) those with shared time involving more nights with the mother than father; (d) those with equal care time; and (e) those whose child spent 53–100% of nights with the father. That is, the latter group includes the small subsample whose child had a shared care-time arrangement involving more nights with the father than mother.

For the most part, child wellbeing did not vary significantly with care-time arrangements, once some of the differences in a selection of other circumstances of families were

controlled.[4] There were three exceptions to this general rule. Compared with the reference group:

- fathers who never saw their child provided less favourable assessments on three measures;
- fathers with a shared care-time arrangement provided more favourable assessments on three measures; and
- mothers whose child spent most or all nights with the father tended to view their child's wellbeing less favourably on four measures.

Of course, those who never saw their child would have been less informed than other parents about their child's wellbeing, and parents' evaluations may have been coloured to some extent by their level of satisfaction or dissatisfaction with their arrangements.

The results suggest that, across all care-time arrangements, children's wellbeing was likely to have been compromised where there had been a history of family violence, where parents held safety concerns associated with ongoing contact with the other parent, and where the inter-parental relationship was either highly conflictual or fearful. Children in shared care-time arrangements appeared to be no worse off than other children where there had been a history of family violence or a negative inter-parental relationship. However, mothers' assessments suggested that, where there were safety concerns, children in shared care fared worse than those who lived mostly with their mother.[5]

These findings are consistent with those of Cashmore et al. (2010) who concluded that shared care time tends to work well for the parents who choose it and for their children, although this is not always the case. Importantly, the generally positive findings about shared care time related more to the characteristics of families that chose these arrangements than to the nature of the arrangement. On the basis of two separate studies, McIntosh et al. (2010) also concluded that the workability of shared care time depended on the circumstances and characteristics of the families that adopt this arrangement.

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[4] The objective circumstances that were controlled covered the age and gender of the child and the following characteristics of the respondents: their age, educational attainment, employment status, relationship status at separation, Indigenous status, whether born overseas, and whether living with a partner when interviewed. The other circumstances that were controlled covered the respondents' perceptions regarding: whether there had been mental health problems or substance misuse issues prior to separation, whether there had been a history of family violence, the quality of inter-parental relationship, and whether they held safety concerns. The precise nature of these measures is described on p. 266 of Kaspiew et al. (2009).

[5] The Evaluation did not differentiate between the links between perceptions of child wellbeing and concerns about personal safety as opposed to the safety of the child.

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Attachment D

Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: Key findings of Australian Institute of Family Studies Research Report No.15

LAWRIE MOLONEY, BRUCE SMYTH, RUTH WESTON, NICHOLAS RICHARDSON, LIXIA QU and MATTHEW GRAY

Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: Key findings of Australian Institute of Family Studies Research Report No. 15

LAWRIE MOLONEY, BRUCE SMYTH, RUTH WESTON, NICHOLAS RICHARDSON, LIXIA QU and MATTHEW GRAY

This research, which used court files as its primary data source, was commissioned by the Australian Government Attorney-General's Department to provide information that could assist in monitoring its Family Law Violence Strategy in the wake of the 2006 family law reforms. In essence, the study sought to produce relevant baseline data that preceded the reforms. To meet this aim, the researchers drew on a sample of files that were as recent as possible but had been finalised. Knowing that it is not uncommon for litigants to return to court even where 'final' orders have been made (Kelly & Fehlberg, 2002), the researchers selected the 2003 calendar year as the time period of interest. It was hoped that sufficient time had passed for most of these matters to have been finalised by the time the samples were drawn in May 2006.

Background to the research

The 2006 family law reforms were outlined in a series of 'Fact Sheets' that were available from Family Relationships Online.[1] Key reforms include:

- the establishment of 65 Family Relationship Centres around the country, the rollout commencing in July 2006 and concluding in July 2008;
- expansion of a range of early intervention services;
- the establishment of the Family Relationships Advice Line;
- the passing of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth); and
- significant amendments to the existing child support legislation.

Many commentators have noted that two core objectives of the reforms stand in some tension with each other. On the one hand, there is the aim to support the right of each child to grow up with love and support from both parents, even if they have separated. On the other hand, there is a further aim to ensure that children in separating families are kept safe from harm, especially

the harm caused by inter-parental violence and child abuse.

Changes to the *Family Law Act* introduced through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* aim to ensure that cases in which violence or abuse are alleged are handled quickly, fairly and properly. At the same time, there is a recognition that alleged violence and abuse cases are among the most difficult within the family law system.

Difficulties in implementing an effective family violence strategy are further exacerbated by the fact that there has been ongoing debate about the 'real' extent of violence and abuse allegations in family law cases, and whether or not most of them are 'true'. There has been an increasing acceptance that family violence and child abuse allegations have become or have come to be recognised as 'core business' within the Family Court. However, a difficulty with most of the key studies that have made such claims is that they have not been tied to clear definitions of violence or child abuse and/or descriptions of what is being alleged.

