

**Submission to Parliamentary Inquiry into a Better Family Law System**

**To Support and Protect Those Affected by Family Violence**

31 August, 2017

**Research Team**

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**Introduction**

The research team who have written this submission express our thanks for allowing late lodgement. This is an important Inquiry and we are pleased to be able to contribute. The main purpose of our submission is to inform the Inquiry about the research we have been conducting about how family reports and family report writers deal with allegations of family.

Over 2015 – 2016 the research team conducted a pilot project regarding how family violence is dealt with in family reports. Prior to this there was little Australian research specifically about family reports, but the few studies that existed suggested that consideration of family violence by family report writers was not always entirely adequate. Further, observations from Women's Legal Services suggested that the expertise of family consultants with regard to family violence deserves attention and development.<sup>5</sup>

In terms of the extant research prior to the pilot, three studies which focused on family reports all noted problems with the identification and analysis of family violence and its relevance to decision-making in parenting cases. Amanda Shea Hart's qualitative analysis of family court judgments between 1991 and 2001 ( $n=20$ ), analysed the role of family reports in judicial constructions of the best interests of the child in cases where family violence was alleged.<sup>6</sup> She found that the 'context of violence within the family was not central to the family report assessments'.<sup>7</sup> Further, family reports referred to in the judgments 'largely failed to address the children's exposure to domestic

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<sup>5</sup> A Lynch, Assessment of Family Violence in Family Law – Letter to Senator the Honourable George Brandis QC, Women's Legal Services Australia, Brisbane, 2013 (copy on file with authors).

<sup>6</sup> A Shea Hart, 'Children exposed to domestic violence: Undifferentiated needs in Australian family law', (2004)18(2) *Australian Journal of Family Law*, 170; A Shea Hart, 'The Silent Minority (2003)28(4) *Children Australia* 31; A Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases', (2011) 46 *Australian Psychologist* 31.

<sup>7</sup> A Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases', (2011) 46 *Australian Psychologist* 31 at 37.

violence, its impact on the child, and the potential future risk for the child and adult victim'.<sup>8</sup> In 2007 the Australian Institute of Family Studies (AIFS) found that, 'no views were generally expressed in family reports about specific allegations of domestic violence'.<sup>9</sup>

The first study conducted after the family violence amendments surveyed family report writers and analysed 400 family reports.<sup>10</sup> It was led by Pam Hemphill who was then the Principal of Child Dispute Services for the Family Courts.<sup>11</sup> Hemphill concluded that:

Family consultants seem to be having difficulty in evaluating the type of family violence (that is, coercive control versus situational couple or separation instigated violence) and in recommending different parenting plans.<sup>12</sup>

She surmised that this could relate to the belief systems which family consultants hold in relation to family violence, but also suggests that 'they may be reluctant to lean in one particular direction as they work in a court setting which relies on judges finding facts, not them'.<sup>13</sup>

There were four major components to the pilot project: a detailed literature review; a review of the legal rules, guidelines, standards and other documents which comprise the professional framework of a family report writer; a series of focus groups with professionals in the family law system and interviews with ten women survivors of family violence who had been through the family report writing process. The results of the first two components were published in an article in the *Journal of Judicial Administration* published in 2016. This concluded that family reports were influential documents inside and outside the courtroom, but that 'there are still challenges in dealing safely and effectively with allegations of family violence'.<sup>14</sup> It was apparent that the family law system would benefit from more research specifically about family reports and family violence.

The data from the focus groups were published in an article in the *University of New South Wales Law Journal*.<sup>15</sup> A total of 56 participants were involved. The results from that aspect of the project suggest that the dynamics and effects of family violence are not well understood by some family report writers. Recommendations for children to spend significant time with perpetrators of violence are frequently made, perhaps partly as a response to the emphasis on ongoing parental relationships in the *Family Law Act* (FLA).<sup>16</sup> Coercive control and non-physical family violence are especially poorly understood and therefore the conduct of the mother post-separation, and during the report writing process, may be misinterpreted. Women's credibility was often at issue. Practical

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<sup>8</sup> A Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases', (2011) 46 *Australian Psychologist* 31 at 37.

<sup>9</sup> L Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study*, Australian Institute of Family Studies, 2007, p 91.

<sup>10</sup> P Hemphill, *On the Crest of a Wave: The Australian Family Violence Reforms One Year Later*, Paper presented at the Association of Family and Conciliation Courts 50th Annual Conference, California, 2013.

<sup>11</sup> The area of the court responsible for the production of family reports.

<sup>12</sup> P Hemphill, *On the Crest of a Wave: The Australian Family Violence Reforms One Year Later*, Paper presented at the Association of Family and Conciliation Courts 50th Annual Conference, California, 2013, p 135.

<sup>13</sup> P Hemphill, *On the Crest of a Wave: The Australian Family Violence Reforms One Year Later*, Paper presented at the Association of Family and Conciliation Courts 50th Annual Conference, California, 2013, p 135.

<sup>14</sup> R Field, S Jeffries, Z Rathus and A Lynch, 'Family Reports and Family Violence in Australian Family Law Proceedings: What do we know?' (2016) 25 *Journal of Judicial Administration* 212 at 235.

<sup>15</sup> S Jeffries, R Field, H Menih and Z Rathus, 'Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence?: Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System' (2016) 39(4) *University of New South Wales Law Journal* 1355

<sup>16</sup> 1975 (Cth)

recommendations about changes in the report writing process relating to time, structure and environment were also provided by focus group participants.

We have attached both of the articles which have been published to date and request that they be considered a formal part of our submission.

The data from the interviews with the women, which generally confirm the views of focus groups participants, are currently in a draft article format intended to be submitted for publication within the next few months. However, we are able to report on some these findings in this submission.

We have only provided responses to Terms of Reference 2 and 5 because they enabled us to refer to our research and make an original contribution to the Inquiry.

## **Term of Reference 2**

- *the making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures;*

Under this ToR we wish to make comment on the legislative framework for making parenting orders generally. Although the ToR focuses on consent orders, we submit that the current provisions of the FLA tend to impel both family law professionals and litigants (or pre-litigation parents) to encourage or agree to parenting orders for equal shared parental responsibility (ESPR) and post-separation shared care time (whether 'equal', 'substantial and significant' or simply quite a lot). This can mean that allegations about family violence are perceived as running counter to the prevailing and preferred philosophy. The research we conducted suggests that the legal framework, especially the presumption and the importance of 'meaningful relationships', plays a role in silencing information about family violence or diminishing its significance to post-separation parenting responsibility and time outcomes.

### The Presumption

We argue that the introduction of the presumption that ESPR is in the best interests of children has been significant in skewing family law outcomes since 2006. Although the relevant section (s 61DA) states that the presumption does not apply when there has been family violence or child abuse, research conducted after the 2006 amendments suggests that this exception is not strongly applied and that parents end up with shared parental responsibility in many cases where there has been family violence, abuse or serious conflict or where serious allegations have been made.

It is clear that the legislative connection between shared parental responsibility and the kind of time orders that have to be considered by judges, other professionals and parents is particularly influential regarding the practical outcomes for children and the way in which their actual post-separation parenting arrangements are structured.<sup>17</sup> The words used by the Full Court of the Family Court in *Goode v Goode* within six months of the operation of the presumption further encouraged this attitude:

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as

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<sup>17</sup> Z Rathus, 'Social Science or "Lego-science"? Presumptions, Politics and Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Journal of Law and Justice* 164.

to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.<sup>18</sup>

It must be understood that the wording of the section that deals with specific time outcomes (s 65DAA) requires a court to consider equal or substantial and significant time arrangements whenever an order for ESPR has been made – and not just when the presumption has been applied. The structure and drafting of the FLA means that a judicial officer can decide that the presumption should not be applied because of a history of family violence or abuse, or should be rebutted for some other reason, but can still make an order for ESPR.<sup>19</sup>

The Evaluation of the 2006 amendments published by AIFS in 2010 showed the small extent to which allegations of violence and abuse impacted on the making of orders for ESPR. As can be seen below, even where both family violence and child abuse had been alleged, over 75% of these cases led to orders for ESPR, whether made by a judge or by consent.<sup>20</sup> Where the only allegation related to family violence, the ESPR outcomes rose to nearly 80%, suggesting that the exceptions contained in the presumption section were not working as intended by the legislature.

**Table 8.7 Parental responsibility outcomes, by allegation of violence or child abuse, judicially determined and consent after proceedings cases, post-1 July 2006**

	Allegation of family violence or child abuse			No allegation
	Both family violence and child abuse	Family violence only	Child abuse only	
		%		%
Shared parental responsibility	75.8	79.6	71.9	89.8
Sole to mother	14.0	18.5	18.0	4.9
Sole to father	4.0	1.0	4.4	1.8
Other	6.3	0.9	5.6	3.4
Total	100.1	100.0	99.9	99.9
Number of children	140	152	129	395

It should, however, be noted that where orders for sole parental responsibility were made in favour of the mother family violence and child abuse were quite often cited as the reason.<sup>21</sup>

AIFS has also undertaken an evaluation of the family violence amendments which became operative in 2012.<sup>22</sup> This allowed a comparison of court and settled outcomes before and after those changes. The evaluation showed that shared parental responsibility orders were still being made in cases where there were allegations of child abuse and / or family violence, but there were differences depending upon whether allegations of both kinds were made and whether the orders were judicially imposed or consented to. The overall results were:

<sup>18</sup> *Goode v Goode* [2006] FamCA 1346 at [72].

<sup>19</sup> This was made clear quite early in *Good v Goode (No2)* [2007] FamCA 315 at [63] and has been followed by other judges.

<sup>20</sup> R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, 2010, AIFS, p 190.

<sup>21</sup> R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, 2010, AIFS p 188 (31% family violence and 18.7% abuse, which may overlap).

<sup>22</sup> R Kaspiew et al, *Court Outcomes Project*, AIFS, October, 2015.



**Table 3.26: Children in shared parental responsibility arrangements, by whether there were allegations of family violence and/or child abuse, pre- and post-reform**

	Pre-reform (%)	Post-reform (%)
Both family violence and child abuse	72.3	69.9
Either family violence or child abuse	79.5	83.7
Neither family violence nor child abuse	89.9	89.9

Note: Percentages are based on weighted data. Differences between pre- and post-reform periods are not statistically significant.

As can be seen, although the allegations make some difference, many parents share ongoing parental responsibility for their children post-separation despite a history of family violence or abuse.<sup>23</sup> The most significant change occurred in respect of shared parental responsibility orders made by judges, which reduced from 51% pre-reform to 40% post-reform.<sup>24</sup> However, it must be remembered that only a tiny percentage of applications commenced in the court end with a judicially determined order. Where parents consented to the orders made, whether before or after initiating proceedings, orders for ESPR are present in about 90% of cases. There were much smaller shifts in terms of changes to orders for shared care time. These largely remained stable after the amendments, despite the relevance of a history of family violence or abuse to the actual living arrangements of children.

Internationally family law scholars have recognised the problems of presumptions in a system that deals with human relationships and expert social science evidence about families.<sup>25</sup> Jonathan Herring makes the point that presumptions take away discretion and are used by those ‘who do not trust individual judicial judgment’.<sup>26</sup> He suggests that they ‘tend to prioritise simplistic messages over welfare’.<sup>27</sup> Peter Jaffe has argued against any presumptions that apply to parents who are litigating:

... parents who enter the justice system to litigate about child custody or access have passed the point where shared parenting should be presumed or even encouraged.<sup>28</sup>

Other scholars have noted that exceptions about family violence which are built into presumptions often fail to prevent inappropriate applications of the presumption, because of the difficulties of disclosure and being believed.<sup>29</sup> The AIFS Evaluations showed that the exceptions are not always applied in the face of the powerful philosophy invoked by the FLA provisions.

<sup>23</sup> It is understood that not all the allegations of family violence and abuse made can or could be proved.

<sup>24</sup> R Kaspiew et al, *Court Outcomes Project*, AIFS, October, 2015, p 66.

<sup>25</sup> J Bowermaster, ‘Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings’ (2001-02) 40 *Duquesne Law Review*, 265; N Ver Steegh and D Gould-Saltman, ‘Joint Legal Custody Presumptions: A Troubling Legal Shortcut’, (2014) 52(2) *Family Court Review* 263; M Brinig, L Frederick and L Drozd, ‘Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases’, 52(2) (2014) *Family Court Review* 271; P Jaffe, A Presumption Against Shared Parenting for Family Court Litigants’, 52(2) (2014) *Family Court Review* 187.

<sup>26</sup> J Herring, ‘The Welfare Principle and the Children Act: Presumably It's about Welfare?’ (2014)36(1) *Journal of Social Welfare and Family Law* 14 at 18.

<sup>27</sup> J Herring, ‘The Welfare Principle and the Children Act: Presumably It's about Welfare?’ (2014)36(1) *Journal of Social Welfare and Family Law* 14 at 20.

<sup>28</sup> P Jaffe, A Presumption Against Shared Parenting for Family Court Litigants’, 52(2) (2014) *Family Court Review* 187 at 187.

<sup>29</sup> M Brinig, L Frederick and L Drozd, ‘Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases’, 52(2) (2014) *Family Court Review* 271 at 276-277.

It was clear from our research that the presumption played a significant role in how family law professionals interpreted the FLA and encouraged parents towards orders and agreements for ESPR and some kind of shared time.

#### “Meaningful Relationships”

It is also apparent that the language of the ideal of ongoing ‘meaningful relationships’ between children and their parents is sometimes given more importance than a history of family violence. A number of the focus group participants in our research identified this concept as influencing how family report writers dealt with family violence. They said that family report writers tend to be looking for ways to continue and grow the post-separation relationships between the children and their parents, perhaps at the expense of fully considering issues of physical and emotional safety.

One legal practitioner’s comment in the focus groups summarised this view:

[The FLA] clearly says that they need to protect the child from ... [various forms of] harm. It’s supposed to be given greater weight than the benefit to the child of having a meaningful relationship ... but that’s I think what they look for, meaningful relationship, and then they pay lip service to the domestic violence...the meaningful relationship still seems to be the driver.

#### **RECOMMENDATION ONE**

It is notable that eminent scholars such as Helen Rhoades<sup>30</sup> and Richard Chisholm have called for a re-writing of Part VII of the FLA, and Chisholm has proposed a new draft that bears consideration.<sup>31</sup> Although we understand that the presumption and the terminology of meaningful relationships are considered to be central planks of the FLA, but it is precisely their centrality that creates the problems.

#### **We recommend that:**

- **the presumption be repealed;**
- **If not, a presumption against shared parental responsibility and shared time where there has been abuse or family violence, should be introduced.**

#### **Term of Reference 5**

- *how the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence*

Despite what is known about domestic violence, the negative impacts on children of living with it, the questionable parenting capacities of abusers, and family law legislation directing that the best interests of children are dependent on protecting them from harm, research suggests that the family courts are still at times prioritising parent-child relationships over safety. The result is that

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<sup>30</sup> H Rhoades, ‘Rewriting Part VII of the Family Law Act’ (2015) 24(3) *Australian Family Lawyer*

<sup>31</sup> R Chisholm, ‘Rewriting Part VII of the Family Law Act: A modest proposal’ (2015) 24(3) *Australian Family Lawyer*

perpetrators of domestic violence continue to obtain significant and substantial unsupervised time with their children. This is a potentially physically, psychological or emotionally dangerous situation for children and their mothers and can be traced to a strong pro-relationship narrative within the family courts. Coercive control poses significant challenges in this narrative. We argue that a set of discursive strategies is employed throughout the family law system which can minimise, dismiss, negate or invalidate domestic violence. Judicial officers are not generally domestic violence experts and rely on the expert evidence adduced before them. A crucial piece of evidence used by the judiciary to determine a child's best interests in cases of domestic violence are the assessments compiled and recommendations made by family report writers.

### Focus Groups

Our research was a Queensland-based pilot project. The focus group aspect of the project explored the practices of family report writers from the perspective of those providing legal and social support to victims of domestic violence in South East Queensland and Cairns. While the views expressed in the focus groups could be locale-specific, this research provides an important contribution to the understanding of family report writing practice, specifically in cases concerning domestic violence. The stories from the focus groups demonstrate the importance of understanding the complexity of such cases and the implications of family assessment reports.

Our findings, which are supported not only by an extensive international literature but also the extant Australian research, suggest that some family report writers tend to invalidate coercive control and other forms of family violence when they look for ways to build and maintain the children's relationships with the perpetrator of the abuse. Our UNSWLJ article discusses our data in detail. They suggest that family violence is invalidated by:

- re-constructing domestic violence as inconsequential and thereby diminishing its relevance to parenting arrangements;
- naming coercive control is reconstituted as something else - it is 'not that serious', episodic, 'only parental conflict', and/or an act from the past that victims needed to 'get over';
- adopting normative gender misconceptions that demand maternal support of the perpetrator/child relationship and call into question women's credibility by labelling them dishonest and manipulative; and
- the selective silencing and misconstruing of children's voices.

There was a general view that some family report writers lacked training and expertise in family violence and were also influenced by the legislative and jurisprudential encouragement of shared parenting responsibility and time. The result is assessments and recommendations that fail to elucidate the potential harm posed by perpetrators to the children and their mothers. This included, for example, frequent recommendations for shared parental responsibility and for children to spend significant unsupervised time with the perpetrator. This placed victim mothers and their children in a situation of ongoing risk because family reports are influential in parenting negotiations and litigation.

According to the focus group participants, little has changed in family report writing practice since the 2012 family violence amendments, which now require the prioritisation of child safety over relationships. However, it was hoped that practice could be improved in the future via:

- family report writer training (to increase knowledge and understanding of coercive control);
- the provision of support, supervision and increased family report writer accountability;
- making the family report assessment process more thorough (through provision of additional time, utilising a broader range of information, and mandatory risk assessments and/or guidelines);

- creating a less sterile/intimidating assessment environment; and
- moving to a pro-safety narrative in the family law system.

## **RECOMMATION 2 – FAMILY REPORT WRITERS**

- (a) Provide training in domestic and family violence for family report writers
- (b) Provide support, supervision to and require increased accountability from family report writers
- (c) Make the assessment process more thorough
- (d) Create a less sterile and intimidating assessment environment

### Interviews with Mothers

The data from this aspect of our research has not yet been published, however, we have presented some preliminary findings at conferences.<sup>32</sup> However, we wish to share some brief insights in our submission. We interviewed ten women in south-east Queensland. They were recruited through legal and community sector networks of the researchers. They ranged in age from late 20s to mid-40s and were born in a number of countries. There were from one to five children in the families and a few step-children as well. The ages of the children under discussion went from 2 years to young adults.

The violence that the women had experienced was serious, but varied in its nature. Some of the men were physically violent and used sexual violence, others were more controlling and emotionally abusive. Many of the women reported financial control by the father. A majority specifically reported being the target of violence when trying to nurture the children. For example, one woman said:

I would be breastfeeding my baby and he'd be standing over the top of me screaming at me. ... I'd feel his spit on my face.

Some of the women's stories confirmed the information we had heard from the focus groups. One woman spoke of the minimisation of the violence:

Maybe I felt like she [family report writer] was minimising it ... and I'm guilty of doing that now too... I feel like I've built up a bit of resistance to domestic violence. You know when I said to you before when he told me he is going to cut my throat, I really get so dismissive about that and I shouldn't because that's quite a really serious thing.

Another explained how the violence was now being placed in the past and rendered irrelevant:

Then she [family report writer] wanted to focus on 'well what's happening right now' and so I was really confused by that because I said 'well' ... and she's like 'is he threatening you right now?' I'm like no. She's like 'well is he being physical with you right now?' and I'm like no, and I said, but he has said ... and she's like 'I don't want to hear about what's happened

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<sup>32</sup> Australasian Institute of Judicial Administration, *Family Improving Court Practice in Family Violence Cases*, Melbourne, June, 2106; *World Congress on Family Law and Children's Rights*, Dublin, June, 2017.

prior, I want to know what's going on right now.' I said, well he's not seeing me much. He's not seeing his kids much so there's not a lot going on. She's like 'well how do you feel about him now?' and I'm like I'm scared and she's like 'but what have you got to be scared of?' I left because of all this stuff that has happened. She's like 'I don't want to hear about what's happened.

The issue of the lack of time for doing a family report was also raised:

Then there was a two-hour interview in there with her. Two hours is not long enough, do you know what I mean, when things have happened. So then... [interviewer asks] she interviewed him and then did she watch both of you with the kids? [Olive continues] Yeah, she did that. That lasted for five minutes here, five minutes there, didn't have enough time. Realised that she didn't really have enough time to do the interview. Second of all, it's clinical. How can you possibly think that an actual real-life situation you can sort out in an office for a whole day?

We are still developing the recommendations from this work, but the direction mirrors those from the focus groups.

The Association of Family and Conciliation Courts, the premier family law body in the USA, has spent a number of years developing a specific set of guidelines for family report writers (custody evaluators) when dealing with cases involving family violence. We attach those Guidelines for your interest. They include ideas such as:

- An evaluator strives to remain attuned to ongoing and past intimate partner violence. Without understanding the dynamics and context of past intimate partner violence, an evaluator is less likely to comprehend the nature and level of present and future risk for family members. Past violence is a significant risk factor for future violence. Furthermore, the form, frequency, and severity of intimate partner violence may change over time.
- A traumatized party may react or respond unexpectedly to evaluator inquiry. A party traumatized by abuse may experience short- and long-term effects of abuse that include memory loss, processing difficulties, and atypical presentation of affect.
- An evaluator may expect to invest substantial time and energy conducting a vigilant and thorough investigation of the impact of intimate partner violence on children and parenting.

## **Conclusion**

We trust that our submission and the information we have shared with you will be useful. Clearly, despite all the efforts made in the family law system to improve its response to domestic and family violence and child abuse, there is still much to learn and much requires change.

We repeat our argument that Part VII of the FLA requires amendment (yet again) and that careful consideration needs to be given to role of the presumption in creating the problems for putting family violence front and centre in decision-making. We also contend that our research on family report writers suggests that those professionals play a crucial role in family law and need to be properly qualified, trained and supported.

## **GOOD EVIDENCE, SAFE OUTCOMES IN PARENTING MATTERS INVOLVING DOMESTIC VIOLENCE? UNDERSTANDING FAMILY REPORT WRITING PRACTICE FROM THE PERSPECTIVE OF PROFESSIONALS WORKING IN THE FAMILY LAW SYSTEM**

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ZOE RATHUS\*\*\*\*

### **I INTRODUCTION**

Cases involving families where there are allegations of domestic violence constitute a significant part of family court caseloads in Australia.<sup>1</sup> Research undertaken by the Australian Institute of Family Studies showed that allegations of spousal violence occurred in over 51 per cent of litigated cases, with the figure rising to over 70 per cent of cases not judicially determined.<sup>2</sup> These are complex and difficult cases often filled with allegations and counter-allegations.<sup>3</sup> A critical piece of evidence often obtained in these cases is a family assessment report (a 'family report'), which is prepared by a family consultant, usually a social worker or psychologist. A recent evaluation showed that family reports are increasingly being obtained in cases involving allegations of domestic violence or abuse, with a rise from one-third in the pre-reform cases reviewed to just over half post-reform.<sup>4</sup> This suggests that family report writers have a critical role to

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1 By which we refer to both the Federal Circuit Court and Family Court of Australia.