It can of course be legitimately argued that instead of being overly concerned with definitions or descriptions, an acceptable starting point is to record cases with allegations, regardless of the circumstances in which these allegations are made. From this point of view, all allegations matter because violence and abuse are never acceptable. A responsible default position from this perspective might also be to assume that allegations are much more likely to be 'true' than 'false'.

From a research perspective, however, an ongoing tension in this field has been in the capacity to distinguish between scholarly research and advocacy. According to Johnston, Lee, Olesen, and Walters (2005), many North American writers on the subject need no further convincing that:

> the extent of real abuse suffered by children and their mothers has been largely ignored, dismissed, or greatly minimized by family courts. For this reason, they believe that the safety of mothers and children has too often been placed at grave risk by custody and access arrangements awarded by the court that favour a controlling and manipulative abuser. (p. 283)

Conversely, Johnston et al. (2005) have noted that some fathers' groups frequently claim that separated mothers routinely make false accusations of family violence and/or child abuse for revenge or to gain a tactical advantage in child custody disputes, with the aim of reducing their former partners' involvement in their children's lives or of cutting them out altogether. Johnston et al. suggest that those who hold this view often support Gardner's (1999) formulation of a 'parental alienation syndrome' to buttress their claims. Gardner claimed to have produced evidence that 'vindictive parents' (mainly mothers) commonly pressure their children to make false claims of mistreatment, especially of sexual abuse in child custody cases.

Though now largely debunked by the research community (see, for example, Faller, 1998, 2003; Garber, 2004) and ruled inadmissible in a number of North American courts (Shields, 2007),[2] some of the thinking that informed Gardner's largely self-published views continue to strike a popular chord. In Australia, for example, a recent telephone survey of 2000 people in Victoria (VicHealth, 2006) found that 46 per cent of respondents agreed with the statement that "women going through custody battles often make up claims of domestic violence to improve their case" (p. 24).[3] Men and women in the general population were equally likely to hold this view, while men from certain cultural groups were more likely than women in those groups to believe that women fabricate allegations to gain a tactical advantage in custody disputes (Taylor & Mouzos, 2006).

Popular perceptions such as these can persist irrespective of factually based evidence. But as the literature review in the *Allegations of Family Violence* report (Chapter 3) demonstrates, Australia has produced little in the way of sound empirical evidence that might assist family law policy makers move forward with confidence. Indeed most of the research to date has reported on small and/or non-probability samples. Provision of reliability and validity tests is unusual and, with some exceptions (e.g. Kaspiew, 2005), reporting on how the data were gathered and analysed has tended to be opaque. It must be said that again with some exceptions, the review of the international literature (Chapter 2) revealed a similar pattern of findings.

When convincing reliable data are unavailable, there is a tendency for the 'loudest voices' to dominate (Smyth, 2004). The 'loud voices' may of course be correct, partially correct, or in serious error. While the existence of solid empirical data will not in itself re-direct erroneous attitudes, without such data it is likely that entrenched positions are simply likely to persist.

Aim and method

Thus a core aim of the research reported here was to examine as objectively and dispassionately as possible (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings; (b) the extent to which alleging parties provided evidence in support of

their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.

The full study has been published as *Research Report* No. 15 and is also available, along with a synopsis, on the Australian Institute of Family Studies website. The study was based on a content analysis of two random samples of court files from the Melbourne, Dandenong and Adelaide registries of the Family Court of Australia (FCoA) and the Federal Magistrates Court (FMC): 240 files from the general population of cases in which parenting matters were in dispute (which the researchers chose to call the 'general litigants sample')[4], and 60 files from judicially determined matters in which parenting was in dispute (the 'judicial determination sample').

In summary, a total of 300 court files was analysed: 150 from the Family Court of Australia and 150 from the Federal Magistrates Court. Although this design called for randomised sampling from three Family Court registries and two Federal Magistrates Courts in two Australian states, it cannot be assumed that this sample is representative of the divorcing population generally, or of separating couples who bring their child-related disputes into the family law adjudication system. Thus the findings should not be generalised to these populations.