2 Lawrie Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 67. See also Adiva Sifris and Anna Parker, 'Family Violence and Family Law: Where to Now?' (2014) 4 *Family Law Review* 3, 5.

3 The Family Court of Australia reports that the percentage of cases that went to final judicial determination in which a 'Notice of Child Abuse, Family Violence or Risk of Family Violence' was filed increased from 10.2 per cent in 2010–11 to 16 per cent in 2014–15: Family Court of Australia, 'Annual Report: 2014–15' (Commonwealth Government, 2015) 67.

4 Rae Kaspiew et al, *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Australian Institute of Family Studies, 2015) 73–4. The family violence reforms were introduced to the *Family Law Act 1975* (Cth) by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). The intention of the reforms was to improve approaches across the family law

play in how the family law system deals with allegations of domestic violence in parenting cases. However, Australian research in this area is currently limited. In this article, we report findings from a focus group study that formed part of an Australian pilot research project exploring family report writer practice in contexts of domestic violence.

Unfortunately for children and the victims of domestic violence, parental separation does not inevitably mean an end to the violence. Rather, domestic violence frequently continues post-separation and can increase in intensity. At its most extreme this may have lethal consequences for victims and/or their children, but other detrimental effects on children include ‘aggression and self-harming behaviours, substance abuse, bed wetting and withdrawn behaviours’.<sup>5</sup> It is against the backdrop of relationship dissolution and a heightened risk of experiencing domestic violence that families enter into family law proceedings.

Australian family law emphasises the importance of protecting the best interests of children post-separation.<sup>6</sup> In the context of regulating the making of post-separation arrangements about children, section 60CC(2A) of the *Family Law Act 1975* (Cth) (*Family Law Act*) now prioritises protecting children from both physical and psychological harm, but section 60CC continues also to emphasise the importance of maintaining a relationship where possible with each of the parents. Research into the ongoing reform processes in family law has demonstrated that tensions are created by these dual aims and has shown that safety is not always prioritised over ongoing contact with both parents in terms of case outcomes.<sup>7</sup> When the government introduced the 2011 family violence amendments, it conceded that the reports received about earlier reforms ‘indicate that the [*Family Law Act*] fails to adequately protect children and other family

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system to handling concerns about family violence, child abuse and child safety in parenting matters. Pre-reform matters include matters initiated after 1 July 2009 and finalised by 1 July 2010. Post-reform matters include those initiated after 1 July 2012 and finalised by 30 November 2014.

- 5 Stephanie Holt, ‘Domestic Abuse and Child Contact: Positioning Children in the Decision-Making Process’ (2011) 17 *Child Care in Practice* 327, 336. See also Lesley Laing, ‘Domestic Violence in the Context of Child Abuse and Neglect’ (Topic Paper, Australian Domestic & Family Violence Clearinghouse, 2003) 2; Lorraine Radford and Marianne Hester, *Mothering through Domestic Violence* (Jessica Kingsley Publishers, 2006) 92–3. See also Carolyn Harris Johnson, *Come with Daddy: Child Murder-Suicide after Family Breakdown* (University of Western Australia Press, 2005). Separation is a dangerous time with almost a quarter of all intimate partner homicides in Australia being committed between separated or former partners: see Jenny Mouzos and Catherine Rushforth, ‘Family Homicide in Australia’ (Trends and Issues in Crime and Criminal Justice Paper No 255, Australian Institute of Criminology, June 2003) 2.
- 6 See *Family Law Act 1975* (Cth) pt VII; see especially *Family Law Act 1975* (Cth) ss 60B, 60CC, 60CC(2), 60CC(2A), 60CG, 60H.
- 7 After a major set of amendments to the *Family Law Act*’s children’s provisions in the mid-1990s by the *Family Law Reform Act 1995* (Cth), some researchers considered that the new regime had created a ‘pro-contact’ culture in family law: see Helen Rhoades, Regina Graycar and Margaret Harrison, ‘The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?’ (Interim Report, University of Sydney and Family Court of Australia, April 1999); Helen Rhoades, Regina Graycar and Margaret Harrison, ‘The Family Law Reform Act 1995: The First Three Years’ (Research Report, University of Sydney and Family Court of Australia, December 2000); Amanda Shea Hart and Dale Bagshaw, ‘The Idealised Post-Separation Family in Australian Family Law: A Dangerous Paradigm in Cases of Domestic Violence’ (2008) 14 *Journal of Family Studies* 291.

members from family violence'.<sup>8</sup> For many years it has not been unusual for the parent with whom a child does not primarily live (usually fathers) to be granted some level of contact with the child, on the basis that this serves the child's best interests, even where that parent is a perpetrator of domestic violence.<sup>9</sup> Our research indicates that, despite the intentions of the reforms to prioritise the safety of children, this situation has not changed since the introduction of the reform amendments.

In Australia, and in other Western jurisdictions including the United Kingdom and United States, family reports are prepared in many parenting cases, particularly those involving complex social issues such as domestic violence. The reports are influential evidence prepared by an expert witness who is independent of the parties. In a system that protects the best interests of children post-separation, and ensures the protection of children from both physical and psychological harm, family report writers ought to be expected to possess significant knowledge of, and have substantial insight into, the complexities of domestic violence, its impact on families and particularly on children. However, as will be demonstrated below, both the research findings reported in this article and prior studies suggest significant gaps in the required levels of knowledge and insight in the current system.

Generally, judicial officers are not domestic violence experts and they can only make decisions on the basis of the evidence before them.<sup>10</sup> Given that domestic violence happens in the privacy of intimate relationships and victims have likely experienced barriers to disclosure as a result of perpetrators' coercively controlling tactics, sparse evidence may be available to prove allegations of abuse. The evidence is also often poorly pleaded or presented.<sup>11</sup> This means that adequate evidence of domestic violence is sometimes lacking in court proceedings. A deficit of evidence together with uneven and often limited knowledge about the nature and impact of domestic violence, and a system that encourages ongoing contact between children and their parents, may explain why

8 Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 1.

9 Zoe Rathus, 'Social Science or "Lego-Science"? Presumptions, Politics, Parenting and the New Family Law' (2010) 10 *QUT Law & Justice Journal* 164, 190. See also, Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institute of Family Studies, December 2009); Dale Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49; Richard Chisholm, 'Family Courts Violence Review' (Report, Attorney General's Department (Cth), 27 November 2009); Stephanie Holt, Helen Buckley and Sadhbh Whelan, 'The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature' (2008) 32 *Child Abuse & Neglect* 797; Patricia Eastaale and Dimian Grey, 'Risk of Harm to Children from Exposure to Family Violence: Looking at How It Is Understood and Considered by the Judiciary' (2013) 27 *Australian Journal of Family Law* 59.

10 Deborah Epstein, 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System' (1999) 11(3) *Yale Journal of Law and Feminism* 3, 27. See also Marjory D Fields, 'Getting Beyond "What Did She Do to Provoke Him?": Comments by a Retired Judge on the Special Issue on Child Custody and Domestic Violence' (2008) 14 *Violence Against Women* 93.

11 Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms', above n 9, 251–2.



discourses based on normative misconceptions of domestic violence (discussed in Part II below) are easily evoked.<sup>12</sup>

This article reports on data gathered through focus groups which sought the perspectives of professionals working in the family law system. It included both people who provided legal advice and those who provided social support to parties in family law proceedings where there is a history or presence of domestic violence. The aim of the focus groups was to better understand current approaches and gain insights into how current practice in family report writing might be improved. This research is important because studies specifically focused on the practice of Australian family report writing are sparse or outdated. This study is the first in Australia and worldwide to provide in-depth qualitative exploration of expert assessor practice from the perspective of those advising and supporting victims at the ‘coalface’ of family law practice.<sup>13</sup> By giving legal practitioners and social support service providers the opportunity to express their viewpoints through open discussion we were able to tap into a body of extensive knowledge that has yet to be explored.

The article begins with a discussion of the extant literature. The methodology of our study is then explained and findings presented. We conclude with a call for further research.

## II LITERATURE REVIEW

### A Domestic Violence, Children and Parenting

In this article the focus is on domestic violence as a coercively controlling pattern of ongoing intentional domineering tactics employed mainly by adult men against their female (ex)intimate partners with the intent of governing their victim’s thoughts, beliefs or conduct and/or to punish them for resisting his regulation.<sup>14</sup> These tactics may include but are not limited to

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12 Amanda Shea Hart, ‘Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases’ (2011) 46 *Australian Psychologist* 31, 32–3. See also Kaspiw et al, ‘Evaluation of the 2006 Family Law Reforms’, above n 9, 245–6.

13 Research in the United States and United Kingdom on ‘expert’ evaluations in family law proceedings have included surveys and interviews of evaluators, undertaking content analyses of their reports and/or interviews with victims. The scholarly literature on this research is cited extensively in Samantha Jeffries, ‘In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the “Expert” Assessments that Guide Judicial Determinations’ (2016) 5(1) *Laws* 8 <<http://www.mdpi.com/2075-471X/5/1/14>>; Rachael Field et al, ‘Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?’ (2016) 25 *Journal of Judicial Administration* 212.

14 Radford and Hester, above n 5; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 12–13; National Council to Reduce Violence against Women and Their Children, ‘Time for Action: The National Council’s Plan for Australia to Reduce Violence Against Women and Their Children, 2009–2021’ (Background Paper, Department of Social Services, March 2009) 13.

emotional/psychological, verbal, social, economic, psychological, spiritual, physical and sexual abuse.<sup>15</sup>

It has been recognised that children living with post-separation coercive control may be especially distressed.<sup>16</sup> This is unsurprising because post-separation child contact can replace the intimate relationship as the avenue for perpetrators to intimidate and control their former intimate partners.<sup>17</sup> As a result, children can ‘bear the brunt’ of ongoing post-separation domestic violence. Many will be directly abused (psychologically, verbally, physically and sexually) by perpetrators during contact visits and/or will continue to witness the ongoing perpetration of post-separation violence. Handing over children to perpetrators for contact is particularly risky with many victims reporting being abused either physically or verbally when dropping their children off for contact.<sup>18</sup> The re-partnering of perpetrators is of further concern as many go on to perpetrate violence and abuse against their new partner, again exposing the children to violence and abuse.<sup>19</sup>

Further, as is the case prior to separation, perpetrators habitually use and engage children in their extended post-separation campaign of control and intimidation against the victim.<sup>20</sup> The physical and sexual abuse of children is noted to be a particularly insidious way that perpetrators continue to incite fear in victims.<sup>21</sup> Other examples of the use and engagement of children in the perpetration of violence include:

- requiring them to monitor and report on the victim’s whereabouts, movements, behaviour, and relationships;
- involving children in discussions around harming and sometimes even killing the victim;
- denigrating the victim, undermining her parenting and attempting to fracture the child’s relationship with her;
- abducting the children or threatening to do so;

15 Liesl Mitchell, ‘Domestic Violence in Australia – An Overview of the Issues’ (Department of Parliamentary Services, 2011) 2–3. This definition is consistent with the current definition of family violence in the *Family Law Act* s 4AB.

16 Ravi Thiara and Christine Harrison, ‘Safe Not Sorry: Supporting the Campaign for Safer Child Contact: Key Issues Raised by Research on Child Contact and Domestic Violence’ (Report, Women’s Aid, 2016) 6; Christine Harrison, ‘Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence’ (2008) 14 *Violence Against Women* 381, 385.

17 Radford and Hester, above n 5, 91–5; see, eg, Stark, above n 14, 251.

18 Radford and Hester, above n 5, 95–6; Thiara and Harrison, above n 16, 6; Holt, ‘Domestic Abuse and Child Contact’, above n 5, 336. See also Miranda Kaye, Julie Stubbs and Julia Tolmie, ‘Domestic Violence, Separation and Parenting: Negotiating Safety Using Legal Processes’ (2003) 15 *Current Issues in Criminal Justice* 73, 89–90.

19 Sharon Woffordt, Delbert Elliott Mihalic and Scott Menard, ‘Continuities in Marital Violence’ (1994) 9 *Journal of Family Violence* 195, 215–16.

20 Similar findings were described in Kathryn Rendell, Zoe Rathus and Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements where there is Violence in the Family* (Women’s Legal Service, 2000) ch 3.

21 Radford and Hester, above n 5, 95–8; Thiara and Harrison, above n 16, 17–18; Lundy Bancroft, Jay G Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage, 2<sup>nd</sup> ed, 2012) 107–22.

- returning the children dirty, unfed or emotionally distraught;
- having the children transmit messages, including threats, to the victim;
- withholding child support;
- using litigation or threats of litigation over child contact to further intimidate and harass the victim; and
- deliberately endangering the children, neglecting them and making groundless reports of maternal child abuse.<sup>22</sup>

The very nature of perpetrators' abusive behaviour calls into question their capacity to parent. Research also highlights further issues about the parental capabilities of perpetrators, particularly in the context of post-separation contact (where perpetrators are afforded longer periods alone with their children).<sup>23</sup> In contrast to non-abusive men, perpetrator fathers are often:

- poor role models (that is, they model violent, abusive and patriarchal norms to their children);
- overly rigid, authoritarian and coercive in their parenting style;
- lacking in empathy and respect for their children;
- neglectful and/or irresponsible in their parenting;
- verbally abusive and manipulative; and
- possessive with a propensity to perceive their children as their property.

Perpetrators of violence also have an inflated sense of entitlement which can result in parent/child role reversal.

Victims face particular parenting challenges also.<sup>24</sup> They may be:

- preoccupied and continue to be fearful of their abuser;
- physically and emotionally exhausted;
- economically strained (due to previous and ongoing financial abuse);
- 'lacking in parental confidence';
- anxious, depressed, or paranoid (with logical reason);

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22 Radford and Hester, above n 5, 91–8; Stark, above n 14, 251; Thiara and Harrison, above n 16, 15–18; Bancroft, Silverman and Ritchie, above n 21, 131–42.

23 Joan S Meier, 'Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions' (2003) 11 *Journal of Gender, Social Policy & the Law* 657; Radford and Hester, above n 5; Ellen Pence et al, 'Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations' (Report, The Battered Women's Justice Project, June 2012) 21; Gillinder Bedi and Chris Goddard, 'Intimate Partner Violence: What are the Impacts on Children?' (2007) 42 *Australian Psychologist* 66; Bancroft, Silverman and Ritchie, above n 21; Stark, above n 14; Jennifer L Hardesty, Megan L Haselschwerdt and Michael P Johnson, 'Domestic Violence and Child Custody' in Kathryn Kuehnle and Leslie Drozd (eds), *Parenting Plan Evaluations: Applied Research for the Family Court* (Oxford University Press, 2012) 442; Peter G Jaffe, David A Wolfe and Susan Kaye Wilson, *Children of Battered Women* (Sage, 1990); Einat Peled, 'Parenting by Men Who Abuse Women: Issues and Dilemmas' (2000) 30 *British Journal of Social Work* 25; Stephanie Holt, 'Focusing on Fathering in the Context of Domestic Abuse: Children's and Fathers' Perspectives' in Nicky Stanley and Cathy Humphreys (eds), *Domestic Violence and Protecting Children: New Thinking and Approaches* (Jessica Kingsley Publishers, 2015) 166.

24 Pence et al, above n 23, 22.

- substance abusing (as a form of self-medication); and/or
- affected by post-traumatic stress.<sup>25</sup>

All these factors have the potential to impair parenting and detrimentally impact the parent/child relationship.<sup>26</sup> This is concerning because studies show that a positive relationship with the non-abusive parent can reduce the negative effects of domestic violence on children.<sup>27</sup> Further, it is important to be aware that the challenges created by the dynamic of domestic violence, and the adverse consequences of domestic violence on the victim's parenting, usually dissipate once she is safe.<sup>28</sup>

An honest recognition of the impact of domestic violence on a perpetrator's capacity to parent poses an inevitable challenge to the propriety of promoting the maintenance of the child's relationship with the perpetrator. In a family law culture which favours shared parenting and the maintenance of parent-child relationships post-separation, this has resulted in the development of a number of discursive strategies to downplay or remove the relevance of coercive control to considerations of children's best interests.<sup>29</sup> For example, research conducted on judicial decision-making in family law matters shows that perpetrator/child relationships can be maintained by invalidating (that is, minimising, dismissing or completely negating) consideration of the perpetration of coercive control through discourses grounded in normative misconceptions of gender and domestic violence.<sup>30</sup> The following themes about how domestic violence is dealt with in family law systems have been distilled from Australian and international research and, as will be demonstrated below, these are reflected in the research findings presented in this article.<sup>31</sup>

1. *Constructing domestic violence as inconsequential* – Here, the impact of living with domestic violence is ignored, not considered or misunderstood. Domestic violence is presented as extraneous to

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25 Ibid.

26 Daniel G Saunders, 'Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns' (Applied Research Paper, National Online Resource Centre on Violence against Women, 2007). See also Hardesty, Haselschwerdt and Johnson, above n 23.

27 See Jeffries, above n 13, 4–5; Peter G Jaffe, Nancy K D Lemon and Samantha E Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability* (Sage, 2003) 28–9. See also Bancroft, Silverman and Ritchie, above n 21; Hardesty, Haselschwerdt and Johnson, above n 23; Thiara and Harrison, above n 16, 18.

28 Hardesty, Haselschwerdt and Johnson, above n 23, 20.

29 See, eg, Radford and Hester, above n 5, ch 7; Holt, 'Domestic Abuse and Child Contact', above n 5; Meier, above n 23; Saunders, above n 26; Rathus, above n 9; Thiara and Harrison, above n 16, 19–20; Rita Smith and Pamela Coukos, 'Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations' (1997) 36(4) *Judges' Journal* 38; Jaffe, Lemon and Poisson, above n 27; Amanda Shea Hart, *Children Exposed to Domestic Violence: Whose 'Best Interests' in the Family Court?* (PhD Thesis, University of South Australia, 2006); Daniel G Saunders, Kathleen C Faller and Richard M Tolman, 'Child Custody Evaluators' Beliefs about Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations' (Report, Department of Justice (US), June 2012).

30 See, eg, Hart and Bagshaw, above n 7; Hart, 'Child Safety in Australian Family Law', above n 12; Hart, *Children Exposed to Domestic Violence*, above n 29.

31 See the literature cited in Jeffries, above n 13, and Field et al, above n 13.

parenting. The possible future risks perpetrators pose to the welfare of the children are frequently ignored, with attention instead given to the negative impacts on children of not having contact with their father.

2. *Reconstituting the domestic violence as something other than coercive control* – This approach seeks to reduce the perception of the seriousness of domestic violence by casting it as mutual, not that serious, or reframing it as ‘just parental conflict’. Domestic violence is also often posited as a sporadic ‘episode’ or as an act from the past which is no longer relevant. As such responsibility is foisted on victims to ‘get over it’ and ‘move on.’
3. *Invoking normative gendered misconceptions* – Here, women who are victims of domestic violence are seen as lacking credibility. They are considered to be hysterical, manipulative, dishonest, prone to overstatement, unreasonable, unfriendly or alienating parents. Assumptions are made that their allegations of abuse are false or exaggerated. In contrast, men who are perpetrators of violence are seen as credible, operating in good faith and genuinely wanting a relationship with their children. Incorrect assumptions are made that the perpetration of domestic violence is limited to the victim and that the perpetrator can otherwise be a good parent. The result of these gendered misconceptions is that the family law system is dismissive of victims of domestic violence and holds them to higher standards than perpetrators.
4. *Adherence to misconceptions about the victims and perpetrators* – It is commonly misconceived that perpetrators simply have ‘anger management issues’ or ‘lack impulse control’, and that victims provoke perpetrators.
5. *Selectively silencing or misconstruing children’s voices* – Children are often considered to be unreliable witnesses when it comes to making statements about violence and abuse. Children who express aversion toward the perpetrator and/or the idea of contact with him are disbelieved because they are seen as being either unhealthily enmeshed with the victim or as having taken on her irrational fears. Instead of being considered protective parents, victims are often seen as alienating the children from the perpetrator. Counter to this, when children express positivity toward the perpetrator and the idea of contact with him, they are immediately believed, and the reasons why a child might act in this way (for example, out of fear or to protect the victim) are not considered or taken into account.
6. *Invoking a hierarchy of evidence credibility* – The expert family report is often accepted as the ultimate authority. The opinions of family report writers are privileged in the system over other evidence, including the evidence of non-abusive parents, children, children’s regular therapists, child protection officers and the police.

When a court orders ongoing contact between a child and an abusive parent the victim parent and the child are not extended an opportunity to heal. Rather, they are required to continue to live with the trauma of domestic violence. Further, in situations where an order is made which provides a perpetrator with unsupervised contact with the children for longer periods than was ever likely to have occurred prior to separation, the child is placed in grave risk of harm because the perpetrator is free from any protective maternal influence. On contact, a child is forced into a situation where they have to cope alone with an abusive perpetrator.<sup>32</sup>

It is important to highlight that there is no research evidence to support benefits to children from having regular contact with perpetrators of domestic violence.<sup>33</sup> Rather studies show that contact with a violent parent is generally a negative experience for children because, as observed by Radford and Hester, '[e]verything that happens to children living in families where there is domestic violence also happens after separation, and sometimes the incidents are worse'.<sup>34</sup> Therefore an evidence-based approach to post-separation arrangements for children in matters where there is domestic violence should provide an exception to the post-separation emphasis on maintaining parent-child relationships. Instead of promoting contact through the use of discourses grounded in normative misconceptions of gender and domestic violence, experts and decision-makers in the system need to ensure that the intention of the legislation is upheld – which is to prioritise the protection of children from harm.<sup>35</sup>

## **B Expert Assessors in Family Law**

Australian expert assessments in post-separation parenting matters are prepared by family consultants, who are usually qualified social workers or psychologists.<sup>36</sup> Family reports are intended to provide independent expert evidence about family dynamics and guidance to decision-makers as to how the child's best interests might be served post-separation.<sup>37</sup>

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32 Radford and Hester, above n 5, 97.

33 Ibid 86.

34 Ibid 95.

35 See, eg, *Family Law Act* ss 60CC(2), (2A).

36 The functions of 'family consultants' are set out in *Family Law Act* s 11A:

The functions of family consultants are to provide services in relation to proceedings under this Act, including:

- (a) assisting and advising people involved in the proceedings; and
- (b) assisting and advising courts, and giving evidence, in relation to the proceedings; and
- (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and
- (d) reporting to the court under sections 55A and 62G; and
- (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

See also *Family Law Act* ss 11A–G, 38BA, 38N, 65L, 69ZS.

37 Easteal and Grey, above n 9, 72; Lawrie et al, 'Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study' (Research Report No 15, Australian Institute of Family Studies, May 2007) 91; Judy Cashmore and Patrick Parkinson, 'Children's

Family reports are often the only social science evidence available in parenting matters, and therefore, if they are to work to protect children from domestic violence, they need to provide the best evidence possible to enable decisions that are in the child's best interests. Cases in which a family report is obtained are amongst the most complex and the impact of these reports on post-separation parenting arrangements in and out of court is significant. Family reports are not only crucial evidence in parenting matters before a court, they are also important to pre-trial negotiations and family dispute resolution processes, as they are acknowledged to be a 'very powerful settlement tool'.<sup>38</sup> Of particular significance to victims is their influence on Legal Aid decisions. An unfavourable family report can mean that a grant of legal aid will not be made to continue to trial.<sup>39</sup> This can clearly have a huge impact on victims who may then be obliged to self-represent against their abuser.