Figure 1 Prevalence of allegations of spousal violence or parental child abuse: Court by sample

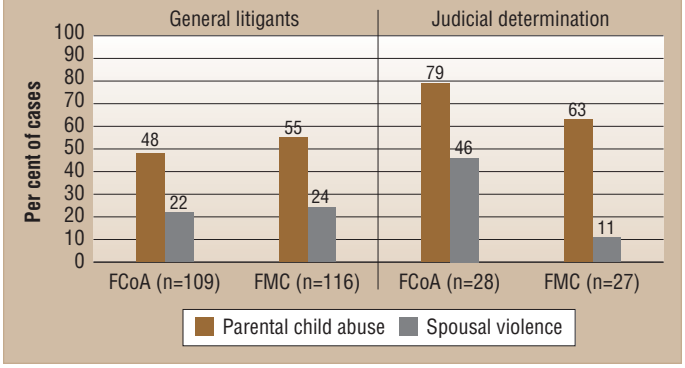
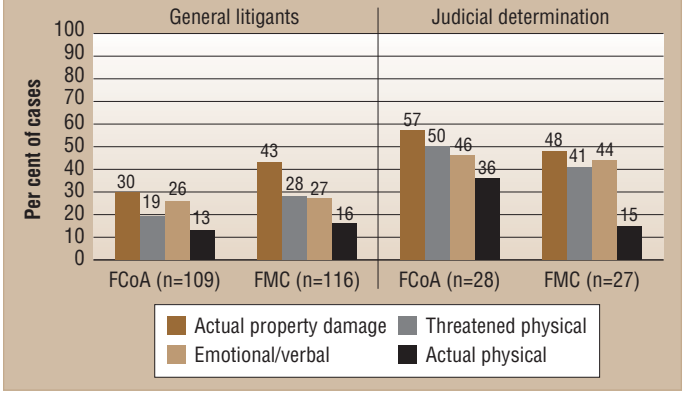


Figure 2 Type of spousal violence alleged: Court by sample



An innovative aspect of the study was the development of an electronic coding frame. This meant that coders[5] could enter data directly from the court files into laptop computers. (Reliability and validity data on the development and subsequent use of the codes are described in the full report.) Background information from the file was entered and any allegation of violence or child abuse was noted. If an allegation was raised, information was entered on:

- the nature of allegations, including the frequency and amount of detail provided;
- what, if any, corroborative evidence was supplied;
- any involvement by relevant state human services departments;
- responses to allegations and the nature of those responses;
- evidence or recommendations from family reports; and
- case outcomes.

Key findings

Set out below are key findings from the study with respect to:

- prevalence of spousal violence and child abuse allegations;
- type of alleged spousal violence;
- co-occurrence of spousal violence and child abuse;
- type of alleged child abuse;
- apparent severity of allegations;
- evidence in support of allegations;
- the nature of the responses;
- level of detail of allegations and responses;
- outcomes; and
- findings from those cases that resulted in written judgements.

These findings relate to allegations of spousal violence and parental child abuse in the context of 'couple cases' only – that is both the applicant and the respondent were the parents of the child. (There were only a small number of 'non-couple' cases in the samples, and only a small number of cases involving allegations of 'other family violence' that did not overlap with allegations of spousal violence.)

With respect to prevalence of allegations, it was found that more than half the cases in both samples of the FCoA and FMC contained allegations of spousal violence or child abuse. Allegations of spousal violence were much more common than allegations of child abuse. Cases that progressed to a defended hearing were the most likely of all cases to contain allegations; these were also more likely to involve allegations by both sides.

Key details with respect to prevalence can be found in Figure 1.

With respect to the type of violence alleged, it was found that the most common forms, in order of frequency, were physical abuse (actual or threatened), emotional/verbal abuse, and property damage.

Figure 2 provides more detail on the issue of types of alleged violence.

The co-occurrence of spousal violence and child abuse has been noted in the general population studies. In the present family law samples, it was found that allegations of child abuse were almost always accompanied by allegations of spousal violence. Figure 3 provides further details.

Figure 4 demonstrates that allegations of child abuse are mainly related to physical abuse, with only a relatively small number of sexual abuse allegations being noted.

It will be seen that a higher proportion of allegations of child abuse were found in the Family Court's judicial determination sample. This suggests that these allegations are more often formally litigated than dealt with at a pre-court negotiation stage. Interestingly, no case of alleged child sexual abuse was heard in the FMC. This suggests that the Family Court is probably recognised as better resourced in this regard, especially with its capacity to oversee the Magellan program, which is designed to deal as expeditiously as possible with such allegations (see Higgins on p. 40 in this issue).

Figure 5 addresses the alleged witnessing of spousal violence by the children and compares this with the actual allegations of spousal violence figures presented in Figure 1.

It can be seen from Figure 5 that these allegations were more likely to be made in the judicial determination sample than in the general litigants sample. Indeed, in the general litigants sample, parents in only half the cases in which violence was alleged went on to allege that the violence had been witnessed by the children.