There are a number of different avenues for the appointment of a family report writer. When looking at the issue of the quality and efficacy of family reports, as here in the context of matters involving domestic violence, it is important to be clear about the professional framework in which a family report is being written. Some family report writers are employees of the family courts, some are employed at Legal Aid offices,<sup>40</sup> and others operate from private practice. Those in private practice are appointed under regulation 7 of the *Family Law Regulations 1984* (Cth) by the Chief Executive Officer of the Family Court or the Federal Circuit Court. It is the family report writers who are employees of the court whose report writing is most clearly guided by a range of formal standards, professional tools and training materials.<sup>41</sup> The Australian Assessment Standards of Practice for Family Assessments and Reporting<sup>42</sup> provide guidance to family report writers but are also a statement to others in the family system about what can be expected from a family report. Family report writers not employed by the courts may be, and should be, informed by these standards and guidelines but it is a matter for each professional.<sup>43</sup> The court can only be

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Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors' (2009) 82 *Family Matters* 15, 16.

38 Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms', above n 9, 317.

39 Australian Women Against Violence Alliance, 'Access to Justice for Women and Children Living with or at Risk of Violence' (Policy Brief, 2016) <<http://awava.org.au/2016/08/22/research/7424>>.

40 This is the situation in Queensland where the current research was undertaken. It also occurs in South Australia.

41 These documents include professional guidelines and tools created by the Child Dispute Services at the family courts to be used by their family report writers: *Family Violence Screening; Professional Directions: Family Reports; Support Persons; Family Violence Safety Issues; Notification of Risk of Abuse*. They have been generously provided to the research team by the Acting Principal, Child Dispute Services, Ms Jane Reynolds. The documents are on file with the authors. For a more comprehensive discussion about the formal framework, see Field et al, above n 13.

42 Pam Hemphill and David Hugall, 'Australian Assessment Standards of Practice for Family Assessments and Reporting' (Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia, February 2015). The Standards are the official guidelines informing the writing of family reports.

43 The professional bodies – the Australian Association of Social Workers and the Australian Psychological Society – may also play a role in maintaining and regulating the competence of their members and the currency of their knowledge.

responsible for the standard of family reports written by its own employees. This means that inconsistencies in the nature and standards of family reports are possible in the current system. The discussions during the focus groups were general in nature and did not involve distinguishing between reports done by family consultants employed at the courts and those who became family report writers through other avenues.

Only limited research has been conducted in Australia and overseas looking at the efficacy of family reports in matters where there is domestic violence. Extant studies affirm the research discussed above regarding how domestic violence is dealt with more generally in the family law system, suggesting that expert court assessors often promote contact through invalidating or diminishing the relevance of consideration of domestic violence.<sup>44</sup> The international research suggests that reasons for this approach may stem from a lack of understanding and training about the nature, dynamics and impact of coercive control.<sup>45</sup> Poor assessment practices are also considered a factor, such as assessments being made under tight time constraints or the range of information sources being too narrow (for example, failing to consult with extended family, teachers, psychologists, child protection workers, police and so on).<sup>46</sup> Questions of training and assessment practice have yet to be explored in Australia.

Research on family report writers and their treatment of domestic violence in Australia is limited to two dedicated studies and two notations in larger research projects.<sup>47</sup> Two of these studies occurred prior to some significant changes in the legislation relating to domestic violence in 2012. Before mid-2012 the dual intentions of the *Family Law Act* were to encourage ongoing relationships with both parents and to protect children from abuse. Concerns that the *Family Law Act* and family law system were not responding adequately to domestic violence led to the introduction of family violence amendments which came into force on

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44 See Pence et al, above n 23; Hart, 'Child Safety in Australian Family Law', above n 12; Hart, *Children Exposed to Domestic Violence*, above n 29; Saunders, Faller and Tolman, 'Child Custody Evaluators' Beliefs', above n 29; Moloney et al, above n 2; Kaspiew et al, *Responding to Family Violence*, above n 4; Maddy Coy et al, 'Picking Up the Pieces: Domestic Violence and Child Contact' (Research Report, Rights of Women and CWASU, 2012); Michael S Davis et al, 'Custody Evaluations when there are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators' (Final Report, Department of Justice (US), 29 November 2010); Megan L Haselschwerdt, Jennifer L Hardesty and Jason D Hans, 'Custody Evaluators' Beliefs about Domestic Violence Allegations during Divorce: Feminist and Family Violence Perspectives' (2011) 26 *Journal of Interpersonal Violence* 1694; Daniel G Saunders, Richard M Tolman and Kathleen C Faller, 'Factors Associated with Child Custody Evaluators' Recommendations in Cases of Intimate Partner Violence' (2013) 27 *Journal of Family Psychology* 473; Pam Hemphill, 'On the Crest of a Wave: The Australian Family Violence Reforms One Year Later' (Paper presented at the Association of Family and Conciliation Courts 50<sup>th</sup> Annual Conference, Los Angeles, 1 June 2013); Jason D Hans et al, 'The Effects of Domestic Violence Allegations on Custody Evaluators' Recommendations' (2014) 28 *Journal of Family Psychology* 957. For a comprehensive review of the current international and national research literature, see Jeffries, above n 13, and Field et al, above n 13.

45 See the literature cited in Jeffries, above n 13, and Field et al, above n 13.

46 Saunders, Faller and Tolman, 'Child Custody Evaluators' Beliefs' above n 29, 109–11; Haselschwerdt, Hardesty and Hans, above n 44.

47 Hart, 'Child Safety in Australian Family Law', above n 12; Moloney et al, above n 2; Kaspiew et al, *Responding to Violence*, above n 4; Hemphill, above n 44.



7 June 2012.<sup>48</sup> As we noted above, the *Family Law Act* now prioritises the protection of children ‘from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence’ over and above any ‘benefit to the child of having a meaningful relationship with both parents’.<sup>49</sup> On the basis of these amendments it could be expected that changes in family report writing practice would be seen after 2012, with greater awareness about domestic violence and less emphasis on the promotion of contact in matters involving domestic violence.

The first Australian study, undertaken as part of a larger project examining allegations of domestic violence in family law proceedings, found that views were rarely expressed in family reports about specific allegations of domestic violence. Analyses of evidentiary material about domestic violence in family reports in 300 file cases between 2002 and 2003 revealed that ‘of all allegations raised, no more than 10% in any group were fully or partially corroborated by a Family Report, and no more than 2% were fully or partially discredited’.<sup>50</sup>

Hart’s qualitative analyses of 20 family court judgments between 1991 and 2001 explored the role of family reports in judicial constructions of children’s best interests in cases where domestic violence was alleged.<sup>51</sup> She found that family report writers, and in turn judges, demonstrated limited or no understanding of domestic violence and its impacts. The context of violence within the family tended to be minimised in the family reports referred to in the judgments. Children’s exposure to violence, its impacts and potential future risk posed to victims and their children were not key considerations. Further, domestic violence was frequently reconstituted or reframed as mutual parental ‘conflict’, and it was this, rather than exposure to what were often extreme acts of domestic violence, that was judged as impacting adversely on the children. Even in the few cases where domestic violence was acknowledged as an issue, the negative effects to children were ‘commonly ignored, minimised or de-contextualised from the violence’.<sup>52</sup>

Hart found that victims of violence tended to be positioned within normative gendered frameworks which negated their credibility. Thus, victims were referred to as ‘hostile and/or irresponsible in their parenting’, and they were situated within a strong discourse of parental alienation – berated for interfering, destabilising and sabotaging relationships between perpetrators and their children.<sup>53</sup> There was little to no recognition that behaviours that might appear ‘hostile’ could in fact be symptomatic of victimisation and/or result from a victim’s fears for their safety and that of their children. Hart observed that certain behaviours were identified as ‘alienating’ when they were really maternal

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48 The family violence reforms were introduced to the *Family Law Act* as amended by *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

49 *Family Law Act* ss 60CC(2), (2A).

50 Moloney et al, above n 2, 91.

51 Hart, ‘Child Safety in Australian Family Law’, above n 12, 33, 37.

52 Jeffries, above n 13, 8.

53 Hart, ‘Child Safety in Australian Family Law’, above n 12, 35.

protective actions.<sup>54</sup> She also found that parenting orders that resulted from an inadequate assessment of violence allegations potentially re-exposed victims to domestic violence. Rather than prioritising child safety, the family report assessments referred to in the judgments tended to construe the child's best interests in terms of the maintenance of the relationship with the perpetrator.<sup>55</sup>

Hart's study is unique as it was the first in Australia to systematically focus on the role of family reports in family law proceedings. However, given the small sample size, the fact that assessment of these reports was based on secondary judicial reference to them and that the research is now somewhat dated (ie, pre-2012 amendments), we need to be careful before drawing definitive conclusions. Her findings are nonetheless supported by more rigorous international explorations of this issue, as well as more recent Australian studies.<sup>56</sup>

Hemphill's Australian research, which specifically focused on family reports and domestic violence, consisted of a survey of 58 family report writers and an analysis of 200 family reports, one set on either side of the 2012 amendments referred to above.<sup>57</sup> Providing further support to the idea that domestic violence is being reframed as something other than coercive control, results suggested that family report writers had difficulty differentiating coercive control from other types of violence, such as mutual or situational violence.<sup>58</sup> While results from the survey component of this research suggested family consultants had become more knowledgeable about domestic violence after the 2012 reforms, analyses of assessment documents revealed a disjuncture between reported understandings, assessments and recommendations; suggesting very little had in fact changed.<sup>59</sup>

Again, as part of a larger evaluation of the family law system after the 2012 family violence reforms, another study showed family reports were more likely to be ordered in cases involving domestic violence post-reforms (33 per cent compared with 53 per cent) and there was an increase in 'explicit discussion of risk assessment' (22 per cent compared with 31 per cent) by family report writers.<sup>60</sup> A survey of judicial officers and lawyers conducted as part of the broader evaluation also confirmed this. Many agreed that there had been a shift in the practice of report writers in terms of the content included. However when they were asked whether report writers had provided recommendations that addressed the implications of information about family violence, child abuse and child safety concerns since the family violence reforms, responses indicated 'some unevenness in practice in this regard': 34 per cent 'reported that this was sometimes their experience', '16% reported that this was rarely or never the case' and around 40 per cent agreed that family reports 'almost always or often provided such recommendations'.<sup>61</sup>

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54 Ibid 35–7.

55 Jeffries, above n 13, 8.

56 Ibid; Field et al, above n 13.

57 See Hemphill, above n 44.

58 Saunders, Faller and Tolman, 'Child Custody Evaluators' Beliefs', above n 29, 25–6.

59 See further discussion below.

60 Rae Kaspiew et al, 'Court Outcomes Project' (Australian Institute of Family Studies, October 2015) 43–66; see especially ch 4.

61 Kaspiew et al, *Responding to Family Violence*, above n 4, 43 [4.4.2].

The available research points to the importance of exploring Australian family report writing practice, particularly in matters involving domestic violence. In the next Part we explain the methodology of our focus group study which sought the perspective of professionals providing legal and social support to victims, to better understand current approaches and gain insights into how current practice might be improved.

### III METHODOLOGY

As noted above, research focused specifically on the practice of Australian family report writing is limited and out-of-date having been conducted prior to the 2012 family violence reforms. This study is the first in Australia and worldwide to provide in-depth qualitative exploration of expert assessor practice from the perspective of professionals who directly support and advise victims of domestic violence in parenting matters.<sup>62</sup> Our research gives legal practitioners and social support service providers a voice that has not been a part of the literature to date.

Focus groups are utilised to obtain detailed information and insight into particular topics.<sup>63</sup> They provide a conversational outlet for research participants with the focus group researcher/moderator encouraging discussion between participants by posing particular topics constructed around the aims of the research.<sup>64</sup> The methodological standard is that focus groups should involve six to eight people who have come from similar backgrounds or who have similar experiences or concerns. They are brought together by the researcher/moderator in a setting where participants feel comfortable enough to engage in a dynamic discussion for around one to two hours. Focus groups encourage a range of responses, which provide in-depth understanding of participants' opinions and perceptions. By allowing group discussion, focus groups can help researchers capture the shared experiences of participants, accessing elements that other methods (such as in-depth interviews) may not be able to reach. Focus groups put control of the interaction into participant hands with the collective interaction between them substituting for their exchange with the researcher. This gives prominence to the participants' viewpoints. In addition, focus groups are

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62 Research in the United States and United Kingdom on expert evaluations in family law proceedings have included surveys and interviews of evaluators, undertaking content analyses of their reports and/or interviews with victims. This research is cited extensively in Jeffries, above n 13; Field et al, above n 13.

63 The efficacy of the focus group methodology is well established in sociological methodology texts: see, eg, Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Pearson, 5<sup>th</sup> ed, 2004); Michael Quinn Patton, 'Qualitative Research' in Brian S Everitt and David C Howell (eds), *Encyclopedia of Statistics in Behavioral Science* (Wiley, 2005) vol 3, 1633; David Silverman, *Doing Qualitative Research: A Practical Handbook* (Sage, 3<sup>rd</sup> ed, 2010); Richard A Krueger and Mary Anne Casey, *Focus Groups: A Practical Guide for Applied Research* (Sage, 5<sup>th</sup> ed, 2015).

64 Pranee Liamputtong, *Focus Group Methodology: Principles and Practice* (Sage, 2011) 3–5; Richard A Krueger, *Focus Groups: A Practical Guide for Applied Research* (Sage, 2<sup>nd</sup> ed, 1994).

beneficial in assessing needs, developing ideas, improving existing processes, and generating information for further research.<sup>65</sup>

In this study, 13 focus groups involving a total of 56 participants were facilitated. Twelve focus groups took place in South East Queensland and one focus group took place in a regional town in North Queensland. Each focus group comprised of only one category of professional (eg, legal practitioners participated only in a group with other legal practitioners. The initial plan was to recruit legal practitioners from different occupational areas, staff from social service organisations who provide support to victims of domestic violence and psychologists/social workers in private practice. Unexpectedly, however, our recruitment materials solicited an overwhelming response, particularly from legal practitioners. It was decided that everyone who wanted to participate should be given the opportunity to do so. Details with regard to the number of focus groups and individual participants by occupational group are reported in the table below.

Occupational Group	Focus Groups (n)	Participants (n)
Legal practitioners	10	44
<i>Lawyers in private practice*</i>	8	23
<i>Legal Aid lawyers**</i>	1	12
<i>Women's Legal Service (WLS)</i>	1	9
Social service providers	2	10
Psychologists/therapists in private practice	1	2
<b>Total</b>	<b>13</b>	<b>56</b>

\* Included a number of independent children's lawyers and barristers

\*\* Included a number of independent children's lawyers

We made every effort to adhere to the methodological standards proscribed for focus groups. Although mean focus group numbers were favourable (n=5) these ranged from between 2 and 12 people. An individual interview was also undertaken with one lawyer who wanted to participate but was unable to attend a group. We found that people would either fail to arrive for their assigned focus group or additional people would arrive on the day wanting to participate. The focus groups, which ran from 2 to 2.5 hours, elicited robust and informative discussion between participants. Two researchers/facilitators present at each focus group encouraged and guided discussion utilising the following four broad topic areas and very quickly reached a point of research saturation with similar responses to these topic areas consistently emerging. The four topic areas were:

1. observations about family report writers' understanding, knowledge and training in the field of domestic violence;
2. the family report assessment process including observations regarding approaches and impacts on victims;

65 Liamputtong, above n 64; Krueger, above n 64.

3. reports and recommendations including observations about how domestic violence is addressed and how recommendations impact on final parent arrangements; and
4. observations with regard to changes in family report writer practice post-2012 and suggestions for improving future practice.

All focus group discussions were recorded and later transcribed. The verbatim de-identified transcripts were then analysed using a thematic analysis technique, drawing the themes from the extant literature. This commonly used qualitative data analysis technique required us to establish criteria for recognising patterns within the transcripts. We searched for repetitions, metaphors and analogies, similarities and differences, and theory-related material. To aid our analysis, we used a computer-assisted qualitative data analysis program NVivo. This program works on a code-and-retrieve theme basis, which is particularly useful when dealing with a large number of transcripts. Once we imported transcripts into NVivo, the key phase of qualitative data analysis was employed – coding. This was done by using the criteria outlined above, which allowed us to identify *a priori* themes (as identified in the literature review above) as well as emergent themes. These are discussed in the next Part.

## IV FINDINGS

### A Understanding, Knowledge and Training

In every focus group, participants noted that family report writers had tertiary qualifications and training within their particular disciplinary area, that is, social work, psychology and sometimes psychiatry. However, understandings of domestic violence were described as varied. Participants stated that only a minority of family report writers appeared to have adequate knowledge about domestic violence:

I think some have got more of an understanding than others ... each family report writer is different about how much they may appreciate certain elements or what they define as domestic violence and to what levels. (Legal practitioner)

Legal practitioners stated that when representing victims, care was needed to ensure the appointment of a report writer with domestic violence expertise. Conversely, if representing perpetrators, they would avoid those with understandings of domestic violence. Both these points are expressed in the following:

There's some I wouldn't go to if I was concerned about the issue of domestic violence, whether it was to knock it on the head as not an issue or whether it was to make sure that it was dealt with and all the information came forward appropriately. (Legal practitioner)

When I worked in private practice we would look for report writers who don't do that level of investigation, who don't report on the violence because that was in our client's [the perpetrator's] interest. (Legal practitioner)

Practitioners expressed concern that it was becoming more difficult to find report writers with domestic violence expertise. Increased caseloads in family

law matters alongside only a small number of expert report writers in the available pool meant waiting lists were growing exponentially:

The problem we're having is that the report writers we choose can't do any reports until next year. I've got to adjourn matters coming up because I can't get them [victim clients] into the family report writer and I just don't want to compromise. (Legal practitioner)

It is hard to get report writers. I said to an Independent Children's Lawyer after it was all finalised, how did you choose so and so? They knew what I was alluding to. They said to me they just didn't have a choice. I said did you try so and so? Yeah, yeah couldn't get them. (Legal practitioner)

In addition to the limited availability of 'preferred' family report writers, participants raised the issue of victim's self-representation or representation by a less experienced lawyer. To achieve equitable access to justice, family report writer expertise in domestic violence should be uniform, and victim/s access to suitably informed assessments should not be stymied by waiting lists or reliant on the variable insider knowledge or networks of lawyers. These concerns were raised by participants in one focus group discussion as follows:

That's really problematic where the victim is self-represented and maybe the private practitioner is presenting a panel of three [report writers] and saying you pick one, and they've got no idea about their history or their qualifications or what kind of issues they tend to address in their family reports. There are well known reputational issues around whose [sic] good in domestic violence. It shouldn't be like that. This goes back to that whole access to justice issue. (Legal practitioners)

The relative lack of domestic violence expertise on the part of many report writers led participants to conclude that systematic training in this area must be lacking. Knowledgeable family report writers were thought to be self-taught, taking the initiative to pursue information and participate in courses at their own instigation. As noted by one legal practitioner: 'Often they will self-educate. They read a lot – the good ones. They go to training.'

## ***1 Invalidating Domestic Violence***

The general lack of understanding, and by extension the absence of adequate training, was evidenced for participants by the way in which the majority of family report writers managed to invalidate coercively controlling violence. Often in the face of overwhelming evidence to the contrary (for example, criminal convictions), focus group discussions revealed that abuse was often minimised, dismissed or completely negated. For example, as stated by one legal practitioner: 'when they write reports they sometimes just leave out the most atrocious violence that has been committed ... they don't want to recognise it'.

### ***(a) The Inconsequentiality of Domestic Violence***

Focus group discussions around the invalidation of domestic violence invariably led to explanations about how this occurred. First, domestic violence seemed inconsequential with participants reporting family report writers ignoring, not recognising or misunderstanding the impact of domestic violence on women or children. As stated by one legal practitioner: 'I don't think the focus is there to any great extent ... there's probably not the depth of

understanding that there should be about the impact on the parents, the impact on the child, what that means in terms of the child's future'.

It seems that rather than being suggestive of abuse, indicators of trauma were either not recognised or misunderstood to the point where the parenting capacity of victims, not that of perpetrators, was called into question:

A lot of the reports are really cognitively dissonant, because they observe all these behaviours [in the victim mother] but then minimise [the domestic violence] so all these experiences she's describing are not really domestic violence. So I don't believe that domestic violence has a weight. However, I observed this woman presenting with all the behaviours of a traumatised woman. (Social service provider)

I think they're making assumptions around parenting abilities or styles of mums, based on the child [being] out of control, she can't look after the child, rather than having an understanding that this child's behaviour is quite possibly a result of domestic violence. (Legal practitioner)

Participants indicated that even when domestic violence was acknowledged, consideration of this with regard to abusive men's capacity to parent was infrequent. In contrast, the potentially adverse impact of victimisation on mothers' parenting capacity was often a focus, without acknowledgement of the probability of this dissipating once the victim and her children were safe. Legal practitioners in one focus group stated that linking trauma with maternal parenting capacity was 'dangerous ground' because it could result in a dim view being taken of the victim and a change of the child's residence to be with the perpetrator. Such an approach was rationalised on the grounds that trauma impedes victim mothers' parenting capacity, their ability to co-parent, and because fear of the father could transfer to the children straining the perpetrator/child relationship:

There have certainly been cases where there's been violence to the extent that a woman has now got some sort of mental health issue. [The perpetrators] make all these accusations about the woman and her parenting skills. Eventually they turn her into the self-fulfilling prophecy and she becomes what it is they've been saying. Then you are left with a perpetrator going, 'See, I told you what she was like'. I have one like that at the moment where the domestic violence has caused her to turn to alcohol. So in order to protect the child [at the report writer's recommendation] they are now living with the father. There was definitely a lack of insight – the domestic violence was just brushed off and the only issue that was really considered properly was the alcohol use. (Legal practitioners)

The inconsequentiality of domestic violence was also manifest in observations that family report writers tended to ignore or downplay the possible future risks posed to children. A legal practitioner expressed concern over the prioritisation of the negative impacts of severing the father/child relationships over the risks posed by contact with a perpetrator as follows:

I just don't think enough time is spent thinking about the pattern [of domestic violence]. The likelihood that these children will repeat what they have observed. They are all over the research about the long term harm to children of not having a relationship with one parent but they don't quote with anywhere near as much rigor [sic] the research about the likelihood of children who have been brought up in that environment becoming like their [perpetrator parent] or of the ongoing emotional scars and an inability to develop their own positive adult relationships in the future. (Legal practitioner)

While a lack of training might partially explain the invalidation of domestic violence through what presented during discussions as discourses of inconsequentiality, it was also reported that judicial expectations that perpetrator/child relationships be maintained put report writers under pressure to somehow 'make contact happen'.

[Report writers] don't listen to domestic violence. They keep prioritising the need for children to have relationships with fathers. You get the same subset of people who know that is what the court wants. They write the reports for what the courts wants. (Legal practitioner)

We need to make sure that the judicial approach is giving [report writers] the freedom to feel that they can make their assessment without the pressure to make contact happen at all costs. (Legal practitioner)

Constructing domestic violence as inconsequential by negating its impact on victims, failing to question the parental capacity of perpetrators, and ignoring the ongoing risks posed to victims and their children enables perpetrator/child relationships to be maintained. In this context, protecting these relationships requires a reframing of a victim's trauma so that it is the victim who is the risk to the children and to the perpetrator's relationship with the child.

#### *(b) Reconstituting Domestic Violence as Something Other than Coercive Control*

The second way that the focus groups reported that domestic violence is invalidated and perpetrator/child relationships are maintained is via the reframing of coercive control as something else. Focus group participants reported that domestic violence was repeatedly transformed into something that was not too serious, episodic, 'only parental conflict' and/or an act from the past that victims needed to 'get over'. The following quotes illustrate these points:

The father certainly admitted that on one occasion he had strangled her, kicked her numerous times, but his evidence was that it only happened once. The family report writer had a similar attitude of, it's only once. The mother's evidence was that this sort of stuff happened all the time. It really troubled me watching the dismissive way that everyone in the case was treating what I would consider a really serious incident. If someone did that to me, I would struggle to get over that. I would struggle to forgive that person. I would then struggle [to be told], it only happened once, what's the problem? The report writer in that case minimised it in a terrible way. (Legal practitioner)

You get some reports that really just miss any allegations of domestic violence and in some cases, I think, have minimised the issues of domestic violence as parental conflict regarding unresolved parenting issues, which I find pretty disturbing. (Legal practitioner)

Historical domestic violence is often underestimated as well, it's like well, look, that was five years ago. Let's just sort of funnel it along now but if you've been a victim of some severe ongoing abuse, you don't just draw a curtain over it. (Legal practitioner)

#### *(c) Invoking Normative Gendered Misconceptions*

Third, domestic violence was invalidated through the adoption of normative gender misconceptions that called into question the credibility of women. The focus groups reported that mothers who seek to protect their children from the risks of contact with a perpetrator are portrayed as dishonest, manipulative,



unreasonable, unfriendly or alienating parents. This construction supports the maintenance of father/child relationships and provides an avenue for dismissing mothers' evidence of domestic violence. The dishonest and manipulative characterisation of women was frequently highlighted in focus group discussions of report writers' views that women make false allegations of domestic violence and seek protection orders as a ruse to paint fathers in a bad light. Examples of this from the focus groups include:

The woman escaped as a result of a quite severe incident of domestic violence. At that time she was brought back because the father had filed a recovery application and was successful. The first report writer, the client went through her history of violence with this man, the evidence was quite clear but in the report it inferred she was playing the victim very well. I mean she wasn't playing any victim. The evidence was there. (Legal practitioner)

There have been cases where we've heard them say things like, well the women have utilised refuge, it is almost downplaying refuge. Like what's your real purpose of going to refuge? Did you really need to go, was it necessary? The sense is that the women are manipulating the system by using refuge and naming it domestic violence. (Social service provider)

Additionally, focus groups reported that women are expected to nurture and maintain father/child relationships and to do otherwise results in them being labelled as an unfriendly or alienating parent. Many of these issues are portrayed in the following conversations recorded in two separate focus groups with legal practitioners; in one of these the gendered double standard was also highlighted, namely a man's anger is reasonable under the circumstances while a woman's is not:

One of my clients, she was angry because no one had ever believed her. That report writer took such a set against her. Her anger made the family report writer make judgements to say the kids should live with dad, she's alienating. It's a classic. I think anger is the worst. Women are not allowed to be angry. No, it's not becoming. Are men allowed to be angry? Yep, because they're not seeing their kids, absolutely, because they're justified in feeling angry about being denied access to their children but she's not justified in being angry because of the violence. She is overreacting or she's alienating. Her role is to be a good mother which means fostering a good relationship [with the father]. (Legal practitioners)

[Mother victims] say look, he's violent, I don't want the children to see him or I don't want the children to have contact with him other than in a supervised contact centre. There will be a real problem – that the mother is just trying to keep the children away from the father. Yeah they get slogged as the alienating parent. So if the mother is being protective, that will be labelled difficult. More often than not, that's not encouraging the relationship. It is putting barriers up. So just the fact that they say well there was domestic violence and dad is still carrying on the same way, that tends not to be a tick [for the family report writers].<sup>66</sup> (Legal practitioners)

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66 These attitudes towards the protective stance of some mothers were clearly identified in research which followed the commencement of the *Family Law Reform Act 1995* (Cth): see Helen Rhoades, 'The "No Contact" Mother: Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71; Zoe Rathus, 'Of "Hoods" and "Ships" and Citizens: The Contradictions Confronting Mothers in the New Post-Separation Family' (2010) 19 *Griffith Law Review* 438.

*(d) Selectively Silencing and Misconstruing Children's Voices*

Finally, focus groups reported that the invalidation of domestic violence by family report writers occurred through what has been previously described as the selective silencing or misconstruing of children's voices. Participants stated that report writers frequently de-contextualised children's responses to perpetrators in ways that supported rather than challenged ongoing father/child contact. Thus, when children were averse toward seeing their father or made direct disclosures about his abusive behaviours this was often discounted or sometimes reframed by report writers as evidence of problematic mothering (for example, the child taking on the irrational fears of the mother) rather than paternal domestic violence perpetration:

When a child is making disclosures, there's the very, very, very high risk that there'll be allegations that the child has been coached [by the mother] or that the disclosures will be looked at without the context of ... [domestic violence] and why they have levels of fear or why they might be having nightmares or why they're frightened of their father. (Legal practitioner)

Even when report writers acknowledged the perpetration of domestic violence and children's fear of perpetrator fathers this did not necessarily impact on their final recommendations. One legal practitioner illustrated this confusing disjuncture, which also renders children's voices silent and supports perpetrator/child relationships:

The report writer self-recorded [the children and mother] were clearly intimidated by [the father] and the children seemed to be afraid of [the father]. [The mother] was asserting a long history of domestic violence and it didn't seem to matter. The recommendation just went ahead that the children should remain with [the father]. (Legal practitioner)

In contrast, as the focus group participants noted, when the family report writer observed children during face-to-face assessments looking happy with their perpetrator fathers and/or expressing that they would like to see them, this was embraced without question; again, promoting and legitimising father/child contact:

I had one recently where we've got children who are saying to mum I don't want to go see dad. They've witnessed all this domestic violence. They've gone to the [family report interview] with him and the observations are having safe happy times, and the report writer's gone, what's the problem? The problem is when he's upset and he's alcohol affected he could snap. So yes, he can be a fun happy great dad. So [the family report writer's] just gone, well I didn't see any signs of them cowering. He was looking for the physical signs that in that environment they would not have anything to do with their father. Because he didn't see that [in a controlled environment] where the children felt safe. It was just so trite really. It just doesn't look at the dynamics of what the risk is going forward. (Legal practitioner)

Children still love their parents, still love their father but they want to be safe and [the family report writer interview is] a safe environment, then they're seeking that. There's a whole range of complex reasons why children can be crawling over their fathers at that time but it doesn't mean that there isn't domestic violence, but it's seen to be, oh, obviously there isn't because they are. (Legal practitioner)

## **B The Family Report Assessment Process**

Participants were unanimous that aside from the minority of family report writers who went ‘above and beyond the call of duty’, the majority lacked efficacy in their assessment process. First, issues were highlighted in relation to the face-to-face assessments conducted with families. Second, concern was expressed about the limited range of information sources report writers utilise to make their assessments.

### **1 Face-To-Face Assessment Process**

Participants expressed that this aspect of the assessment process in South East Queensland typically occurred over the course of one day or less in offices either onsite at the court or offsite. It was noted that assessments undertaken with families at the court in Brisbane tended to be more time restrictive (taking place over a few hours) than those contracted offsite with private practitioners (usually half to a full day). Typically, the procedure was noted to involve interviews of between 30 minutes and a few hours with the mother, father and sometimes (although this appeared to be the exception rather than the rule) other family members. Depending on age, children might also be interviewed alongside report writer observations of parent/child interactions.

The consensus was that the face-to-face assessment process was inadequate. Participants questioned how in such an artificial and sterile environment (that is, a family report writer’s office) with so little time spent with families, report writers were able to make thorough assessments, particularly in cases where domestic violence was an issue. Whether traumatised children and/or victims were actually capable of opening up to complete strangers under time constraints in an unfamiliar and potentially intimidating environment was a particular concern:

I don’t know how it can be. Seeing someone for one day, for a period of time, how they can make that assessment in an artificial environment for the children and the mum. (Social service provider)

You are called into a foreign environment which is extremely sterile and you know ahead of time that you will be seeing the [perpetrator] because generally they want you to all go together with the children. Then the mothers like lambs to the slaughter, are sent into a room with their children [and] observed. These women don’t feel comfortable. Every move they make with their child is being judged by the family report writer. They’ve never met them before. They don’t know the family history. They don’t know the children or what issues the kids have got. From an hour a report is written about their lives.<sup>67</sup> (Psychologist/therapist in private practice)

Focus group participants discussed the duality of victim/perpetrator presentation at interview. First, they described perpetrators as highly manipulative and presenting as very calm, rational and charming. Consequently, concern was expressed that it may be difficult to accurately assess abusive men:

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67 The difficulties victims of domestic violence have in presenting well during the period they are being assessed in relation to post-separation parenting arrangements has been noted. See, eg, Peter G Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans (2008) 46 *Family Court Review* 500.

Men are not entirely dysfunctional most of the time. They're only there for an hour or so and they're on their best behaviour. It's a matter of when they're upset, angry or under pressure that's when they snap. They're not going to do that in the assessment. The report writer sees them having a good time and goes what's all the fuss about? (Legal practitioner)

Second, in contrast to perpetrator presentation, participants noted that victim mothers often exhibited nervousness, angst, fear and agitation during interviews not only because they are living with domestic violence but also because the process itself creates an environment in which mothers felt uncomfortable, anxious and fearful:

How can a woman go into a room and feel comfortable enough to talk to a complete stranger about her domestic violence history when the man who has hurt her is sitting waiting for his turn to go in. So she's about as vulnerable as she can get and I would say that the vast majority of women I've worked with talk about the fear of the court report writing process. (Psychologist/therapist in private practice)

In addition, it seems that the way victim mothers present during assessments invariably raised doubts with regard to their mental stability and their parenting capacity:

She's super anxious and she's just out of her tree and over it all. And you get the hyper vigilance and then [report writers] think they're weird. They're the one with the problem. And she's reliving all that [domestic violence] there and then, oh well, look at her. She's got mental health issues. (Legal practitioners)

Often you will find that children of victims who know their father's capable of quite controlling or demanding behaviours, they are very compliant when their father's around. So when you're in a family report assessment and the father is calm and has them under control – he looks like a great parent. Then the kids are seen with the mother who's overly anxious and freaking out and she's not got them under control that day. She looks like she's got parenting capacity issues. (Legal practitioner)

Creating an environment in which traumatised children can feel safe enough to open up can take time and high degree of therapeutic expertise. It is difficult to create such a climate within the time-poor milieu of the family report writing assessment process. This concern alongside discussion about face-to-face assessments re-traumatising children was most poignantly expressed during the focus group with psychologists and therapists in private practice:

It is probably more traumatising for the children than the woman. The woman has some capacity. She has language. Kids can't articulate what that experience is. It's not like I went to [the family report assessment] today and it's over. The little girl I was telling you about, I think she was about 7, she wet her pants every day after the assessment for months. You can't tell me that's acceptable. Our society says to children don't talk to strangers and then we wheel little Johnny up to the family report writer, it's alright mate, I know you've never met him, I know he looks a bit scary but you're going to go into this room with this complete stranger and he's going to ask you questions, you just tell him the truth, it's all good. So we drop them into a room with a complete stranger and they ask them some of the most intimate, frightening, scary questions that the kids have ever heard and then they finish with them and send them on their way. Seriously? There's this thing we've got in therapy – it's called rapport building and you have to spend a lot of time doing that. Have you ever gone up to a complete stranger and then told them about anything that's really deeply disturbing about yourself ever? No. They have rights. Kids have rights. But they're not given any rights. Putting children in a room with

a father who is extremely violent and then asking them to play at a table with him, what is that? What is that? Sit down, play a game with your dad while I sit here and take notes about your connection and your behaviour. Seriously? I think it's abuse of children. (Psychologist/therapist in private practice)

## 2 Additional Information Sources

In addition to expressed concerns over the face-to-face assessment environment, we were also told that report writers in South East Queensland rarely consulted with extended family members, teachers, the children's or victim's psychologists/therapists, child protection workers, police, general practitioners and others involved in the children's lives. Reasons for this included a lack of funding, time restraints and what was described as deliberate avoidance of these potentially rich sources of information on the grounds of 'bias':

I have never been contacted by a family report writer. I've never been asked ever. We see [the victim mother and children] over this really extended period of time but our material is tainted which I find really unbelievable. I've had court report writers suggest that I can't be unbiased. So my information is irrelevant. I just go – you've got to be kidding me. I'm working with a woman and I'm working with the children. How can that not be relevant? To seriously imagine that we sit with our clients and we believe every single thing they tell us and we don't question anything, that is really disrespectful. (Psychologist/therapist in private practice)

Legal practitioners in South East Queensland explained that family report writers are not expected to gather additional evidence unless they are authorised and/or directed to by a judge. Rather, the usual way this type of information finds its way to them is via the subpoenaed documents. However, report writers do not consistently read this material. A lack of funding and thus time means that only some reportedly read through this material on their own initiative. As one practitioner noted:

Some of the report writers go into the subpoena office at the court and sit there and read them and others won't. Because again, resource issues. That takes a lot of time and the professional payment for these reports, I would suggest doesn't really factor in the time it would genuinely take for someone to go and sit and read three boxes of records for that family. (Legal practitioner)

This often means that the provision of the subpoena document information is dependent on the appointment of an independent children's lawyer ('ICL'). Participants explained that ICLs would often provide summaries of the documents to report writers but where no ICL was appointed, this task rested with the parties' lawyers. In other words, the provision of this crucial information to report writers is largely dependent on the diligence of the lawyers involved in the case. This variability raises concerns regarding access to justice, especially for self-represented litigants:

Subpoena documents, this is a many and varied process, when I receive them [as an ICL] they can be in boxes, piles high. So that can take hours to read. So my process is do a summary and I give that to the report writer and let them know that if they want to actually see the source material they're welcome to and we can get it to them. Because what I've found is if someone has four boxes of documents, there's a strong chance that they probably won't read them. If there's no ICL, there's every chance that the parties themselves don't have the capacity to get copies of those documents. They can look at them in the court, but they can't get them. Let's say the report's going on over here, there's every chance that those

subpoena documents are not making their way to the report writer. (Legal practitioner)

However, according to the participants, it seems that even when provided with detailed summary reports of the subpoena documents this does not necessarily mean that report writers actually read them.

### **3 *An Exception to the Rule?***

A number of the problems highlighted by the focus group participants in South East Queensland with regard to report writer practice were not raised to the same extent in the North Queensland focus group. Here, report writers seemed to spend more time undertaking assessments. For example, home visits, which were thought never to occur in South East Queensland, were not uncommon and the entire approach was generally described in ways suggestive of a higher degree of efficacy. However, concerns were still expressed that this situation was starting to change due to funding issues. Nevertheless, this points to variability in the family report writing depending on the location; again raising questions with regard to the uniformity of access to justice for victims of domestic violence.

## **C Family Report Recommendations**

According to focus group participants, the practice of invalidating domestic violence, discussed above, invariably led to family report assessments and recommendations that failed to address the risks posed to mothers and their children by the perpetrators use of coercive control. While the consequences of extreme acts of physical violence might be acknowledged in a limited fashion, other less overt tactics of coercive control (such as emotional or financial abuse) were generally overlooked unless the report was compiled by one of the small minority of family report writers with actual expertise:

We find we can get very different [report] outcomes with the physical violence because it's so much more evident. They respond to that because that's very clear. It's the coercive control. The emotional, psychological, the financial, the cultural; I don't think they're seeing that. Some recommendations are fair. It just depends on the level of domestic violence. When we see extreme physical violence they are taking that into account and there's more caution around safety. (Social service providers)

Taking 'more caution around safety' in cases of serious physical violence resulted in what could be described as piecemeal attempts to reduce risk by limiting the possibility of direct contact between perpetrators and victims. Thus recommendations included more control around changeovers (such as the use of contact centres) to prevent victim/perpetrator contact, communication books to discuss parenting issues in lieu of direct verbal communication and not providing perpetrators with victims' addresses.

These approaches could be viewed as a step in the right direction because domestic violence is not construed as being altogether inconsequential to post-separation parenting arrangements. However, while attempting to restrict the possibility of children being exposed to further perpetrator abuse, these recommendations do not take into account the numerous other dangers posed to children by perpetrators of violence discussed above. Further, and as noted by the

focus group participants, perpetrators can still find ways to abuse victims at changeovers even in more controlled settings; and the written word in the communications book can be used as an outlet for abuse just as readily as verbal communication:

The domestic violence can still occur with the contact centres, like in the car park. A lot of parties hide somewhere and then follow the car as it leaves [the contact centre or other more secure change over location], follow it home and try to run it off the road. I've had quite a few of those types of things. (Legal practitioners)

I had one recently where the Dad actually wrote in [the communication book] well, I had to tell the daughter – who was three at the time – that you were a bitch. He actually wrote it in capital letters – and it's all your fault that I had to tell her you were a bitch but I told her you were [a] bitch – mum is a bitch. (Legal practitioner)

In cases where extreme physical violence was not perceptible, invalidation via a tendency to construct coercive control as inconsequential is evidenced in what focus group participants perceived to be frequent recommendations in family reports for equal shared parental responsibility.<sup>68</sup>

A report writer has done reports for me recently. In some of them I've had really quite extreme domestic violence, criminal charges, jail time and there's still a recommendation for equal shared parental responsibility. I've got to the point now where I'm writing letters saying, can you just explain to me how this is going to possibly work? (Legal practitioner)

Domestic violence might be flagged and then the first recommendation is equal shared parental responsibility. It shows a lack of understanding of domestic violence and how he can continue to make her life hell; it allows him into that family's home in a constant way. (Legal practitioner)

Requiring victims and perpetrators to make joint decisions about important long-term issues in the lives of their children (such as schooling) presents domestic violence as extraneous to parenting, invalidates the ongoing impacts of victimisation (for example, fear) and extenuates future risk by providing perpetrators with another avenue for abuse. Joint parental responsibility and domestic violence are incongruous. It is plausible therefore that the habitual propensity to make recommendations of shared parental responsibility stems not only from discourses of inconsequentiality, but also from the previously reported tendency of family report writers to reconstitute coercive control as something else, that is, something that is not that serious, mutual, only parental conflict, sporadic and historical.

Focus group participants expressed that it was not uncommon for report writers to recommend that perpetrators and victims attend parenting programs and post-separation couples counselling together:

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68 The results of the Australian Institute of Family Studies evaluation of the 2012 family violence amendments show that equal shared parental responsibility is the most common order overall, whether cases were judicially determined, settled after proceedings had been commenced or involved consent orders filed without litigation. Prior to the family violence reforms 86.2 per cent of cases had orders for equal shared parental responsibility, falling to 85.1 per cent after the reforms. But there was a more observable trend in respect of orders that had been judicially determined. In these cases, judges only ordered equal shared parental responsibility in post-reform cases in 39.8 per cent of cases as compared to 50.6 per cent pre-reform: Kaspiew et al, 'Court Outcomes Project', above n 60, 57.

The last report that I saw, the idea was that they needed couples counselling because they are not able to parent together. Couples counselling for a victim and a perpetrator!? (Social service providers)

Recommendations for perpetrators to attend anger management courses were also reputed to be common when domestic violence allegations were noted in family reports. In this instance, participants pointed to family report writers' misconceptions about perpetrators of domestic violence:

Anger management – it's a joke – it's an absolute joke. [The family report writer recommends] sending them off and they have to go and they tick the box, you attended six appointments. You're cured. Seriously? (Psychologist/therapist in private practice)

[The report writers] prescribed anger management for him. That really indicates they have no actual understanding. It's not a problem of anger management. (Social service providers)

Coercively controlling violence is 'not a problem of anger management' because perpetrators are not deficient in self-control. Rather, they engage in a deliberate process of intimidation and control aimed at bending the victim to their will. Indeed, perpetrators of domestic violence are very able to be perfectly calm, straightforward, reasonable and charming when it suits them.

As a result of these attitudes the focus groups reported that recommendations for substantial unsupervised time between perpetrators and their children were common. While domestic violence was minimised, the need to promote the perpetrator/child relationship through recommending significant time was noted as present in many assessments. Despite the risks, family report recommendations for long-term supervised or no contact between abusers and their children were the exception, not the rule, and guidance, apart from that discussed above (anger management counselling and communication books), was lacking with regard to supporting families where violence was an issue. We were told over and over again that time spent with each parent (ideally equal) and relationships were being prioritised over safety:

That is the presumption I'm getting from the report writers that we have to get to this equal time arrangement; that's what we're all aiming for. You think why are we aiming for that when there's severe domestic violence? (Legal practitioner)

I believe the child's right to safety needs to override the right to know both parents or have a meaningful relationship with those parents. The safety of children really is often just overlooked. (Social service provider)

Of great concern is the fact that mothers and children were likely to be placed in a situation of ongoing risk as a result of family report assessments and recommendations because according to every focus group participant, these had a significantly determinant role in final parenting arrangements. We were told that:

1. Family reports were an extremely persuasive settlement tool used by lawyers and judicial officers to exert pressure on victims to agree to out of court settlements:

Lawyers and judges put too much weight on what the report writers say – we expect clients to settle on the basis of someone who's seen them for a couple of hours. (Legal Practitioner)



2. Legal Aid funding could be withdrawn from victims on the basis of an unfavourable report:

There's a huge amount of settling that goes on and a huge amount of pressure to settle [on the basis of the family report]; financial pressure but also judicial pressure; Legal Aid pressure; and lawyers. I think lawyers are often scared of losing. (Legal practitioner).