Aside from distinguishing between different types of spousal violence and child abuse, the research team also classified each party's set of allegations and each case's set of allegations according to how abusive or potentially injurious the overall alleged situation was likely to be. (The typology developed for this appears in Appendix B of the full report.) Clearly, any attempt to code cases along these lines is fraught with conceptual and philosophical difficulties. Nonetheless, imagining being in the 'shoes' of legal representatives, judges or federal magistrates, having to sift through the many complex and varied pieces of information surrounding allegations of family violence, we reasoned that we should attempt to draw out some notion of the severity of the alleged situation.[6] The grounded theory approach to building the typology, including a description of the reliability checks, is described in Section 5.1.2 of the full report. To make our approach as transparent as possible, each case was also summarised and placed in its respective category (see Appendix C of the full report).

This process led to the conclusion that many of the allegations appeared to be at the severe end of the spectrum. Moreover, this finding was not confined to the Family Court cases. The Federal Magistrates Court, too, dealt with a substantial proportion of cases involving allegations of apparently severe violence. Further details are presented in Figure 6. The three categories in this figure represent allegations from the potentially least serious (Category A) to the potentially most serious (Category C). Cases in which there was a mixture of categories were classified according to the more (or most) serious category.

Figure 3 Co-occurrence of spousal violence and child abuse: Court by sample

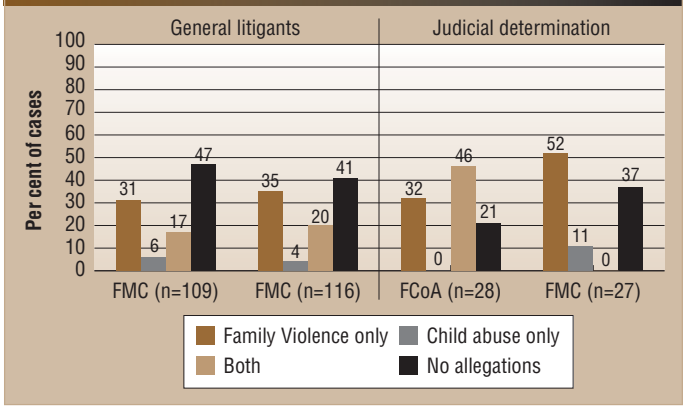


Figure 4 Most common types of parental child abuse alleged: Court by sample

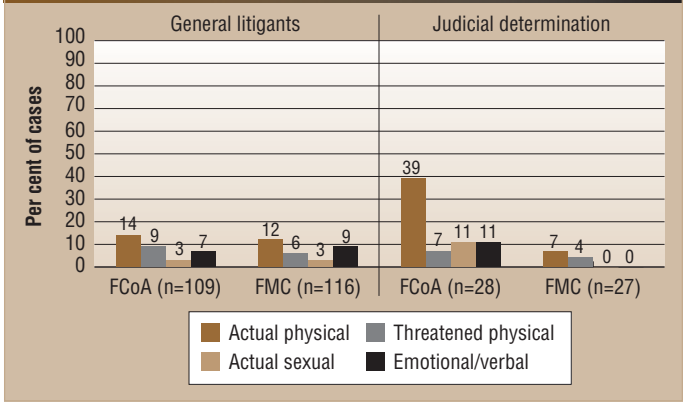
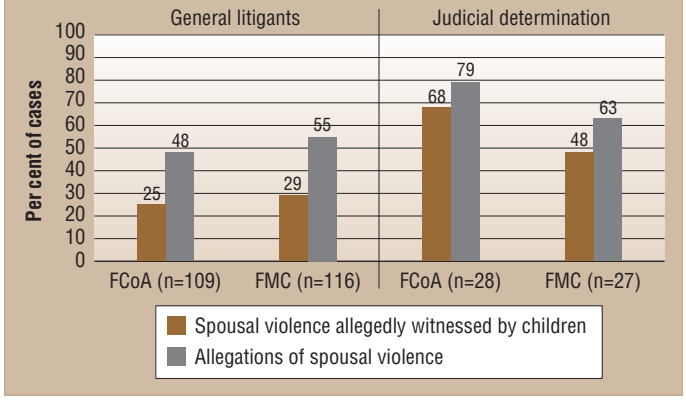
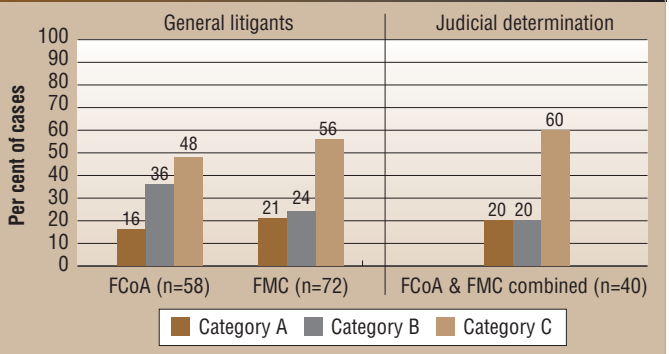


Figure 5 Extent that spousal violence was alleged to have been witnessed by children compared with prevalence of allegations of spousal violence: Court by sample



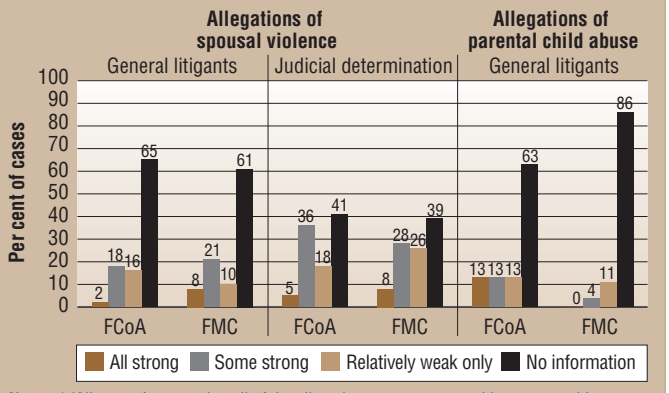
Consideration of the findings related to prevalence (Figure 1) and apparent severity (Figure 6) reinforces previous research-based and anecdotal accounts of violence being or having become 'core business' in the Family Court. In addition, the finding that the Federal Magistrates Court was also dealing with a substantial proportion of allegations at the severe end of the spectrum presents a significant challenge to notions of this court being a court that aims to expedite hearings and outcomes.[7]

Figure 6 Apparent severity of allegations: Court by sample



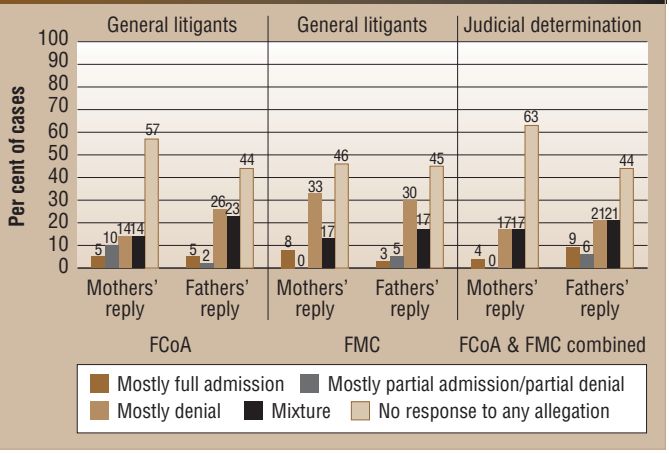
Notes: Category A refers to the most ambiguous allegations, and to allegations that did not seem as serious as those contained in Category B or C. By contrast, Category C allegations appeared to be particularly serious.

Figure 7 Extent of corroborative evidence of spousal violence and parental child abuse provided by the alleging party: Court by sample



Notes: * 'All strong' means that all of the allegations were supported by strong evidence.
** 'Relatively weak only' refers to such things as hearsay reports, interim ex parte orders, or evidence by a relative (see Appendix A).

Figure 8 Response of litigants to allegations of spousal violence: Court by sample by gender of respondent



These findings related to prevalence and apparent severity of allegations (Figures 1 and 6) reinforce previous research-based and anecdotal accounts of violence being or having become 'core business' in the Family Court. In addition, the finding that the Federal Magistrates Court was also dealing with a substantial proportion of allegations at the severe end of the spectrum presents a significant challenge to notions of this court being a court that aims to expedite hearings and outcomes.[7]

On the question of the apparent strength of evidence accompanying allegations (Figure 7), it was found that with respect to allegations of both spousal violence and child abuse, most commonly the allegations contained no information.

It can be seen from Figure 8 that by far the most common *response* to all allegations, both from mothers and fathers and across all samples, was 'no response'. The next most common response was denial of the allegation, though in the judicial determination sample, a mixture of denials and admissions was equally common. Full or substantial admissions were relatively rare. Figure 8 provides further details of this pattern.

When the levels of detail of allegations and responses to these allegations were combined, the most common finding was a pooling of low detail in the allegation and low detail in the response. Next most common was medium level of detail in the allegation accompanied by low level of detail in the response. Allegations *and* responses containing high detail appeared to be rare. Figure 9 outlines this pattern.

These three layers of ambiguity surrounding the allegations – that is, relatively few allegations with evidence of strong probative weight or high level of detail, plus relatively little in the way of detailed responses – suggest that decision-making by judicial officers or agreements made (mainly) with the assistance of clients' legal representatives, are likely to be taking place in the context of widespread factual uncertainty.

How, then, did allegations appear to impact on outcomes? Regardless of the apparent severity or probative weight of allegations, it remained unusual for some form of contact[8] between the child and the alleged perpetrator to be denied.