3. Some judicial officers viewed the family report as the ultimate authority and rarely made orders in opposition to the recommendations made:

It depends on your judge. Most of them would be very guided by the family report. There's two or three you think well it doesn't matter what's in the family report, the judge will make up his own mind but the others are quite lazy, they look at the report, they'll read it and they'll say yes well I've read the recommendations, I think you should step outside and see if you can sort it out. (Legal practitioner)

We say to ourselves this judge will take the easy way and follow the family report. There are some judges that will do that and if you've got a report in your favour, short of anything catastrophic happening, you're fairly comfortable that that will be the outcome. It is trial by family report in some cases. (Legal practitioners)

## **D The Need for Change**

### ***1 Change in Family Report Writing Practice Post-2012***

Focus group participants shared their opinions about practice after the 2012 domestic violence reforms. While a minority of knowledgeable family report writers continued to produce reports of a considered and high standard, the practices of those who failed to properly consider the impact and significance of domestic violence prior to the legislative amendments were said to have remained relatively unchanged. Thus, there was no discernible shift in the majority of report writers other than a subtle change in the report wording. Described as a ceremonial ticking of the legislative box, it was observed that domestic violence was more frequently noted to be a 'consideration' but what followed was no actual consideration of it whatsoever. Each of these points is expressed in the following:

I think the wording [in the family reports] has changed. I don't know the effect has been different. So they're ticking a box. I think they still gloss over it and I don't think they have a particularly good understanding of the latest amendments. (Legal practitioner)

I couldn't say to you that I've seen any shift as a result of the 2012 amendments. To me it comes back to whether the family report writers you are working with are alive to these issues. (Legal practitioner)

Thus, in the view of the focus group participants, the maintenance of perpetrator/child relationships was still being prioritised over safety by most family report writers:

It clearly says that they need to protect the child from physical or psychological harm, from being subjected to or exposed to abuse, neglect, or family violence. It's supposed to be given greater weight than the benefit to the child of having a meaningful relationship but they look for the meaningful relationship, and then they pay lip service to the domestic violence. (Legal practitioner)

## 2 *Suggestions for Change*

Focus group participants were asked if they could provide suggestions for ways in which family report writer practice could be improved. In line with previously expressed concerns, recommendations included:

- increasing the pool of family report writers with understanding/knowledge of domestic violence and in particular, coercive control;
- the provision of family report writer support, supervision and increased accountability;
- making the assessment process more consistent and thorough;
- creating a less sterile/intimidating assessment environment; and
- the need for systemic change in the family law system.

### *(a) Increasing the Pool of Family Report Writers with Understanding and Knowledge of Domestic Violence*<sup>69</sup>

Focus group participants expressed the urgent need to increase the number of report writers with expertise in domestic violence. The view was that having a degree in social work or psychology does not automatically make you a domestic violence ‘expert’. Rather, family report writers need comprehensive and ongoing training specifically on domestic violence conducted by experts in the field. It was suggested, for example, that report writers be trained by those who work within the domestic violence sector including social workers or psychologists who run programs and provide support to perpetrators, adult victims and their children. The idea of a national accredited qualification in domestic violence for family report writers was also put forward. According to participants, properly trained report writers should have an understanding of coercive control. In particular they need to understand its emotional aspects, its impact, and the ongoing risks. They also need a sophisticated knowledge of how perpetrators and victims (both adult and child) present at interview:

Training and education I think has got to be number one. Have them trained, and in an accredited program. Not just a two-hour information session. They need to have something at the end of that to show and demonstrate their understanding. (Social service provider)

I think you need to look at their fundamental qualifications. You can be a social worker of 30 years’ experience or a psychologist of 30 years but that doesn’t mean you are a domestic violence expert. Family report writers actually need to take the time to learn about domestic violence. (Legal practitioner)

### *(b) The Provision of Support, Supervision and Increased Accountability*

Alongside training, it was suggested that practice could be improved via the provision of support, supervision and increased accountability. It was expressed

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69 In the last few years the family courts have provided significant training and resourcing to the family report writers who are their employees but this does not extend to those employed by other agencies or in private practice. In the data collected from our focus groups, it is not possible to distinguish between comments made about family report writers employed at the courts and others. In any further research, it will important to endeavour to make this distinction.

that report writers might become desensitised to stories of domestic violence. Therapeutic supervision via the provision of an avenue to debrief with other psychologists or social workers was suggested as beneficial. Further, the special protections provided to report writers in the legislation were questioned on the grounds that greater accountability for assessments could increase efficacy:<sup>70</sup>

It feels like they can write anything they want about anybody they want and there is no comeback. (Psychologist/therapist in private practice)

*(c) Making the Assessment Process More Thorough*

Given the overwhelming concern expressed about the time-poor assessment environment, failure to read subpoenaed documents and/or utilise information beyond that obtained during interviews, focus group participants offered the view that family report writers needed to conduct more comprehensive assessments. It was suggested that additional time is needed with families, that report writers should be utilising a broader range of information and that the use of risk assessment and/or guidelines should be mandatory.

First, it was recommended that the initial assessment process should include multiple meetings and extend over a series of days, weeks or months. In addition to building a rapport with victims and their children, this approach may well, as argued in the quotation below, increase the likelihood of perpetrators showing their ‘true colours’:

So perhaps it could be done as more of a longitudinal activity; that they’re not constructed by just one snapshot. It needs to develop and it might mean multiple meetings on other occasions. I would really like to see more than a very short time with each party. Because I really don’t know how they can find anything out about a party in a couple of hours. Especially when somebody comes along and they’re so stressed about going to the family report assessment. If you’re a perpetrator that’s really good because you don’t have the opportunity to push their buttons, for the strain to show; after a few hours they start to crack. (Legal practitioner)

Additionally, participants indicated that family report writers’ involvement in court proceedings should be extended beyond the initial assessment phase to include a series of re-assessments undertaken between interim and final orders. The aim would be to monitor the impact of contact arrangements on victims and their children. In other words, report writers should come back as a matter of course to follow-up and reassess how things are going. This might include attending contact changeovers and observing parent/child interactions during visitation, as well as assessing victim and perpetrator progress. The longevity of the family court process allows for this possibility.

Second, the provision of more initial assessment time would ensure family report writers had the opportunity to actually read through the subpoenaed information and provide the opportunity to gather additional material including for example from children’s teachers, therapists, extended family members, child safety departments and police. The latter could require the provision of more

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70 *Family Law Act* s 11D provides for the immunity of family consultants in the following terms: ‘A family consultant has, in performing his or her functions as a family consultant, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge’.

extensive fact-finding powers to family report writers. As participants explained, at present family report writers' capacity to gather information can be limited by judicial directives and the documents ICLs and/or party lawyers have decided to subpoena. It was suggested that report writer powers could be extended by either providing them with processes which allow them access to information or documents which they consider they require;<sup>71</sup> or establishing a clearly defined collegial role with ICLs who do have the power to subpoena. In this case, an ICL would therefore need to be appointed in all cases where allegations of domestic violence are made. These two points are noted in the following:

Even if the [*Family Law Act*] gave report writers inherent powers to go and inspect; you didn't need to seek leave from the court. There's probably a few other powers you could give them like more investigative [powers, and the power to] issue their own subpoenas. So allowing the family report writer to go in and dig a bit deeper, gather info, off their own bat. (Legal practitioner)

I think that it should be a collegiate partnership between an ICL and the report writer. That they work together and get the evidence and that it's required for the court to be able to make a proper determination as to what parenting orders are going to protect these children. (Legal practitioner)

Third, it was suggested that the assessment process could be made more comprehensive if adherence to the best practice principles and engagement in risk assessment were made mandatory for all family report writers, whether they are employed by a family court, under regulation 7 of the *Family Law Regulations 1984* (Cth), through a Legal Aid office, or privately. In the following, domestic violence service providers express their confusion with regard to whether or not risk assessment is actually taking place:

I don't see risk assessment happening, even though they are meant to do risk assessment. I've talked to our clients to see what they did around risk assessment, there wasn't an actual risk assessment. So what do they do in terms of assessing risk? I don't get the sense that the risk assessment process is streamlined and that there is a specific tool. (Social service provider)

#### (d) *Creating a Less Sterile and Intimidating Assessment Environment*

Participants also expressed that family report writing assessment practice could be improved through the provision of a less sterile and less intimidating assessment environment. For some this meant report writers being able to take the time to build a rapport with families. Others suggested that assessments should be moved out of the office environment and into family homes or other more relaxed environments.<sup>72</sup> However, given the intrusive nature of home visits this proposal would need to be considered carefully on a case-by-case basis as it could be particularly threatening to some. We were told, for example, that Indigenous families might find this approach particularly challenging.

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71 Perhaps this could be in the nature of a subpoena issued by a non-party.

72 Although the risks of home visits need to be acknowledged and accounted for in the systems which might be established: see, eg, Sharon C Lyter and Ann A Abbott, 'Home Visits in a Violent World' (2007) 26 *The Clinical Supervisor* 17.

*(e) The Need for Systemic Change in the Family Law System*

Finally, the perceived problem of family report writers prioritising perpetrator/child relationships over safety was argued to be a systemic problem within the family law system. As noted by one legal practitioner: ‘It isn’t just the report writers getting it wrong, it’s the lawyers, and the judge is giving the same view: that it is all about equal shared parental responsibility, moving towards equal time, everyone is getting it wrong’. Thus, participants spoke of the need for institutional change within family law system with safety taking precedence.

## V CONCLUSIONS

Despite what is known about domestic violence, the negative impacts on children of living with it, the questionable parenting capacities of abusers, and family law legislation directing that the best interests of children are dependent on protecting them from harm, research suggests that the family courts are still prioritising parent-child relationships over safety. The result is that perpetrators of domestic violence continue to achieve significant and substantial unsupervised time with their children. This is a potentially dangerous situation and can be traced to a strong pro-relationship narrative within the family courts. Coercive control poses significant challenges to this narrative and as a result, a particular set of discursive strategies are employed to invalidate domestic violence (that is, minimise, dismiss or completely negate consideration of it), remove it from considerations of children’s best interests and ensure perpetrators achieve continued contact with their children. Judicial officers are not generally domestic violence experts and rely on the expert evidence adduced before them. A crucial piece of evidence used by the judiciary to determine a child’s best interests in cases of domestic violence are the assessments compiled and recommendations made by family report writers.

Through the use of a focus group method the research presented in this paper explored the practices of family report writers from the perspective of those providing legal and social support to victims of domestic violence in South East Queensland. Our findings, which are supported not only by an extensive international literature but also the extant Australian research, suggest that family report writers tend to invalidate coercive control via discourses not dissimilar to those within the court. Priority is given to maintaining the perpetrator’s relationship with their children and as a result, family report writers frequently minimise, dismiss or completely ignore domestic violence.<sup>73</sup>

First, this is achieved by re-constructing domestic violence as inconsequential by:

- ignoring, not recognising or misunderstanding the impact of living with domestic violence on victims and their children;

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73 See Jeffries, above n 13; Field et al, above n 13, for a comprehensive discussion of the international and national research on family report writing practice.

- presenting domestic violence as extraneous to perpetrators' parenting;
- recognising the impact of coercive control on maternal parenting but only in terms of the risk victims pose to children; and
- ignoring or downplaying the possible future risk posed by perpetrators to victims and their children.

Second, coercive control is reconstituted as something else. That is, it is 'not that serious', episodic, 'only parental conflict', and/or an act from the past that victims needed to 'get over'. Third, domestic violence is invalidated by family report writers through the adoption of normative gender misconceptions that demand maternal support of the perpetrator/child relationship and call into question women's credibility by labelling them dishonest and manipulative. Fourth, the dismissal of domestic violence is achieved through the selective silencing and misconstruing of children's voices.

The invalidation of domestic violence was thought to result from a lack of family report writer training and thus expertise, alongside judicial pressure to maintain children's relationships with both parents even where one is a perpetrator of violence, and assessment processes that lacked efficacy. The result, were assessments and recommendations that failed to elucidate the potential harm posed by perpetrators to victims and their children. This included, for example, frequent recommendations for shared parental responsibility and for children to spend significant unsupervised time with the perpetrator. This placed victim mothers and their children in a situation of ongoing risk because family reports were argued to have a significant determinant impact on final parenting arrangements.

According to the focus group participants, little has changed in family report writing practice since the 2012 family violence amendments, which now require the prioritisation of child safety over relationships. However, it was hoped that practice could be improved in the future via:

- family report writer training (to increase knowledge and understanding of coercive control);
- the provision of support, supervision and increased family report writer accountability;
- making the family report assessment process more thorough (through provision of additional time, utilising a broader range of information, and mandatory risk assessments and/or guidelines);
- creating a less sterile/intimidating assessment environment; and
- moving to a pro-safety narrative in the family law system.

The research presented in this article was a Queensland-based pilot project. While the views expressed in the focus groups could be locale-specific, this research provides an important contribution to the understanding of family report writing practice, specifically in cases concerning domestic violence. The stories from the focus groups demonstrate the importance of understanding the complexity of such cases and the implications of family assessment reports. Accordingly, the perceptions and experiences from focus groups participants

provide a better insight into current challenges and issues surrounding family report writing process.

Future research needs to be undertaken in each of Australia's states and territories with comparative analyses across regional and non-regional jurisdictions to determine if, as suggested here, family report writer efficacy differs within and between jurisdictional locales. While, as noted above, the opinions expressed in our focus groups are mirrored in the prior research literature, definitive conclusions with regard to family report writer practice cannot be drawn from the opinions of particular stakeholder groups. Given the relative dearth of Australian research in this area, results from this study should nonetheless be viewed as an important starting point from which a conversation can be had and further research undertaken. It is crucial that future studies include direct investigation of family report writer practice as well as exploration of both adult and child victims' experiences of the process. Further, in the data collected from our focus groups, it was not possible to distinguish between comments made about family report writers employed at the courts versus elsewhere. Prospective studies should distinguish between the family reports undertaken by employees of the family courts versus those working for other agencies such as Legal Aid or in private practice.

Finally, it is important to highlight and commend the expertise and efficacy of the minority of family report writers described to us during the course of this research who go 'above and beyond' what they are funded to do to ensure thoroughness in assessment practice in cases of domestic violence. Access to quality family reports should not rest on luck, financial resources, legal representation, locale or the good will of family report writers. It should be uniform across the system to ensure that the best interests of children are always served.

## Family reports and family violence in Australian family law proceedings: What do we know?

Dr Rachael Field, Dr Samantha Jeffries, Zoe Rathus AM and  
Angela Lynch\*

*Family reports are critical documents in family parenting cases. They are often the only social science information available to the judge, the lawyers and the parties. They are influential in judicial decision-making and out-of-court negotiations. Despite their importance there has been little direct research about the quality and impact of family reports in Australia. It is also known that family violence is a common occurrence in parenting cases that progress to litigation, and therefore the kinds of cases in which family reports are ordered, but again this is an under-researched issue. This article presents foundational information about the existing research to identify what is known about family reports and family violence. It examines the legislative framework for family report writing and analyses the official guidelines and documents and informal information that provide context to this work. It considers what family report writers need to know and understand about family violence to write reports that deal appropriately with family violence and make safe recommendations. Australian and international research on family violence, its impact on parenting, its role in family law proceedings and its influence in family report writing is reviewed. The article concludes that Australian research in this area is required to contribute to improved practices in family reports.*

### INTRODUCTION

Family reports are a critical piece of expert evidence that informs decisions of the Australian family courts about what post-separation arrangements will best serve the interests of children, including the issue of, and appropriate responses to, family violence. Family reports are prepared by social scientists,<sup>1</sup> known as “family consultants” who provide “an independent assessment of the issues in the case and can help the judge hearing the case to make decisions about arrangements for the child/ren”.<sup>2</sup> Family reports are often the only social science evidence available in Australian parenting matters, and therefore need to provide the best evidence possible to enable decisions that are in the best interests of children, and that work to protect children from physical or psychological harm.

Australian family courts deal with private cases involving children – usually between the parents – not child welfare or juvenile justice matters, but it is increasingly acknowledged that a history of family violence is common in private family law parenting matters that are resolved through the family law system.<sup>3</sup> In 2006, major reforms to the Australian family law system<sup>4</sup> were implemented with the intention of better supporting the involvement of both parents in children’s lives after

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<sup>1</sup> Family consultants are generally employed at the court or have been appointed under the *Family Law Regulations 1984* (Cth) which will be discussed later.

<sup>2</sup> Child Dispute Services, *Fact Sheet: Family Reports* (Family Court of Australia) <<http://www.familycourt.gov.au/wps/wcm/connect/coaweb/reports-and-publications/publications/child+dispute+services/family-reports>>.

<sup>3</sup> Longitudinal research undertaken by the Australian Institute of Family Studies has consistently recognised that family violence is present in a significant majority of matters that are dealt with by the family law system. See, eg L Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (Australian





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separation, protecting children from the harm of violence and abuse, and changing “the culture of family breakdown from litigation to cooperation”.<sup>5</sup> The dual legislative intentions of encouraging ongoing relationships with both parents and protecting children from abuse are likely to create a tension in decision-making involving families where violence and abuse has occurred.

After the implementation of the 2006 reforms, concern in relation to the efficacy of Australia’s family law system’s response to family violence and child abuse became apparent.<sup>6</sup> The Australian Institute of Family Studies’ (AIFS) evaluation of the reforms “concluded that the system had some way to go in finding an effective response in this regard”,<sup>7</sup> a conclusion supported by a number of other reports.<sup>8</sup> Two national frameworks – The National Plan to Reduce Violence Against Women and their Children 2010-22,<sup>9</sup> and the National Framework for Protecting Australia’s Children 2009-2020<sup>10</sup> – demonstrated that there was strong concern in government and the community about the effectiveness of systemic responses to family violence and child protection.<sup>11</sup> More recently, the Federal Attorney-General asked the Family Law Council “to consider ways in which the family law system’s response to families with complex issues can be improved”.<sup>12</sup>

One response to these concerns was the introduction of a suite of family violence related amendments to the Australian *Family Law Act 1975* (Cth), which came into force on 7 June 2012.<sup>13</sup> As a result of those reforms, the Act specifically requires the court to deal expeditiously with allegations of family violence,<sup>14</sup> and requires that each party to parenting proceedings is asked

Institute of Family Studies, 2007) 67; R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Government, 2009); J De Maio et al, *Survey of Recently Separated Parents – A Study of Parents who Separated Prior to the Implementation of the Family Law* (Research Report No 15, Australian Institute of Family Studies, 2007); R Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015). See also A Shea Hart, “Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases” (2011) 46 *Australian Psychologist* 31. Further, in the US, for example, it is estimated that up to 50% of disputed custody cases involve domestic violence: see P Jaffe, M Zerwer and S Poisson, *Access Denied: The Barriers of Violence and Poverty for Abused Women and their Children After Separation* (London Family Court Clinic, 2002) 1; AC Morrill et al, “Child Custody and Visitation Decisions when the Father has Perpetrated Domestic Violence against the Mother” (2005) 11(8) *Violence Against Women* 1076 at 1078.

<sup>4</sup> *Family Law Amendment (Shared Parental Responsibility) Act 2009* (Cth) as well as the provision of a range of services.

<sup>5</sup> Commonwealth, *Second Reading Speech for Family Law Amendment (Shared Parental Responsibility) Bill 2005*, House of Representatives, 8 December 2005, 8 (the Hon Phillip Ruddock, then Attorney-General).

<sup>6</sup> The tragic death of Darcey Freeman at the hands of her father in 2009, shortly after family law proceedings, led to a public outcry and was the trigger for the federal government commissioning a report into how the family law system dealt with family violence by the Honourable Richard Chisholm AM, a former judge of the Family Court of Australia. See: R Chisholm, *The Family Courts Violence Review* (Australian Government, 2009).

<sup>7</sup> Kaspiew et al (2009), n 3; R Kaspiew et al, “Family Violence: Key Findings from the Evaluation of the 2006 Family Law Reforms” (2010) 85 *Family Matters* 38 at 39.

<sup>8</sup> Chisholm, n 6; Australian Law Reform Commission and the Law Reform Commission of NSW, *Family Violence – A National Legal Response* (Australian Government, 2010); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Family Violence Committee, 2009); P Parkinson and C Humphreys, “Children who Witness Domestic Violence – The Implications for Child Protection” (1998) 10 *Child and Family Law Quarterly* 147; D Bagshaw et al, *The Effect of Family Violence on Post-separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (Australian Government, 2010).

<sup>9</sup> This Plan was endorsed by the Council of Australian Governments in 2010 and is now being implemented in its Second Action Plan. Consultations are currently underway for the Third Action Plan (2015-18).

<sup>10</sup> Commonwealth of Australia, *Protecting Australia’s Children is Everyone’s Business: National Framework for Protecting Australia’s Children 2009-2020* (Australian Government, 2009).

<sup>11</sup> This Plan was endorsed by the Council of Australian Governments in 2010.

<sup>12</sup> Kaspiew et al (2015), n 3, 1. See also Family Law Council, *Interim Report to the Attorney-General: In Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Commonwealth of Australia, 2015).

<sup>13</sup> *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

<sup>14</sup> *Family Law Act 1975* (Cth) ss 67ZBA, 67ZBB.

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whether a child has been or is at risk of being exposed to child abuse, neglect or family violence.<sup>15</sup> Further, Pt VII of the Act<sup>16</sup> now places significant emphasis on addressing a child's best interests by prioritising the protection of children from both physical and emotional harm when post-separation parenting decisions are made.<sup>17</sup> The protection of children "from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence" has been elevated above any "benefit to the child of having a meaningful relationship with both parents".<sup>18</sup> This means that when a family court<sup>19</sup> is determining what parenting arrangements will be in the best interests of children, and when advisers, such as family dispute resolution practitioners and family lawyers, are assisting parents to resolve these matters, the protection of children should take priority over the child's right to "a meaningful relationship" with both parents.<sup>20</sup>

As noted above, family reports are a vital piece of expert evidence utilised to inform Australian family courts about post-separation arrangements that may best serve children's interests. Cases in which a family report is ordered are among the most complex dealt with by Australian family court judges, and the impact of these reports on post-separation parenting arrangements in both court and out-of-court contexts is significant. Family reports are not only crucial evidence in parenting cases, they are also important to pre-trial negotiations and family dispute resolution processes as they are acknowledged to be a "very powerful settlement tool".<sup>21</sup> Of particular significance to vulnerable litigants is the influence of reports on legal aid decisions. An unfavourable family report can mean that a grant of legal aid will not be made to continue to trial.<sup>22</sup> Obviously this can have a huge impact on victims of family violence who may then be obliged to self-represent against their abuser. In a perfect system, victims of family violence should not receive an unfavourable family report, but existing research into the Australian and other similar family law systems demonstrates that family report writers (and their equivalents in other countries) do not always understand family violence and its relevance to appropriate post-separation parenting arrangements.

In the US and the UK, issues of inadequate understandings of family violence, and a lack of family report writer training, have been highlighted. Australian research is limited but suggests that better understandings of family violence could improve some family reports. One study contends that this deficiency is having negative "flow on effects" to judicial decision-making in parenting disputes.<sup>23</sup> However, Australian research is yet to provide comprehensive information regarding family consultant expertise and understandings of family violence or the impact of the report writing process on the

<sup>15</sup> *Family Law Act 1975* (Cth) s 69ZQ(1)(aa)(i).

<sup>16</sup> This part deals with parenting matters.

<sup>17</sup> D Higgins and R Kaspiew, *Child Protection and Family Law ... Joining the Dots* (NCPC Issues 34, National Child Protection Clearinghouse at the Australian Institute of Family Studies, 2011) 8. See also the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). Further, in other western jurisdictions including the US and UK, family violence is now explicitly recognised in family law as a crucial consideration in the determination of the child's best interests: see D Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns* (Applied Research Forum, National Online Resource Center on Violence Against Women, 2007) 1 <[http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=1134](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1134)>; DA Wolfe et al, "The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique" (2003) 6(3) *Clinical Child and Family Psychology Review* 171 at 208; M Coy, E Scott and R Tweedale, *Picking Up The Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU, London, 2012) 13.

<sup>18</sup> *Family Law Act 1975* (Cth) s 60CC(2)(a), (b), (2A).

<sup>19</sup> In this article references to "family courts" include the Family Court of Australia and the Federal Circuit Court as well as the Family Court of Western Australia.