As Figure 10 suggests, however, the making of allegations of spousal violence or child abuse that were judged by the research team to be at the severe end of the spectrum, appeared to impact on the proportion of cases in which overnight contact occurred.[9]

A similar pattern can be seen with respect to allegations, at least one of which had evidence of strong probative weight.[10]

In summary, in the general litigants sample, allegations of spousal violence or parental child abuse appeared to make a difference to case outcomes if they were supported by evidence that appeared to have strong probative weight; the proportion of cases with orders for overnight stays decreased, and the proportions of cases with orders for daytime-only and no contact increased. A similar pattern emerged where the sets of allegations were classified as serious (Category C). In addition, the report found (Chapter 6, Table 6.13) that cases classified as containing the most severe allegations of spousal violence were more likely than other cases to be accompanied by evidentiary material of a strong

probative weight. (Most allegations of child abuse were classified into the Category C grouping.) This means that there was some overlap between the apparent severity of allegations and the apparent weight of evidence in support of such allegations. In the end, however, overnight contact remained the most common of orders, irrespective of the apparent severity of the allegation and the apparent weight of evidence that supported these allegations. And regardless of the weight of evidence or the apparent severity of allegations, daytime-only contact was more likely to be ordered than no contact.

Judicial findings concerning violence

It will be recalled that the original sample was divided into the general litigants sample and a separate sample of 60 cases that went to judicial determination. The report produced a flow chart (Figure 7.1) that shows (a) the proportion of the original 240 'general litigants' that proceeded to full judicial determination and what proportion of these had written judgments; and (b) the proportion of the judicial determination sample of 60 cases that also continued on to written judgements.

In the general litigants sample, 6 of the 109 couple cases in the FCoA and 4 of the 116 couple cases in the FMC proceeded to full litigation.[11] Thus, the percentage of this group that proceeded to litigation is broadly consistent with previously cited FCoA data that suggest litigation rates with respect to all applications of approximately 5 to 6 per cent (FCoA, 2006). Of the 55 couple cases in the judicial determination sample, 18 FCoA and 4 FMC couple cases were fully litigated (that is, both parties contested the case).

For a variety of reasons outlined in the report, not all litigated cases resulted in written reasons for judgement. In the end, the final grand total of written judgements on couple disputes in which allegations had been made, was 24 (18 FCoA and six FMC). Of the 18 FCoA alleged violence cases that contained written reasons, 11 made findings about allegations of family violence and/or child abuse (while in one other case, findings were made about mental health issues). Of the 11 cases where findings were made, 10 cases resulted in a finding that violence had occurred, with a link between violence and the court orders evident in 9 of these 10 cases.

Of the six FMC alleged violence cases that contained written reasons, five contained findings about allegations of family violence and/or child abuse. In four of these five cases, violence was found to have occurred, with a link between violence and the court orders evident in three of these four cases.

Thus, of the small select sample of 24 fully contested cases containing allegations and written reasons behind the judgment,[12] the final court order appeared to take into account the allegations raised in half these cases (n = 12). These data can, of course, be approached positively or critically. (Is the glass half full or half empty?) From a critical perspective, the following questions can be asked: Why were there no findings in eight cases? What led to a finding that an allegation was unfounded? Where there was a finding that violence had occurred, why was this finding unrelated to the outcome in two cases?

A key aspect that appeared to differentiate between cases in which allegations were and were not addressed was the level of evidentiary material in support of the allegations. In all eight of the cases where allegations were not addressed, the court file contained no evidence or only evidence of lower

Figure 9 Level of detail of each allegation by level of detail of response: General litigants sample