<sup>20</sup> P Parkinson, "The 2011 Family Violence Amendments: What Difference Will They Make?" (2012) 22(2) *Australian Family Lawyer* 1. The amendments also removed the "friendly parent provisions" (previously s 60CC(3)(c)) by which the court had to take into account the extent to which a parent was willing and able to encourage a close relationship between the child and the other parent.

<sup>21</sup> Kaspiew et al (2009), n 3, 317.

<sup>22</sup> Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (Commonwealth of Australia, August 2015) [9.38].

<sup>23</sup> Shea Hart, n 3, 33.

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parties. For this reason, the Australasian Institute of Judicial Administration (AIJA) has funded a pilot project on family report writing which is exploratory in nature.<sup>24</sup> Exploratory research is useful in contexts where understanding of a particular topic is limited and/or has only been considered from a specific angle and can lay the groundwork for future research. The aim of the research will be to better understand how family report writers (ie family consultants) deal with and report on family violence in the families they assess.

The purpose of this article is to provide a foundational discussion for that research. The article begins by explaining the Australian legislative framework, within which family report writers operate, as well as examining the plethora of official guidelines and less formal documents which now inform the work of these professionals. These guidelines include the *Australian Assessment Standards of Practice for Family Assessments and Reporting*,<sup>25</sup> and the *Family Violence Best Practice Principles*<sup>26</sup> and a range of materials made available to family report writers. The article then explores what needs to be understood about family violence in a post-separation context and examines the extant literature from both Australia and overseas to identify the current key issues around the writing of family reports.

### FORMAL FRAMEWORK FOR WRITING FAMILY REPORTS

Family reports are ordered in complex parenting matters by a family court pursuant to s 62G(1) of the Act where the care, welfare and development of a child is relevant. They may also be arranged privately by an independent children's lawyer (ICL) or by the parties themselves. Family report writers are family consultants<sup>27</sup> with qualifications in social work or psychology,<sup>28</sup> and must have at least five years' practice experience in a "related field".<sup>29</sup> Some family report writers are employees of the family courts, some are employed at legal aid offices,<sup>30</sup> and others operate from private practice. Those in private practice are appointed under reg 7 of the *Family Law Regulations 1984* (Cth) by the Chief Executive Officer of the Family Court of Australia or the Federal Circuit Court. For these reasons, a family report writer has something of a special role within the family law system. They are not a usual expert witness in the context of an adversarial legal system. They come as a witness who already enjoys the imprimatur of the court – as someone who is accepted as holding the relevant qualifications and skills to be a regular contributor to the court process.<sup>31</sup> However, family report writers must still provide their formal qualifications.<sup>32</sup>

A family report is described as "a professional forensic assessment" which "assists a court and/or the parties" to make "informed and child-centred decisions" about parenting arrangements by

<sup>24</sup> The authors of this article and other colleagues, including Dr Helena Menih (School of Behavioural, Cognitive and Social Science, University of New England) and Cate Banks, are the researchers on that grant.

<sup>25</sup> P Hemphill and D Hugall, *Australian Assessment Standards of Practice for Family Assessments and Reporting* (Family Court of Australia, 2015).

<sup>26</sup> Family Violence Committee of the Family Court of Australia, *Family Violence Best Practice Principles* (Family Court of Australia, 2013).

<sup>27</sup> The functions of "family consultants" are set out in *Family Law Act 1975* (Cth), s 11A: assisting and advising people involved in the proceedings; assisting and advising courts and giving evidence in relation to the proceedings; helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; reporting to the court under ss 55A and 62G; and advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

<sup>28</sup> See *Family Law Act 1975* (Cth) Pt III, ss 11A – 11G, 38BA, 38N, 65L, 69ZS.

<sup>29</sup> Senate Finance and Public Administration Committee, "Question Taken on Notice", *Domestic Violence Inquiry*, "Answer Provided by Family Court of Australia", 11 June 2015.

<sup>30</sup> This is the situation in Queensland where the pilot research funded by the AIJA is being conducted, although not all legal aid offices employ family report writers.

<sup>31</sup> Interestingly *Family Law Rules 2004* (Cth) Ch 15 Pt 5, which relates to expert evidence, does not apply to family consultants employed by the Family Courts or those appointed under *Family Law Regulations 1984* (Cth) reg 7. (In fact r 15.41(1)(d) refers to reg 8 – however, it should refer to reg 7.)

<sup>32</sup> This is done by appending a curriculum vitae to their report.

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providing an independent, “comprehensive and impartial appraisal of the family”, “from a social science and non-partisan perspective”.<sup>33</sup> The assessment of the family made in the report “provides information about the views and needs of children and their relationships with their parents and other significant adults, and of the attitudes and parental capacities of the adults with regard to the children’s needs”.<sup>34</sup> As part of the assessment, a family report writer is required, unless it would be inappropriate because of the child’s age or maturity, or because of some other special circumstance,<sup>35</sup> to ascertain the views of the child and include the views of the child in their report.<sup>36</sup> However, a report writer cannot compel a child to express his or her views.<sup>37</sup>

A family report makes recommendations about a range of issues relevant to determining the best interests of the children including: parental roles and responsibilities, how the children will spend time and communicate with their parents, family members and other significant people in their lives, safety issues, and support services or other interventions that may help.<sup>38</sup> Interviews conducted for the purpose of writing a family report are usually concluded within a day, although sometimes they take place over a number of days.<sup>39</sup> Generally, the interviews take place in a neutral environment, such as the family report writer’s offices, in order to minimise the possibility of conflict between the adult parties. Legal Aid Queensland advises parents to prepare for the interviews with the report writer by thinking about what is best for the children and why, and telling the children they are going to see someone that is “helping to work out the best way for the children to spend time with people who are important to them”.<sup>40</sup> Parents are also encouraged to set aside a whole day for the appointments, to bring food, drinks and some things to keep the children entertained, as well as someone to look after the children while the adults are being interviewed.<sup>41</sup> In addition, parents are asked to prepare a play activity with the children so that the report writer can observe the children spending time with the adults.<sup>42</sup>

## Legislation

It is important to understand that, although family report writers approach their work from the social science perspective, they nevertheless operate within the context of the legislation which governs parenting cases. Most family reports are ordered by a judge, requested by an ICL or the lawyers for the parties. A letter of instruction is usually provided to the family report writer, asking them to address the factors relevant to the best interests of the children as set out in the Act.<sup>43</sup> Of great significance in writing family reports are the primary considerations contained in s 60CC(2). They require consideration of “the benefit to the child of having a meaningful relationship with both of the child’s parents”<sup>44</sup> and “the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence”.<sup>45</sup> As noted in the Introduction above,

<sup>33</sup> Hemphill and Hugall, n 25, 7.

<sup>34</sup> Hemphill and Hugall, n 25, 7.

<sup>35</sup> See *Family Law Act 1975* (Cth) s 62G(3B)(a), (b).

<sup>36</sup> See *Family Law Act 1975* (Cth) s 62G(3A)(a), (b).

<sup>37</sup> See *Family Law Act 1975* (Cth) s 60CE. Advisers: ss 60D, 63DA.

<sup>38</sup> Legal Aid Queensland, *Is a Family Report being Prepared for Your Family Law Matter? Everything You Need to Know about a Family Report* (LAQ, Brisbane, 2015) <[www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au)>.

<sup>39</sup> Legal Aid Queensland, n 39.

<sup>40</sup> Legal Aid Queensland, n 39.

<sup>41</sup> Legal Aid Queensland, n 39.

<sup>42</sup> Legal Aid Queensland, n 39.

<sup>43</sup> See A Harland, D Cooper, Z Rathus and R Alexander, *Family Law Principles* (Thomson Reuters, 2nd ed, 2015) 373-381.

<sup>44</sup> *Family law Act 1975* (Cth) s 60CC(2)(a).

<sup>45</sup> *Family law Act 1975* (Cth) s 60CC(2)(b).

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the Act states that greater weight is to be given to the latter consideration,<sup>46</sup> but the idea that post-separation relationships between parents and children should be facilitated where possible has been identified as a strong philosophical force in contemporary Australian family law.<sup>47</sup> These tensions arguably present challenges for forensic social scientists working with separated families in the context of the family law system.<sup>48</sup>

Family report writers also need to be cognisant of the definition of “family violence” contained in the Act because this is the definition applied by judicial officers when determining matters. It is found in s 4AB of the Act. Family violence is:

- (1) ... 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.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
  - (a) an assault; or
  - (b) a sexual assault or other sexually abusive behaviour; or
  - (c) stalking; or
  - (d) repeated derogatory taunts; or
  - (e) intentionally damaging or destroying property; or
  - (f) intentionally causing death or injury to an animal; or
  - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
  - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
  - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
  - (j) unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty.
- (3) For the purposes of this Act, a child is *exposed* to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

Subsection 4AB(4) sets out useful practical “examples of situations that may constitute a child being exposed to family violence”.

Following traditional principles of statutory interpretation, the definition is entirely contained in ss 4AB(1) and the examples given in ss 4AB(2) do not extend the meaning.<sup>49</sup> Therefore, for conduct to amount to “family violence” under the Act it must either coerce or control a family member or it must cause them to be fearful. Some concerns raised by this are discussed in the section below on the official guidelines.

### Official guidelines

The *Australian Assessment Standards of Practice for Family Assessments and Reporting* (Assessment Standards) were launched on 11 February 2015 and are the official guidelines which now inform the writing of family reports. The Assessment Standards were developed after consultation with a wide range of stakeholders, including family report writers (both at court and appointed under reg 7 of the

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<sup>46</sup> *Family law Act 1975* (Cth) s 60CC(2A).

<sup>47</sup> J Dewar, “Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia” (2010) 24 *AJFL* 139; H Rhoades, “The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform” (2008) 36 *Fed LR* 279; R Graycar, “Family Law Reform in Australia, or Frozen Chooks Revisited Again?” (2012) 13(1) *Theoretical Inquiries in Law* 241; A Naraqi, *Lost in Translation: An Examination of Judicial Application of the Family Violence and Child Abuse Exception to Shared Parental Responsibility* (ANU College of Law Research Paper No 08-29, Social Science Research Network, Legal Scholarship Network, Canberra, 2008); Z Rathus, “Shifting the Gaze: Will Past Violence be Silenced by a Further Shift of the Gaze to the Future under the New Family Law System?” (2007) 21 *AJFL* 87.

<sup>48</sup> There is also a long list of “additional considerations” contained in *Family law Act 1975* (Cth) s 60CC(3) which family report writers are usually asked to address. These include the views of the child, the nature of the relationship the child with each of their parents, parental capacity and attitude, family violence and family violence orders, age, maturity, background and Indigeneity.

<sup>49</sup> Parkinson, n 20, 5.



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Family Law Regulations), judges of the family courts, family lawyer organisations, legal aid commissions and women's legal services. While they provide a practice framework for family report writers, "[t]he overarching aim of this publication is to provide information to the decision-makers, agencies and legal professionals involved in the cases, as to what constitutes good practice in family assessments and reporting".<sup>50</sup>

The Assessment Standards provide useful and practical guidance on preparing family reports. They deal with conflicts of interest, obtaining information from third parties, communications with parties and their legal representatives, processes for conducting assessments, working with children, formulating opinions and other matters. There is also significant information directed specifically at family violence.

Principle 2(b) of the Assessment Standards states that: "As an expert witness, family assessors should have appropriate training, qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or exposure to family violence or abuse, mental health problems and drug or alcohol misuse on the children and any party to the proceedings".<sup>51</sup> This requirement is developed further in principle 6(e), which states that "family assessors must have detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence".<sup>52</sup> Such knowledge is essential because family report writers are required to "conduct an expert family violence assessment as part of their report ... where family violence is identified as an issue in a matter".<sup>53</sup> The requirement of expertise is also articulated in principle 27, which states that: "family assessors should only express opinions in areas where they are competent to do so, based on adequate knowledge, skill, experience and qualifications".<sup>54</sup>

The Assessment Standards state that family assessors should "conduct assessments, as per the Family Court of Australia and Federal Circuit Court of Australia *Family Violence Best Practice Principles* – edition 3.1 of 2013".<sup>55</sup> The Best Practice Principles are "designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise",<sup>56</sup> and play a complementary role to the Assessment Standards. The question of expertise is also addressed in these Best Practice Principles, which state that "in considering the appointment of an expert witness to prepare a family report or other report, the Court may wish to satisfy itself that the expert witness has appropriate qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or of being exposed to the risk of family violence or abuse, on the children and any party to the proceedings".<sup>57</sup>

In augmenting the definition of family violence in the Act, the Best Practice Principles state that "family violence takes many forms and, when framing parenting orders, it is important to differentiate

<sup>50</sup> D Bryant (Chief Justice of the Family Court of Australia), J Pascoe (Chief Judge of the Federal Circuit Court of Australia) and S Thackray (Chief Judge of the Family Court of Western Australia), "Foreword", in Hemphill and Hugall, n 25, 3.

<sup>51</sup> Hemphill and Hugall, n 25, 9.

<sup>52</sup> Hemphill and Hugall, n 25, 11: principle 6(e) referring to the conduct of assessments as per Family Violence Committee of the Family Court of Australia, n 26.

<sup>53</sup> Hemphill and Hugall, n 25, 23: principle 27(a) – family report writers "should use commonly accepted interpretive frameworks for family violence".

<sup>54</sup> Hemphill and Hugall, n 25, 24.

<sup>55</sup> Hemphill and Hugall, n 25, 11: principle 6(e).

<sup>56</sup> Family Violence Committee of the Family Court of Australia, n 26, 2.

<sup>57</sup> Family Violence Committee of the Family Court of Australia, n 26, 13.

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between the types of violence”.<sup>58</sup> They then refer to the “typologies” of family violence articulated by Kelly and Johnson: coercive controlling violence, violent resistance, situational couple violence, and separation instigated violence.<sup>59</sup>

Kelly and Johnson’s first category of family violence – coercive controlling violence – is consistent with the terminology of the definition of family violence in the Act. In the Best Practice Principles this form of violence is described as an “ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. The focus is on control, and does not always involve physical harm”.<sup>60</sup> The Best Practice Principles do not acknowledge, however, that Kelly and Johnson’s typology, while commonly used in training on family violence in the Australian family law system,<sup>61</sup> is also the subject of critique and concern among family violence specialists. It is argued by some scholars that it requires a deep understanding of the dynamics of family violence to apply the typology theory appropriately and to avoid over-simplification and incorrect categorisation.<sup>62</sup> In particular, there is concern about the potential for misunderstanding and inappropriately categorising abusive behaviour as either situational couple violence,<sup>63</sup> or separation instigated violence.<sup>64</sup> This could mean that the behaviour is then discounted as not constituting a concerning form of family violence, or it might be seen as a form of family violence that is not relevant to parenting proceedings. It is interesting to note that in the US, Draft Guidelines regarding custody evaluations and intimate partner violence (IPV) currently under consideration by the Association of Family and Conciliation Courts, use a different approach in taking a “broad view of intimate partner violence” by defining IPV as including “physically, sexually, economically, psychologically, and coercively-controlling aggressive behaviors”.<sup>65</sup> They explain that:

These behaviors may occur alone or in combination. They vary from family to family in terms of: frequency; recency; severity; directionality; pattern; intention; circumstance and consequence. These variables combine to explain the context within which intimate partner violence occurs.<sup>66</sup>

In other words, coercive control is an important part of the picture but it may not always be present. It is beyond the scope of this article to engage in a critical analysis of the typology literature, so here we merely flag that this is a contested area of social science. However, it is relevant to our exploration of how family violence is dealt with in family reports that different definitions of family violence exist in the extant literature, as well as different interpretations of what constitutes family violence that is relevant to making decisions in the best interests of the children.

<sup>58</sup> Family Violence Committee of the Family Court of Australia, n 26, 6.

<sup>59</sup> J Kelly and M Johnson, “Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 *Family Court Review* 476.

<sup>60</sup> Family Violence Committee of the Family Court of Australia, n 26, 6.

<sup>61</sup> See, eg the AVERT family violence training: <<http://www.avertfamilyviolence.com.au>>.

<sup>62</sup> J Wangmann, *Different Types of Intimate Partner Violence – An Exploration of the Literature* (Issues Paper No 22, Australian Domestic and Family Violence Clearinghouse, 2011) 14; A Bailey et al, *Typologies of Violence in Family Court Processes: Reflections from the Field* (Paper presented at the 11th Australian Institute of Family Studies Conference, Melbourne, 7-9 July 2010); Z Ratus, “Shifting Language and Meanings between Social Science and the Law: Defining Family Violence” (2013) 36 UNSWLJ 359. See also Z Ratus, “A Call for Clarity in the Use of Social Science Research in Family Law Decision-making” (2012) 26 AJFL 81.

<sup>63</sup> Situational couple violence is defined as “partner violence that does not have its basis in the dynamic of power and control. Generally, situational couple violence results from situations or disputes between partners that escalates into physical violence”: Family Violence Committee of the Family Court of Australia, n 26, 7.

<sup>64</sup> Separation instigated violence is defined as “violence instigated by the separation where there was no history of violence in the relationship or in other contexts”: Family Violence Committee of the Family Court of Australia, n 26, 7.

<sup>65</sup> Association of Family and Conciliation Courts, *Draft Guidelines for Evaluators Examining the Effects of Intimate Partner Violence on Families: A Supplement to the Model Standards of Practice for Child Custody Evaluation* (US, 2015) 3 (emphasis added) <<http://www.afccnet.org/LinkClick.aspx?fileticket=EiNGmybSFT0%3d&portalid=0>>.

<sup>66</sup> Association of Family and Conciliation Courts, n 66, 3.

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### Less formal materials and training

As family report writers are professionals who operate in the domain of their own discipline, it would be expected that many will develop their own library of information relevant to their work and attend conferences and seminars as part of their life-long learning as a professional. For example, family report writers who are registered psychologists are required to fulfil the continuing professional development program for ongoing registration with the Psychology Board of Australia.<sup>67</sup> There is no equivalent requirement for social workers, however both professions have codes of conduct, practice guidelines and other documents which must be followed.<sup>68</sup>

Family report writers who are employees of the family courts are provided with a professional development program directly relevant to their work. This program includes induction for new staff, specific training modules in relation to family violence and a set of materials contained in a “core knowledge database”.<sup>69</sup> There is also a range of materials relevant to risk assessment, including a tool based on the Mediator’s Assessment of Safety Issues and Concerns (MASIC) tool developed in America, which has been trialled in the Melbourne and Brisbane registries since April 2015.<sup>70</sup>

Of course it must always be remembered that social science is an inherently contested area of human endeavour and knowledge. It is not possible in this article to analyse all of the materials which are already made available for family report writers. However, it is noted that some materials which are provided carry messages about family violence and allegations of family violence which perhaps challenge views presented in the more formal materials. For example, Dr Chris Lennings presented a seminar for family court family consultants in 2014 entitled *Forensic Examination of Violence in Family Law Context*. Much of it was based on a training manual prepared by him for working with professionals preparing family assessment reports in the family law and child protection systems.<sup>71</sup> There is much thoughtful and practical information contained in the Lennings’ Training Manual, including useful exercises to allow for the development of practical skills.

However, there are some aspects of his materials which seem out of alignment with the general thrust of the Assessment Standards and other guidelines and materials. Lennings takes the view that perceiving partner violence “as a product of coercion” is a “feminist theory” which recasts “female violence as ‘violent-resistance’” and describes this approach as “a simplistic duality” which “fails to account for the substantial body of research identifying females as initiators of violence”.<sup>72</sup> It could be argued that this is a rather cursory account of the diversity and intricacy of theoretical feminist frameworks used to describe and explain family violence. However, to complete the picture, Lennings also describes a number of other theories about family violence, setting out what he perceives as the major aspects of each theory. Lennings also takes a particular view on the question of false allegations. The idea that women make up false allegations of violence and abuse to improve their position in family law proceedings has gained some traction in the Australian community,<sup>73</sup> arguably

<sup>67</sup> Psychology Board of Australia, *Continuing Professional Development Registration Standard* (2010) which requires a minimum of 30 hours per annum: see <<http://www.psychologyboard.gov.au/Registration/Audit.aspx>>.

<sup>68</sup> Australian Psychological Society, *Code of Ethics* (2007) <<http://www.psychology.org.au/about/ethics>> and Australian Association of Social Workers, *Code of Ethics, Practice Standards* and other documents at <<https://www.aasw.asn.au/practitioner-resources/ethics-standards>>.

<sup>69</sup> Senate Finance and Public Administration References Committee, n 22.

<sup>70</sup> Senate Finance and Public Administration References Committee, n 22.

<sup>71</sup> C Lennings (with A Bolton), *Training in Child and Family Court Assessment and Risk Assessment for Child Protection* (Version 3, March 2013). It should be noted that this is a “draft training manual for research and not for commercial use”, nevertheless its contents were central to the seminar delivered by Dr Lennings.

<sup>72</sup> Lennings, n 72.

<sup>73</sup> 46% of the Victorian community apparently believe this: VicHealth, *Two Steps Forward, One Step Back: Community Attitudes to Violence against Women* (Victorian Government, 2006) 59.



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partly as the result of quite successful public lobbying by fathers' rights groups.<sup>74</sup> But this is a heated debate in the social science community and the domestic violence sector.<sup>75</sup> Explaining that there are "polarised views about child abuse and domestic violence allegations" within the context of divorce litigation he says: "In forensic environments the reporting of abuse as a strategy for gaining advantage is a well-known phenomenon."<sup>76</sup>

The problem with this expressed view is that it could invite family report writers to hear allegations of family violence with scepticism, which is not consistent with the general philosophy of the Assessment Standards and could well leave victims of family violence feeling disbelieved and unprotected. These matters are not mentioned here for the purpose of debating them in this article, but rather to show that any collection of training materials will ultimately contain resources which present different views around domestic and family violence, child abuse and other social issues. This, by necessity, creates challenges for the professionals engaged to craft reports for the court.

It is clearly apparent that the courts are committed to the training and education of their staff in respect of family violence. However, family report writers who are not employees of the family courts are not mandated to participate in continuing professional development programs that relate specifically to family breakdown or family violence. Ongoing training and professional development for all persons who write family reports – not just those employed at the courts – is important. At the recent Senate Inquiry into Domestic Violence, concerns were raised about uneven expertise and the need for consistent training for family report writers.<sup>77</sup> The Committee made a clear recommendation in this regard:

The committee recommends the Commonwealth Government through the Attorney-General's Department, coordinate the development of consistent training for and evaluation of family consultants who write family reports for the Family Court alongside the development of a national family bench book by June 2017.<sup>78</sup>

Training of family report writers across the family law system is an issue for exploration in the forthcoming research.

#### UNDERSTANDING FAMILY VIOLENCE IN THE CONTEXT OF MAKING POST-SEPARATION PARENTING DECISIONS

There is no doubt that family reports are critical documents, and that their recommendations are influential and constitute an important form of evidence relied upon by judicial officers in their assessment of the best interests of the children in parenting disputes.<sup>79</sup> For children and adult victims of family violence, parental separation does not mean that the violence will come to an end. Research shows that family violence is likely to continue post-separation and often increases in severity.<sup>80</sup> At its

<sup>74</sup> M Flood and B Pease, *The Factors Influencing Community Attitudes in Relation to Violence against Women: A Critical Review of the Literature* (VicHealth, 2006) 51; M Flood, "Backlash: Angry Men's Movements": in SE Rossi (ed), *The Battle and Backlash Rage On: Why Feminism Cannot be Obsolete* (Xlibris, 2004).

<sup>75</sup> For contrasting views see: T Brown et al, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia* (Family Violence and Family Court Research Program, Monash University, Clayton, and Australian Catholic University, Canberra, 1998); F Black, R Schweitzer and F Varghese, "Allegations of Child Sexual Abuse in Family Court Cases: A Qualitative Analysis of Psychiatric Evidence" (2012) 19(4) *Psychiatry, Psychology and Law* 482.

<sup>76</sup> Lennings, n 72.

<sup>77</sup> Senate Finance and Public Administration References Committee, n 22, [9.36]. See also the cited evidence of Ms Rhonda Payget of Women's Legal Services Australia at [9.41] and Ms Rosslyn Monro of Women's Legal Service (Brisbane) at [9.42].

<sup>78</sup> Senate Finance and Public Administration References Committee, n 22, recommendation 17 at [9.71].

<sup>79</sup> J Cashmore and P Parkinson, "Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors" (2009) *Family Matters* 82; P Eastal and D Grey, "Risk of Harm to Children Exposed to Family Violence: Looking at How it is Understood and Considered by the Judiciary" (2013) 27 *AJFL* 59, 72; Moloney et al, n 3, 91.

<sup>80</sup> S Holt, H Buckley and S Whelan, "The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature" (2008) 32 *Child Abuse and Neglect* 797, 800; L Laing, *Domestic Violence in the Context of Child Abuse and Neglect* (Australian Domestic Violence Clearinghouse, 2003), 2.

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most extreme, this may have lethal consequences for adult victims and/or their children.<sup>81</sup> In this context, the importance of reliable evidence to inform judicial decision-making in contested parenting disputes before the family courts, and also to inform less formal processes such as family dispute resolution and lawyer negotiations, cannot be overstated.

Since the 2011 amendments which came into force in June 2012, the Act has explicitly prioritised protecting children from family violence. The recommendations made in family reports have a significant influence on the ultimate decision in such matters,<sup>82</sup> and so a deep understanding of family violence is necessary for the efficacy of such recommendations in terms of protecting children from harm. This section considers the nature of intimate partner violence (IPV) specifically and the impact it has on adult victims and their children. This analysis highlights why an understanding of the complex nature of family violence is critical to making post-separation parenting decisions for children that are in their best interests, and emphasises the importance of family report writers having expertise in the nature, dynamics, cycle, impact and relevance of family violence.

The definition of family violence in the Act, outlined above, has a focus on violent, threatening or other behaviour that is coercive and controlling. Although some concerns have been noted regarding the use of typologies and the label of coercive and controlling violence, the notion of coercive control brings attention to non-physical violence and abuse. Section 4AB of the Act is consistent with literature that acknowledges, as Stark says, that coercive violence is “a pattern of on-going intentional domineering tactics employed by usually male perpetrators with the intent of governing their female victim’s thoughts, beliefs or conduct and/or to punish them for resisting their regulation”.<sup>83</sup> Further, for example, family violence is recognised as involving “an ongoing pattern of behaviour aimed at controlling one’s [ex]partner through fear” and the range of violent tactics used by perpetrators of violence are employed “to exercise power and control”.<sup>84</sup> These tactics, as the examples provided in s 4AB(2) of the Act also recognise, include a variety of behaviours such as: emotional abuse (eg, victim blaming, undermining the victim’s self-esteem and self-worth); verbal abuse (swearing, humiliation and degradation); social abuse (systematic social isolation); economic abuse (controlling access to finances and assets); psychological abuse (threats and intimidation); spiritual abuse (misusing religious or spiritual traditions to justify abuse); physical abuse (direct assaults on the body, including sleep deprivation); and sexual abuse (pressured/unwanted sex or sexual degradation).<sup>85</sup> The reality is that many perpetrators do not ever use physical violence, rather they use tactics such as these to control and coerce their victim. An understanding of this issue is important, if family report writers are to make recommendations in their family reports that will serve to protect children from harm.

Family report writers also need an appreciation of the fact that although the emotional and psychological trauma that result from living under the oppression of coercive control is less obvious than injuries resulting from physical violence, victims of family violence commonly report that the non-physical elements of abuse can cause them as much, if not more, pain and trauma, both in the short- and long-term.<sup>86</sup> Of course, psychological abuse has a negative impact on a victim of violence’s mental health in terms of their experience of high levels of fear, anxiety, depression, and substance misuse, as well as attempted and actual suicide.<sup>87</sup> However, it is probably less well understood that psychological abuse can also have a physical impact on victims in that there is an established link

<sup>81</sup> Laing, n 81, 2.

<sup>82</sup> Shea Hart, n 3, 33.

<sup>83</sup> E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

<sup>84</sup> Australian National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and Children, 2009–2021* (Department of Families, Housing, Community Services and Indigenous Affairs, 2009) 13.

<sup>85</sup> L Mitchell, *Domestic Violence in Australia – An Overview of the Issues* (Social Policy Section, Australian Government, Canberra, 2011), 2-3.

<sup>86</sup> Stark, n 84.

<sup>87</sup> J Radford, “Impacts, Coping and Surviving Domestic Violence” in L Harne L and J Radford (eds), *Tackling Domestic Violence: Theories, Policies and Practice* (Open University Press, Berkshire, 2008), 38-43. See also Stark, n 84, 120-123.

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between psychological abuse and increased physical health problems such as arthritis, chronic pain, migraines and stomach ulcers.<sup>88</sup> It is also critical that family report writers understand that when perpetrators who engage in emotionally abusive and controlling behaviours feel that they are losing control of their victim, for example, when the victim instigates a separation, that this is a significant predictor of intimate partner homicide.<sup>89</sup>

Another critical understanding about family violence for family report writers concerns the relationship between IPV and child abuse. In the past, IPV and child abuse were frequently treated as separate issues. More recently, a growing body of research has demonstrated that first, IPV and child abuse often co-occur,<sup>90</sup> and second, witnessing and living with IPV is a form of child abuse.<sup>91</sup> As a result of this research, there is growing recognition that the perpetration of IPV is itself a child protection issue.<sup>92</sup>

Section 4AB(4) of the Act acknowledges that children who are exposed to and live with family violence hear the violence and see its traumatising effects, such as blood, injuries, and damaged property.<sup>93</sup> Children may also be used as a tool in IPV abuse (eg, being forced to spy on a parent by the abusive parent or used to send them threatening messages). Children may be blamed for the violence; they can be used as a hostage by a violent parent to intimidate and scare their victim; and some children feel compelled to defend their parent against the violence and try to intervene to stop the violence.<sup>94</sup> The crime of filicide is perhaps the most deplorable illustration of the nexus between IPV and child abuse.<sup>95</sup> Here, the perpetrator's relationship with the children is secondary to the use of them as an intermediary tool for the abuse of the victim.<sup>96</sup> The murder of children in these contexts is not only the ultimate act of child abuse, it is also a decisive act of control and revenge against intimate partners.<sup>97</sup> In terms of assessing what is in the best interests of a child and making recommendations about post-separation parenting arrangements that will ensure the child is protected from family violence, it is essential that family report writers are alert to the correlation between the perpetration of IPV and child abuse.

As Parkinson and Humphreys note, IPV "does not usually occur in a way which is separated from the lives of children"; they are "frequently either present when the violence occurs, or are made aware

<sup>88</sup> DK O'Leary and RD Maiuro, *Psychological Abuse in Violent Domestic Relationships* (Springer Publishing, New York, 2001) xii.

<sup>89</sup> Stark, n 84, 276-277.

<sup>90</sup> S Jeffries, R Field and C Bond, "Protecting Australia's Children: A Cross-jurisdictional Review of Domestic Violence Protection Order Legislation" (2015) 22(6) *Psychiatry, Psychology and Law* 1, 1 and S Jeffries, "In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the 'Expert' Assessments that Guide Judicial Determinations" (2016) 5(1) *Laws* 14, referring to, among others, JW Fantuzzo and WK Mohr, "Prevalence and Effects of Child Exposure to Domestic Violence" (1999) 9(3) *Domestic Violence and Children* 21, and Laing, n 81. See also n 74, De Maio et al, n 3, 42-43, and R Kaspiew et al, *Independent Children's Lawyer Study: Final Report* (Australian Institute of Family Studies, Melbourne, 2014) 130. See also WM McGuigan and CC Pratt, "The Predictive Impact of Domestic Violence on Three Types of Child Maltreatment" (2001) 25 *Child Abuse and Neglect* 869; T Herrenkohl et al, "Intersection of Child Abuse and Children's Exposure to Domestic Violence" (2008) 9(2) *Trauma, Violence and Abuse* 84; WS Folsom et al, "The Co-occurrence of Child Abuse and Domestic Violence: An Issue of Service Delivery for Social Service Professionals" (2003) 20 *Child and Adolescent Social Work Journal* 375.

<sup>91</sup> See, eg Jeffries, Field and Bond, n 92; and Jeffries, n 92 and the research cited there.

<sup>92</sup> Jeffries, Field and Bond, n 92; Jeffries, n 92.

<sup>93</sup> *Family Law Act 1975* (Cth) s 4AB.

<sup>94</sup> Parkinson and Humphreys, n 8, 148; Holt, Buckley and Whelan, n 81; K Richards, "Children's Exposure to Domestic Violence in Australia" (2011) 419 *Trends and Issues in Crime and Criminal Justice* 401.

<sup>95</sup> Laing, n 81, 2; Domestic Violence Resource Centre Victoria, "Just Say Goodbye": *Parents who Kill their Children in the Context of Separation* (Domestic Violence Resource Centre Victoria, Melbourne, 2012).

<sup>96</sup> Holt, Buckley and Whelan, n 81, 800. See also, K Cavanagh, RE Dobash and RP Dobash, "The Murder of Children by Fathers in the Context of Child Abuse" (2007) 31 *Child Abuse and Neglect* 731, 738; and New South Wales Domestic Violence Death Review Team, *Domestic Violence Death Review Team Annual Report* (New South Wales Government, Sydney, 2015) 16.

<sup>97</sup> Domestic Violence Resource Centre Victoria, n 97, 63.

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of the violence in other ways".<sup>98</sup> It is significant that research shows that children who live with IPV, but have not been directly victimised themselves, "exhibit levels of emotional and behavioural problems, trauma symptoms, and compromised social and academic development comparable to children who are the direct victims of sexual and physical abuse".<sup>99</sup> As there is a significant negative impact on children who live with the reality of IPV, and negative implications for their well-being,<sup>100</sup> IPV can be seen as a form of child abuse.<sup>101</sup>

As flagged above, family report writers need to understand that violence does not necessarily come to an end with parental separation. Rather the opposite is true, with research showing that IPV frequently continues post-separation and in fact often increases in severity.<sup>102</sup> As Jaffe, Lemon and Poisson express it, separation is not a "vaccination against domestic violence".<sup>103</sup> Certainly, it is common for perpetrators to use contact with their children as an occasion to continue the abuse of their ex-partner. This is a manifestation of "child abuse as tangential spouse abuse ... a particularly effective intimidation tactic during separation ... when the offender's access to [the victim], but not to the children, may be limited ... the offender treats the child as an extension of the mother and as a way to hurt or control her".<sup>104</sup> In addition, when violent fathers re-partner, many go on to abuse their new spouse.<sup>105</sup> This means that, despite parental separation, many children will continue living with violence.<sup>106</sup> It is against the backdrop of separation and heightened risk that adult victims and their children enter into family law proceedings.

It is also critical that family report writers are alert to the compromised nature of the parental capacity of perpetrators of family violence as parents who directly abuse their children and/or expose them to IPV.<sup>107</sup> A perpetrator of violence's prioritisation of the abuse of their (ex)spouse demonstrates that they are unable to put the best interests of the child first.<sup>108</sup> Furthermore, the literature confirms that in contrast to non-abusive parents, IPV perpetrators often parent in ways that are less than positive for children.<sup>109</sup> For example, they tend to be self-absorbed and this can result in negligent or irresponsible parenting.<sup>110</sup> They also often have an inflated sense of entitlement and experience difficulty focussing on their children's needs due to their selfish and self-centred tendencies.<sup>111</sup> They have a tendency towards verbally abusive and manipulative parenting, such as lying, providing false promises, drawing children in as agents of abuse against the victim, and/or trying to fracture the

<sup>98</sup> Parkinson and Humphreys, n 8, 148.

<sup>99</sup> E Pence et al, *Mind the Gap: Accounting for Domestic Violence in Child Custody Evaluations* (The Battered Women's Justice Project, Minneapolis, 2012) 21; PG Jaffe, DA Wolfe and SK Wilson, *Children of Battered Women* (Sage, Thousand Oaks, 1990).

<sup>100</sup> Australian Law Reform Commission and Law Reform Commission of NSW, n 8, 243.

<sup>101</sup> Holt, Buckley and Whelan, n 81, 799.

<sup>102</sup> Holt, Buckley and Whelan, n 81, 800; Laing, n 81, 2.

<sup>103</sup> PG Jaffe, NKD Lemon and SE Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Sage, Thousand Oaks, 2003) 29.

<sup>104</sup> Stark, n 84, 251.

<sup>105</sup> S Woffordt, D Mihalic and S Menard, "Continuities in Marital Violence" (1994) 9 *Journal of Family Violence* 195.

<sup>106</sup> Jaffe, Lemon and Poisson, n 105, 32.

<sup>107</sup> Jeffries, n 92, 4-5; R Geffner et al, "Conducting Child Custody Evaluations in the Context of Family Violence Allegations: Practical Techniques and Suggestions for Ethical Practice" (2009) 6(3-4) *Journal of Child Custody* 189, 192.

<sup>108</sup> Jeffries, n 92, 4-5; L Bancroft and J Silverman, *The Batterer as a Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage, Thousands Oaks, 2002) 29.

<sup>109</sup> Jeffries, n 92, 4-5; JL Hardesty, ML Haselschwerdt and MP Johnson, *Domestic Violence and Child Custody* (University of Illinois at Urbana-Champaign, Illinois, 2011) 22; L Hooker, R Kaspiew and A Taft, "Domestic and Family Violence and Parenting: Mixed Methods Insights into Impact and Support Needs" (2016) 1 *Landscapes: State of Knowledge Papers* 1.

<sup>110</sup> Jeffries, n 92, 4-5; Bancroft and Silverman, n 110, 7-11.

<sup>111</sup> Jeffries, n 92, 4-5; Bancroft and Silverman, n 110, 7-11 and 34-37; and JS Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions* (George Washington University Law School, 2003) 705.

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child's relationship with the victim.<sup>112</sup> Male perpetrators of IPV tend to be excessively patriarchal, believing in strict gender roles, the superiority of men and the subordination of women.<sup>113</sup> They are not only coercively controlling with intimate partners, but also tend to utilise harsh and rigid discipline with their children.<sup>114</sup>

Further, perpetrators are poor role models,<sup>115</sup> and children who are exposed to IPV may grow up believing that such behaviour is acceptable.<sup>116</sup> This conclusion is supported by research that shows that sons of male perpetrators have dramatically elevated rates of IPV perpetration in adulthood, while daughters often find themselves victimised by men like their fathers.<sup>117</sup> The parental relationship between a perpetrator of violence and his children is extremely complex. Children may feel negative, ambivalent, disappointed, bitter or confused about the perpetrator, but on the other hand may be drawn to his power and control within the family. Thus, where there are aspects of a positive relationship with a perpetrator, these are usually combined with unhealthy elements "caused by traumatic bonding and his erratic availability".<sup>118</sup>

Perpetrators are possessive and perceive their (ex)partners as their property, a perception that may also extend to their children.<sup>119</sup> Possessive parenting is linked to an increased risk of child physical and sexual abuse.<sup>120</sup> Perpetrators also generally lack the empathy that allows parents to treat their children with respect and to validate their feelings, qualities that are important to raising emotionally healthy, conscientious and caring children.<sup>121</sup> Jaffe, Lemon and Poisson note that IPV perpetrators also frequently twist the impact of the violence on their (ex)spouse (eg, common trauma symptoms such as depression and anxiety) into claims that the victim is "crazy", "unfit" or "unstable".<sup>122</sup> It is also notable that perpetrators present to others as charming and rational. Bancroft and Silverman, for example, comment that:

[A perpetrator's] manipulateness often extends to the public arena. The great majority of [perpetrators] project an image that is in stark contrast to the private reality of their behaviour and attitudes. They may impress others as friendly, calm, and reasonable people, often with a capacity to be funny and entertaining. The public reputation that a [perpetrator] can build may cause people to be reluctant to believe allegations of his [violence], thus making it more difficult for his partner and children to obtain emotional support and assistance.<sup>123</sup>

These issues highlight how important it is that family report writers, when preparing assessments of a family, are able to identify the existence of IPV and understand the multifaceted problems that

<sup>112</sup> Jeffries, n 92, 4-5; Bancroft and Silverman, n 110, 32-37; L Bancroft, "The Batterer as a Parent" (2002) 36(2) *Court Review* 44; Jaffe, Lemon and Poisson, n 105, 29.

<sup>113</sup> Jeffries, n 92, 4-5; Jaffe, Lemon and Poisson, n 105, 30-31.

<sup>114</sup> Jeffries, n 92, 4-5; Pence et al, n 101, 22; Hardesty, Haselschwerdt and Johnson, n 111, 22; Bancroft and Silverman, n 110, 30-31; Bancroft, n 114; Meier, n 113, 706.

<sup>115</sup> Jeffries, n 92, 4-5; Pence et al, n 101, 22; Hardesty, Haselschwerdt and Johnson, n 111, 22.

<sup>116</sup> Jeffries, n 92, 4-5; Jaffe, Lemon and Poisson, n 105, 30; Hardesty, Haselschwerdt and Johnson, n 111, 22.

<sup>117</sup> Jeffries, n 92, 4-5; Bancroft and Silverman, n 110, 47-51.

<sup>118</sup> Bancroft and Silverman, n 110, 51.

<sup>119</sup> Jeffries, n 92, 4.

<sup>120</sup> Bancroft and Silverman, n 110, 11-13.

<sup>121</sup> Meier, n 113, 706. See also, Jeffries, n 92, 4.

<sup>122</sup> Jaffe, Lemon and Poisson, n 105, 31.

<sup>123</sup> Bancroft and Silverman, n 110, 15 referring to N Jacobson and J Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (Simon and Shuster, New York, 1998), and C Ayoub et al, "Alleging Psychological Impairment of the Accuser to Defend Oneself against a Child Abuse Allegation: A Manifestation of Wife Battering and False Accusation" in M Robin (ed), *Assessing Child Maltreatment Reports: The Problem of False Allegations* (Haworth Press, New York, 1991), 191. See also P Jaffe et al, "Custody Disputes involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans" (2008) 46 *Family Court Review* 500.



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pervade the lives of children who have a parent who perpetrates such violence.<sup>124</sup> Family report writers have a relatively brief encounter with the family to conduct their assessment, and it is difficult to accurately understand and assess the relationships at play. A deep understanding of the nature of family violence and its impact on families is necessary to make appropriate assessments. And yet Bancroft and Silverman observe “a tendency in some service providers and court personnel not to recognise the depths” of the complexity of this relationship.<sup>125</sup>

In addition, family report writers need to be aware of the impact of IPV on adult victims, which create a number of specific parenting challenges. For example, victims are often preoccupied and continue to be fearful of their abuser, physically and emotionally exhausted, economically strained, lacking in parental confidence, anxious, depressed, paranoid (with logical reason), substance abusing (as a form of self-medication) and/or affected by post-traumatic stress.<sup>126</sup> All these factors have the potential to impair parental capacity and detrimentally impact the victim’s relationship with the child.<sup>127</sup> If victims of violence are judged by family report writers simply on the face of some of their behaviours at interview, and not in the context of IPV, then incorrect conclusions may well be reached about what is in the best interests of the children. It may, for example, be recommended that as the victim’s parenting capacity appears compromised, the children should not continue in their care. This is extremely concerning because studies show that a positive relationship with the non-abusive parent can ameliorate the negative impacts of family violence on children.<sup>128</sup> It is therefore critical that victims are protected from ongoing post-separation violence, as once they are safe the adverse consequences of experiencing family violence often dissipate.<sup>129</sup>

Finally, it is important that family report writers understand the gendered nature of family violence.<sup>130</sup> This issue poses challenges for family report writers who are expected, as the Practice Guidelines say, to be independent and impartial. Acknowledging the gendered nature of family violence may feel as though a pre-judgement has been made against the father. Nevertheless, the data indicate that any family violence assessment should be made in the context of an awareness of the prevalence of male violence against women. A failure to recognise this may compromise the post-separation safety of women and their children, and result in an outcome that is not in the best interests of the children.

## **FAMILY REPORTS AND FAMILY VIOLENCE: WHAT DOES THE RESEARCH SHOW?**

### **Australian research**

This article has consistently noted that family reports are a critical piece of evidence in family proceedings because the opinion of family consultants expressed through family reports plays a significant role in informing judicial officers’ understandings of children’s best interests.<sup>131</sup> Indeed, studies suggest judicial officers may privilege the opinions of family report writers as independent court-appointed experts over other evidence, including the evidence of non-abusive parents, children, children’s regular therapists, child protection officers and the police.<sup>132</sup>

In terms of research specifically on the writing of family reports and their treatment of family violence, as far as we know there are only four relevant Australian studies. Of concern, given the

<sup>124</sup> Bancroft, n 114; Bancroft and Silverman, n 110; Pence et al, n 101, 22.

<sup>125</sup> Bancroft and Silverman, n 110, 52.

<sup>126</sup> Jeffries, 92, 4-5; Pence et al, n 101, 22.

<sup>127</sup> Jeffries, 92, 4-5; Hardesty, Haselschwerdt and Johnson, n 111, 20; Saunders, n 17, 18.

<sup>128</sup> Jeffries, 92, 4-5; Jaffe, Lemon and Poisson, n 105, 28-29.

<sup>129</sup> Jeffries, 92, 4-5; Hardesty, Haselschwerdt and Johnson, n 111, 20.

<sup>130</sup> Australian National Council to Reduce Violence against Women and their Children, n 85, 20-21. See also Australian Bureau of Statistics (ABS), *Personal Safety Survey* (ABS Cat No 4906, 2012); R Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015).

<sup>131</sup> Shea Hart, n 3, 33; Felicity Bell, *Children and Parenting* (2016) 6 *Family Law Review* 46.

<sup>132</sup> Shea Hart, n 3, 33-34 and 37; A Shea Hart, *Children Exposed to Domestic Violence: Whose “Best Interests” in Family Court* (PhD Thesis, University of South Australia, 2006) 150-151.