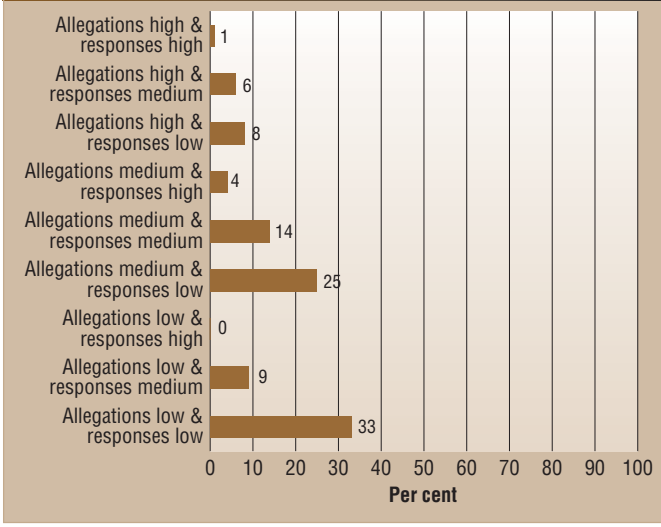


Figure 10 Apparent severity and case outcomes: General litigants sample

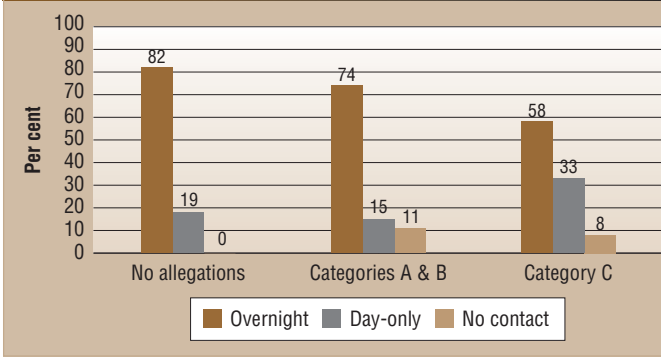
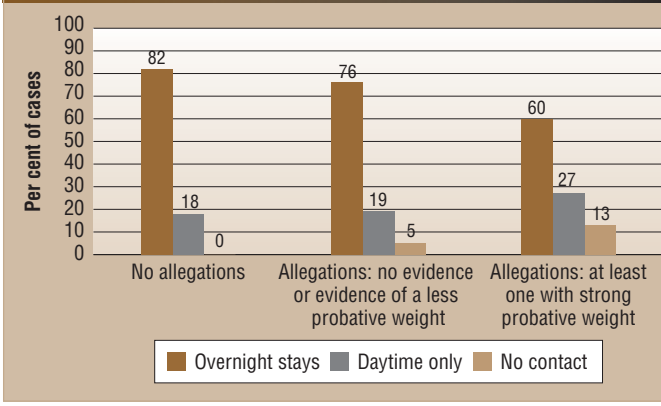


Figure 11 Apparent probative weight of evidence: General litigants sample



probative weight in support of allegations. In contrast, 9 of the 16 cases where allegations were addressed had supportive evidence of higher probative weight in support.[13]

It is also interesting to note that in all but two cases in which allegations were addressed, allegations were made by both the applicant and respondent; one case that was the exception was (albeit unsurprisingly) undefended. Three of the eight cases that involved 'unaddressed' allegations were made by one party only, compared with 14 of the 16 cases in which allegations were 'addressed'. In addition, three of the eight cases contained emotional abuse exclusively, compared with none of the 16 cases in which allegations were addressed. This suggests that those cases in which allegations were addressed were more complex and/or perhaps involved more tangible allegations.

Perhaps, too, amidst the ongoing controversies surrounding 'false allegations' and 'false denials' in family law disputes, practitioners and researchers may underestimate the extent to which it is no trivial matter for many litigants to make any allegations against a former partner with whom one has had children, and with whom one probably wanted to share a lifetime.

Discussion

These data, which reveal the existence of a considerable number of concerning allegations of violence and abuse accompanied by low levels of specificity, low levels of corroborative evidence, and either denials or a complete absence of responses, inevitably pose challenges with respect to assessing outcomes. When specific allegations with evidence of a high probative weight were fully litigated, the courts' orders were much more inclined to reflect the concerns that were raised. For example, they may have demonstrated signs of caution (such as daytime parenting arrangements only) or built in stronger protective qualifiers (such as supervised parenting). In addition, when specific allegations with evidence of a high probative weight led to consent orders, these orders also tended to be similarly responsive to the allegations.

As we have seen, however, most of the allegations in all four court sub-samples lacked supporting evidence and specificity. In addition, when responses were made, they were mainly (and overwhelmingly in the case of child abuse allegations) in the form of full denials. In cases involving allegations that lacked evidence or specificity, the outcomes, whether fully litigated or not, were much more similar to the outcomes in the cases in which violence or abuse was not alleged. It would appear at first glance, therefore, that if the parenting outcomes for many of the alleged violence cases were indistinguishable from the outcomes in the cases in which no violence or abuse was alleged, then both categories (alleged violence and no alleged violence) were being treated, on average, as if they were the same.

In considering these findings, it should of course be appreciated that this study cannot adequately tap into the subtleties that accompany the weighing of evidence when cases are judicially determined. Nor can it analyse the informal admissions, concessions or, perhaps, promises that might be made during the negotiations that take place with a view to resolving a matter without the need for a fully defended hearing. In other words, the data do not permit us to assess the possibly more nuanced nature of the determinations or of the negotiating processes that may be taking place on behalf of each litigant and on behalf of their children.

In addition, on the data presented, we can only speculate about the circumstances, thinking, motivation or advice that led the majority of litigants to make so many non-specific allegations which, in turn, often elicited no response. The issues that influenced litigants' behaviour may have included the well-recognised difficulties experienced by those who have been in a victim role in *simultaneously* breaking free, asserting their rights, detailing the nature of the violence or abuse *and* gathering evidential support. More speculative is the idea that legal processes within a settlement-oriented family law 'culture' might inhibit the making of fully fledged allegations or responses.[14]

Perhaps, too, amidst the ongoing controversies surrounding 'false allegations' and 'false denials' in family law disputes, practitioners and researchers may underestimate the extent to which it is no trivial matter for many litigants to make any allegations against a former partner with whom one has had children, and with whom one probably wanted to share a lifetime. The data may therefore be reflecting some ambivalence on the part of some of the litigants – perhaps a desire to set a tone that speaks of violence or abuse without being totally condemning of the other party.

A further way of approaching this issue is to consider that the fact that violence in the home has become a criminal matter does not in itself address the highly complex *meaning* of the behaviour. Bala, Jaffe, and Crooks (2007), for example, cite a prosecutor in a Toronto domestic violence court who describes the situation this way:

> it's a crime. But you can't tell me a stranger hitting you is the same as your husband hitting you. There are just not as many factors involved. A stranger doesn't pay the mortgage; he isn't the father of your children and he's sure not someone, rightly or wrongly, that you love. (p. 22)

At this stage, the data suggest that to the extent that the information that informs litigation processes is a reflection of the information contained in the court files, much of the decision-making and negotiating in family law children's cases in which violence is alleged in Melbourne and Adelaide appears to be taking place

in a climate of considerable factual uncertainty. This could mean that courts and negotiators are generally struggling to make transparent links between many of the violence-related allegations and the final outcomes. One possible explanation for this is that allegations of violence were simply so ubiquitous and, on average, so difficult to assess in detail, that the impact they had on the outcomes became 'blunted'. It could, on the other hand, mean that negotiations and decisions are being based largely on material that is not formally recorded on court files. If the first of these hypotheses is the case, one way forward would be to explore ways in which this material can be made clearer and more informative. If the second hypothesis has more weight, then the focus of future research would need to move further in the direction of understanding decision-making processes within the courts themselves, and decisions being made at the level of pre-trial negotiations conducted mainly, though not exclusively, by legal representatives.[15]

But in either case, it is difficult to see how persisting with such a paucity of information attached to core sworn documents can be helpful. We suggest that where uncertainty predominates in a set of such core documents, its impact is most likely to be in the direction of a relative downgrading of the violence and child abuse allegations. We suggest this because if allegations of serious violence or abuse were to be reflected in the details of the parenting arrangements ordered or agreed to, one would expect these arrangements to look somewhat different to the parenting orders in the sample in which no allegations were made.

Endnotes

1. http://www.familyrelationships.gov.au
2. Johnston (2005) is among those who have provided more sophisticated analyses of the phenomenon of the rejection of a parent by a child.
3. The survey was administered to two random samples: (a) 2000 Victorians 18 years and over; and (b) an over-sample of 800 adults from specific culturally and linguistically diverse (CALD) backgrounds.
4. The clients in this sample were referred to as 'litigants' because they had made formal applications requesting the court to grant them certain orders with respect to their children. In many of these cases, however, disputes are resolved before any significant litigation takes place. Typically, negotiations take place with the assistance of clients' legal representatives, sometimes aided by advice given at preliminary hearings and/or meetings with court-appointed mediators (now called 'Family Consultants'). This complex process conducted 'in the shadow of the law' (Mnookin & Kornhauser, 1979) is sometimes referred to (see Galanter, 1984) as 'litigation'.
5. A further possibly unique feature of this study was that (a) the researchers were guided in the development of the coding by an experienced barrister; and (b) the transfer of material from the court files into the coding frame was done by this and another experienced barrister.
6. We acknowledge that lawyers, judges and federal magistrates would have access to more information than is available in the file material that forms the basis for this analysis.
7. This refers to the general litigants sample. There were too few Federal Magistrates judicial determination cases for the percentages to be meaningful.
8. Parenting arrangements in 2003 were called 'residence' and 'contact'.
9. It is important to note that this figure only focuses on specified orders for overnight stays, daytime-only contact and 'no conatct', and excludes 'other orders'. 'Other orders' mostly concern parental decision-making responsibilities, but also includes orders that were recorded as 'as agreed' or 'as specified', changeover arrangements and scheduling of parenting time.
10. As with Figure 10, this figure only focuses on specified orders for overnight stays, daytime-only contact and 'no contact', and excludes 'other orders'.
11. See Step 2 of Figure 7.1 in the full report.
12. Step 4: 18 FCoA, 6 FMC – Figure 7.1 in the full report.
13. See definitions of 'lower' and 'higher' probative weight in Chapter 6 and Appendix E in the full report.
14. Though such speculation has support. See, for example, Kimm (2006), who has written on lawyers' settlement conventions in the context of Australian family law.
15. See previous studies in this regard, such as Ingleby (1992) and Eekelaar, Maclean, and Beinart (2000).

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