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importance and influence of family reports, is that these studies suggest that the consideration of family violence by family report writers is not always entirely adequate.<sup>133</sup> Further, observations from Women's Legal Services and more recently in the media, suggest that the expertise of family consultants with regard to family violence deserve attention and development.<sup>134</sup>

Undertaken as part of a larger project examining allegations of family violence in family law proceedings, the Australian Institute of Family Studies found that, "no views were generally expressed in family reports about specific allegations of domestic violence".<sup>135</sup> In analyses of evidentiary material about family violence in family reports, in *n*=300 file cases (Family and Federal Magistrate Courts) between 2002 and 2003, it was concluded that "of all allegations raised, no more than 10% in any were fully or partially corroborated by a Family Report, and no more than 2% were fully or partially discredited".<sup>136</sup>

Shea Hart's qualitative analysis of family court judgments between 1991 and 2001 (*n*=20), analysed the role of family reports in judicial constructions of the best interests of the child in cases where family violence was alleged.<sup>137</sup> She found that the "context of violence within the family was not central to the family report assessments".<sup>138</sup> Further, family reports referred to in the judgments "largely failed to address the children's exposure to domestic violence, its impact on the child, and the potential future risk for the child and adult victim".<sup>139</sup> Family violence was frequently reframed as mutual parental "conflict", and it was this "conflict", rather than exposure to what were often extreme acts of violence, that was judged as impacting adversely on the children.<sup>140</sup> Even in the few cases where family violence was acknowledged as an issue, Shea Hart found that adverse effects to children were commonly ignored, minimised or de-contextualised from the violence. Further, no reference was made to family reports having outlined the potential risks of ongoing exposure to violence if children were placed in the care of perpetrators.<sup>141</sup>

Judicial reference to family reports in the judgments analysed by Shea Hart tended to construct women within stereotypical gendered frameworks, which called into question their creditability.<sup>142</sup> Further, report writers, and in turn judges, demonstrated limited or no understanding of family violence and its impacts. Victims were subsequently referred to as being "hostile", "irresponsible in their parenting" and/or alienating.<sup>143</sup> They were criticised for interfering, destabilising and sabotaging

<sup>133</sup> Moloney et al, n 3, 91; Shea Hart, n 3; P Hemphill, *On the Crest of a Wave: The Australian Family Violence Reforms One Year Later* (Paper presented at the Association of Family and Conciliation Courts 50th Annual Conference, California, 2013).

<sup>134</sup> A Lynch, "Assessment of Family Violence in Family Law – Letter to Senator the Honourable George Brandis QC" (Women's Legal Services Australia, Brisbane, 2013) – copy on file with authors; Women's Legal Service Victoria, Submission to the Senate Finance and Public Administration Committee, *Domestic Violence in Australia* (2014); J Hill, "In the Child's Best Interests", *ABC*, 14 June 2015 <<http://www.abc.net.au/radionational/programs/backgroundbriefing/in-the-childs-best-interests-v2/6533660>>.

<sup>135</sup> Moloney et al, n 3, 91.

<sup>136</sup> Moloney et al, n 3, 91; Jeffries, n 92, 8.

<sup>137</sup> Shea Hart, n 3.

<sup>138</sup> Shea Hart, n 3, 37.

<sup>139</sup> Shea Hart, n 3, 37.

<sup>140</sup> While it is the case that children from high-conflict families can experience adverse effects, their experiences and needs are different from those living with family violence. High-conflict relationships are characterised by mutual distrust and disagreement. This is fundamentally different from family violence where a perpetrator's intent is to wield power and control over their victim/s via numerous tactics aimed to intimidate and incite fear: Shea Hart, n 3, 37; Geffner et al, n 109, 191; E Stark, "Rethinking Custody Evaluation in Cases Involving Domestic Violence" (2009) 6(3-4) *Journal of Child Custody* 287, 294-295.

<sup>141</sup> Shea Hart, n 3, 35-37; Jeffries, n 92, 8.

<sup>142</sup> Shea Hart, n 3, 35-37.

<sup>143</sup> Shea Hart, n 3, 35-37. See also J Stubbs and J Wangmann, "Competing Conceptions of Victims of Domestic Violence within Legal Processes" in D Wilson and S Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, UK, 2015) 107-132.

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relationships between violent men and their children.<sup>144</sup> There was little to no recognition that “hostile” behaviours might actually be symptomatic of victimisation and/or resulting from victims’ fear for their safety and that of their children. Shea Hart observed that certain behaviours (such as providing a child with a mobile phone on contact which infuriated the abusive father) were identified as “alienating behaviours” when they were really protective actions taken by victims of violence for their children.<sup>145</sup> She also found that parenting orders that resulted from an inadequate assessment of violence allegations by family report writers potentially re-exposed children and adult victims to family violence. Rather than prioritising child safety, the family report assessments referred to in the judgments examined tended to construct the child’s best interests in terms of maintaining the parent/child relationship, even if that parent was a perpetrator of family violence.<sup>146</sup> Such an approach is clearly now inconsistent with the requirements of the legislation under s 60CC(2A).

Shea Hart’s study is the first in Australia to systematically consider the role of family reports in family court proceedings. However, given the small sample size, the fact that assessment of these reports was based on secondary judicial reference to them, and the research is now somewhat dated (ie, pre-family violence reforms), we need to be careful before drawing definitive conclusions from this study about report efficacy in cases of family violence. Her findings are nonetheless supported by more rigorous international explorations of this issue, as well as more recent Australian research, both of which are discussed below.<sup>147</sup>

Two Australian studies relevant to family reports have been conducted since the family violence amendments became operative. The first, which was specifically focussed on family reports and family violence, was conducted by the principal of Child Dispute Services<sup>148</sup> at the Family Court of Australia at the time, Pam Hemphill.<sup>149</sup> The second is the Evaluation of the 2011 reforms by the Australian Institute of Family Studies. While the focus of this research was not specifically on family reports, mention is made of the family report writers’ treatment of family violence post the implementation of the reforms.<sup>150</sup>

Hemphill’s research consisted of a survey of family report writers and an analysis of two sets of  $n=200$  documents, s 11F memoranda,<sup>151</sup> and family reports, one set on either side of the family violence amendments. This report concludes that: “Family consultants seem to be having difficulty in evaluating the type of family violence (that is, coercive control versus situational couple or separation instigated violence) and in recommending different parenting plans.”<sup>152</sup> Hemphill surmises that this could relate to the belief systems which family consultants hold in relation to family violence, but she also suggests that “they may be reluctant to lean in one particular direction as they work in a court setting which relies on judges finding facts, not them”.<sup>153</sup>

The extent to which the report’s assessment results in a de facto finding of fact is a complex issue in relation to the expert role of the family report writer, particularly when they are making a family violence assessment. As an expert adviser in court proceedings, it is ostensibly not the role of the family consultant to make any findings of fact; rather their role is to make recommendations arising out of their professional assessments. In the Western court system, the role of fact-finding is the

<sup>144</sup> Shea Hart, n 3, 35-37.

<sup>145</sup> Shea Hart, n 3, 35-37. See also, Jeffries, n 92, 8.

<sup>146</sup> Shea Hart, n 3, 37.

<sup>147</sup> Jeffries, n 92, 8.

<sup>148</sup> Child Dispute Services is the area in which family consultants work.

<sup>149</sup> Hemphill, n 135.

<sup>150</sup> Kaspiew et al (2015), n 3.

<sup>151</sup> This is a short-form of family report which can be ordered by the court to inform decision-making at an interim stage.

<sup>152</sup> Hemphill, n 135, 20.

<sup>153</sup> Hemphill, n 135, 20.



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jurisdiction of the court and the relevant judicial officer. As Justice John Faulks<sup>154</sup> has said: “Judges are qualified and have expertise in making findings of fact in a legal system that was developed to provide a procedurally fair manner in which evidence can be presented and decisions made.”<sup>155</sup>

The question of fact-finding pervades discussion about the role of family consultants throughout the literature and guideline documents. It seems somewhat disingenuous to suggest that professional social scientists who have spent time with a family for the purpose of assessing the family’s dynamics and functioning would not be making findings of fact about what has and has not occurred. Lennings cites research which suggests that in the context of care and protection, “workers were often able to agree upon the facts of the cases presented to them ... but disagreed on the recommendations or actions that flowed from them”.<sup>156</sup> This suggests that family report writers may form a view about the facts but are prohibited from claiming this due to the constraints of our legal system and the process surrounding family report writing. The inability to make conclusions about the facts of a matter may impinge on the capacity of family report writers to make strong and clear recommendations that are in the best interests of the children.

However, the Assessment Standards, which are partly an outcome of Hemphill’s research, make reference to the need for family report writers to “focus on reporting their findings and assessments”,<sup>157</sup> and to situations “where family violence or abuse is established”.<sup>158</sup> The use of the words “findings” and “established” both indicate a need for the drawing of some conclusions about the facts in a given matter. For example, in instances “where family violence or abuse is established”, the principles state that the family assessor should report on:

the impact of the family violence or abuse on the children and a parent/adult who may be a victim; any steps taken by a parent or adult to act protectively; whether the person acknowledges that family violence or abuse has occurred, and whether the person accepts some or all responsibility for the family violence; whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate; whether the person has participated or is participating in any program, course or other activity to address the factors contributing towards his or her violent or abusive behaviour.<sup>159</sup>

These are matters that are inherently factual in nature. It is suggested that this is an issue open to be explored, and deserving of deeper analysis, through further future research.

Consistent with Lennings, Hemphill also notes that family report writers may have difficulty “translating their knowledge into the way they describe the violence and how it impacts on children and individuals and on recommendations for different parenting plans”.<sup>160</sup> Her research suggests that there may have been more discussion about family violence in the reports written subsequent to the family violence amendments which commenced in 2012,<sup>161</sup> however, this may not have been translated into recommendations which prioritise children’s safety.

Findings from the 2015 AIFS Evaluation suggest that family reports were more likely to be ordered in cases involving family violence after the reforms – increasing from 33% to 53% – and there was an increase in “explicit discussion of risk assessment” from 22% to 31% by family report writers.<sup>162</sup> The survey conducted with judicial officers and lawyers as part of the Evaluation confirmed this – with many agreeing that there had been a shift in the practice of family consultants in terms of the content included in reports. However when judicial officers were asked whether “family

<sup>154</sup> Then Deputy Chief Justice of the Family Court of Australia

<sup>155</sup> J Faulks, “Justice and the Protection of Children” in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law – Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies Families, 2014).

<sup>156</sup> Lennings, n 72.

<sup>157</sup> Hemphill and Hugall, n 25, 24: principle 28(d).

<sup>158</sup> Hemphill and Hugall, n 25, 24: principle 27(b).

<sup>159</sup> Hemphill and Hugall, n 25, 24: principle 27(b).

<sup>160</sup> Hemphill, n 135, 22.

<sup>161</sup> *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

<sup>162</sup> Kaspiw et al (2015), n 3.

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consultants had provided recommendations that addressed the implications of information about family violence, child abuse and child safety concerns since the family violence reforms”, their responses and those of the lawyers interviewed, indicated “some unevenness in practice in this regard”.<sup>163</sup>

It is not possible to canvass the detail of the AIFS analysis here, but it is noteworthy that, since the family violence amendments, there have only been small shifts in overall changes to orders made in the courts (whether by consent or judicial determination) for parental responsibility and care time. The shifts were described as “modest” with “little indication in the data that approaches to children’s matters have changed to any great extent, except where there are concerns about both family violence and child abuse”.<sup>164</sup> Interestingly, even though judicially determined orders for equal shared parental responsibility decreased after the reforms (from 51% to 40%), there was “almost negligible” change in judicially imposed orders for shared care time.<sup>165</sup>

### International research

While the available Australian research on family report writing is still relatively limited, there is now an emerging body of research exploring the writing of family reports in both the US<sup>166</sup> and the UK.<sup>167</sup> In the US, the equivalent of Australia’s family reports are referred to as “custody evaluations”. In the US, studies of custody evaluations include surveys and interviews of evaluators as well as content analyses of their reports.<sup>168</sup> Results from this research show that custody evaluators frequently:

- (1) fail to document and understand the nature and risk of coercively controlling violence;
- (2) question the credibility of victims of family violence by presenting them as having made false or inflated allegations of abuse;
- (3) label victims as “unfriendly” or “alienating” parents; and
- (4) de-contextualise trauma symptoms in victims from domestic violence.<sup>169</sup>

Each of these points is discussed below.

Evaluator failure to understand the nature of coercive control is highlighted in the research of Hans et al who undertook a survey of  $n=607$  custody evaluators from across the US.<sup>170</sup> Factorial vignettes were used to quantitatively examine evaluators’ assessment in hypothetical cases of coercively controlling violence, as compared with mutual violence, occurring in the context of high conflict relationships. Results showed that most evaluators recommended joint custody regardless of the type of violence. Given that custody evaluators’ recommendations can have a large impact on a

<sup>163</sup> Kaspiew et al (2015), n 3, 43.

<sup>164</sup> Kaspiew et al (2015), n 3, 65.

<sup>165</sup> Kaspiew et al (2015), n 3, 66.

<sup>166</sup> See DG Saunders, KC Faller and RM Tolman, *Child Custody Evaluators’ Beliefs about Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation* (United States Department of Justice, 2012); DG Saunders, RM Tolman and KC Faller, “Factors Associated with Child Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence” (2013) 27(3) *Journal of Family Psychology* 473; MS Davis et al, *Custody Evaluations When There are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators* (United States Department of Justice, 2007); TK Logan et al, “Child Custody Evaluations and Domestic Violence: Case Comparisons” (2002) 17(6) *Violence and Victims* 719; ML Haselschwerdt, JL Hardesty and JD Hans, “Custody Evaluators’ Beliefs about Domestic Violence Allegations during Divorce: Feminist and Family Violence Perspectives” (2011) 26 *Journal of Interpersonal Violence* 1694; JD Hans et al, “The Effects of Domestic Violence Allegations on Custody Evaluators’ Recommendations” (2014) 28(6) *Journal of Family Psychology* 957; JN Bow and P Boxer, “Assessing Allegations of Domestic Violence in Child Custody Evaluations” (2003) 18(2) *Journal of Interpersonal Violence* 1394; Pence et al, n 101.

<sup>167</sup> Coy, Scott and Tweedale, n 17.

<sup>168</sup> Coy, Scott and Tweedale, n 17, 16-27.

<sup>169</sup> Jeffries, n 92, 9.

<sup>170</sup> Hans et al, n 168.

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judge's final decision, this finding was found to be "troubling given the greater risks associated with coercively controlling violence and the higher likelihood that this type of violence will continue even after separation and divorce".<sup>171</sup>

Davis et al undertook statistical analyses of case files ( $n=69$ ) and interviews with evaluators ( $n=15$ ) to explore "outcomes of custody and visitation disputes when there is a history of domestic violence by examining the knowledge and beliefs about domestic violence that custody evaluators bring to their court-ordered task, how they investigate allegations, and how their recommendations influence court orders".<sup>172</sup> The conclusions and recommendations in the custody evaluators' reports had a determining influence on court outcomes, but evidence of extreme domestic violence was not predictive.<sup>173</sup> The primary influence on the evaluators' conclusions and recommendations, and in turn final court outcomes, was risk assessment around the likelihood of ongoing serious family violence. However, these assessments were predicated on evaluator knowledge of the nature and dynamics of family violence and whether or not it was understood as being an issue of power and control. Few evaluators understood family violence as coercive control. Rather, most evaluators saw it as either one or more of the following: mutual conflict; a problem of perpetrators' poor impulse control/anger management; or a result of victim provocation. Consequently, most evaluations then went on to recommend custody and visitation arrangements that would not protect the victim and children from further abuse.<sup>174</sup>

Haselschwerdt et al conducted interviews with evaluators ( $n=23$ ) to determine their perspectives on family violence and the influence of these perspectives on their recommendations. They found that custody evaluators were aligned with either one of two perspectives – that is, a family systems/interaction or coercive control perspective – and that the theoretical approach taken impacted beliefs about the significance of family violence to parenting decisions, the credibility of victim allegations and ultimately their recommendations to the court.<sup>175</sup>

The beliefs of evaluators expressing a family systems/interaction approach ( $n=14$ ) was that of family violence being stress-induced, normative, mutual, the result of a "conflict" in the relationship and thus likely to end after separation. While acknowledging that coercively controlling violence did exist, these evaluators considered such violence to be rare in family court proceedings – something that happened "out there" among a minority of particularly "violent, evil, and horrible people".<sup>176</sup> Indeed, when faced with a scenario of coercive control, they appeared unable to recognise it and simply relabelled it as "conflict". As such, it did not factor into their evaluations. These evaluators did not consider spousal abuse as being relevant to child custody, largely viewing the relationship between parents as separate from that of parents and children. All but one evaluator failed to acknowledge that perpetrators of family violence might lack positive parenting skills and all implied that the abuser was able to co-parent "independently from the family violence".<sup>177</sup> Instead, the parental capacity of the victim was called into question with concerns expressed about the "emotional volatility of the victimized parent".<sup>178</sup> In addition, all the evaluators studied expressed "concerns about mothers making false or exaggerated domestic violence allegations – which were 'common and purpose-

<sup>171</sup> Hans et al, n 168, 963-964; Jeffries, n 92, 9.

<sup>172</sup> Davis et al, n 168, ii.

<sup>173</sup> Davis et al, n 168, 85.

<sup>174</sup> Davis et al, n 168, vii and 85; Jeffries, n 92, 9.

<sup>175</sup> Haselschwerdt, Hardesty and Hans, n 168, 1704; Jeffries, n 92, 10.

<sup>176</sup> Haselschwerdt, Hardesty and Hans, n 168, 1708.

<sup>177</sup> Haselschwerdt, Hardesty and Hans, n 168, 1709.

<sup>178</sup> Haselschwerdt, Hardesty and Hans, n 168, 1709.

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ful”.<sup>179</sup> The resulting recommendations made to the courts prioritised co-parenting and the father/child relationship with little mention of safety concerns where family violence was alleged.<sup>180</sup>

Evaluators who utilised coercive control to understand family violence ( $n=9$ ) all stressed that “power and control by male partners” was “central to the dynamics of domestic violence in the majority of their cases”.<sup>181</sup> For these evaluators, the importance of identifying coercive control was important because it was highly relevant to child custody. They expressed concerns about the ability of coercively controlling fathers to be a good parent, acknowledged the negative effects on children from living with domestic violence, and recognised the potential for concurrent direct child abuse to occur. They also expressed the view that false allegations in the context of custody disputes were rare among mothers, but estimated that over 50% of men falsely claim to be victims of family violence. Overall, they expressed concern that family violence was “downplayed or underreported” by victims rather than “falsely alleged”. While they “considered ongoing father–child contact to be important for children, they prioritised victim safety” in cases of coercive control. Recommending, for example, supervised visitation and exchanges, and discouraging joint custody or overnight visits with perpetrators.<sup>182</sup>

While the research of both Davis et al and Haselschwerdt et al have relatively small sample sizes, these analyses are corroborated by the results of a large-scale quantitative study conducted by Saunders et al and published in 2012 and 2013. Saunders surveyed custody evaluators ( $n=465$ ) to ascertain what factors were associated with their recommendations. It was found that belief in false allegations of family violence was significantly related to beliefs that: victims alienate their children from the other parent; victims harm the children if they do not co-parent with the perpetrator; and domestic violence is not important to consider in custody and visitation decisions. Arguably, this set of beliefs is likely to come from evaluators taking a family systems approach. In contrast, evaluators who said they would explore hypotheses about coercive controlling behaviour and mental health consequences of living with this type of violence were more likely to believe that: family violence is important in custody decisions; mothers do not make false allegations; and refusing to co-parent does not harm the child. Further, believing in false allegations of family violence was related to recommendations for custody/visitation arrangements that would increase abuser–child contact. In fact, the beliefs held by evaluators about family violence were the biggest predictor of custody/visitation recommendations. Those holding what presented as a family systems view were, for example, more likely to recommend perpetrators of violence have custody of their children.<sup>183</sup>

Finally, Pence et al’s examination of family violence related custody reports and case files ( $n=18$ ) showed that evaluators did not “consistently describe or explain the nature and context of the violence occurring”.<sup>184</sup> Rather, evaluators “did just the opposite” – they obscured, discounted or explained the family violence away.<sup>185</sup> This minimisation of family violence in evaluators’ reports came about as the result of one or more of the following:

- (1) Some evaluators only mentioned family violence in a cursory way and limited consideration to “one or two discrete incidents”.<sup>186</sup>
- (2) Some of the custody evaluation reports examined focussed exclusively on physical violence without consideration of other features and characteristics of family violence, such as coercive control.<sup>187</sup>

<sup>179</sup> Haselschwerdt, Hardesty and Hans, n 168, 1709.

<sup>180</sup> Haselschwerdt, Hardesty and Hans, n 168, 1712; Jeffries, n 92, 10.

<sup>181</sup> Haselschwerdt, Hardesty and Hans, n 168, 1704.

<sup>182</sup> Haselschwerdt, Hardesty and Hans, n 168, 1704–1705; Jeffries, n 92, 10.

<sup>183</sup> Saunders, Tolman and Faller (2013), n 168, 479–480; Jeffries, n 92, 10.

<sup>184</sup> Pence et al, n 101, 5–6.

<sup>185</sup> Pence et al, n 101, 5–6; Jeffries, n 92, 10.

<sup>186</sup> Pence et al, n 101, 7–8.

<sup>187</sup> Pence et al, n 101, 8.

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- (3) Some evaluators subjectively weighted information – deciding what “counts” when it comes to family violence, “without a thorough exploration of the circumstances and without regard to established research on risk factors associated with abuse”.<sup>188</sup>
- (4) Some evaluators subsumed family violence under alternative frameworks, such as high conflict, mutual conflict or communication problems, or under a mental health framework.<sup>189</sup>
- (5) It was not uncommon for an evaluator to treat an inference, observation or opinion as a factual finding and then draw a conclusion that did not represent what was actually going on.<sup>190</sup>
- (6) There was little evidence in the reports examined of any connection between the dynamics of family violence and parental or co-parenting capacity. Not once was an assessment made about how the experience of family violence impacted either the victim or the perpetrator’s capacity to parent either individually or together.<sup>191</sup>
- (7) The impact on children of living with family violence was rarely discussed. In fact when it was raised, the evaluators noted “in a conclusory fashion, that the violence simply had not impacted on the children”.<sup>192</sup>
- (8) Family violence was frequently constructed as being “a thing of the past” and something that adult victims and their children just needed to “get over” and “move past”.<sup>193</sup>

Unsurprisingly, given the ways in which domestic violence was obscured, discounted or explained away in the evaluations analysed by Pence et al, the recommendations made to the courts in these matters “seemed to bear little or no relationship to the problems that domestic violence created for children and their abused parents”.<sup>194</sup> Instead, “evaluators’ recommendations seemed more tied to their own wishful thinking about the future than to the present realities of domestic violence”.<sup>195</sup> This was despite the fact that the violence reported in the case files involved ongoing coercively controlling violence.<sup>196</sup>

Thus the US research on family evaluators indicates that misconceptions about family violence and the use of gendered stereotypes can place children at further risk of harm through consequent recommendations for perpetrators to have significant contact with their children. In the process, adult victims can also be exposed to further family violence.<sup>197</sup> Evaluator misconceptions have been attributed to a lack of specialised training around coercive control and pro forma approaches to the methods of interview and sources of information gathered during evaluations.<sup>198</sup> Haselschwerdt et al found, for example, that evaluators who understood and utilised coercive control in their assessments had more extensive family violence training and education than those employing a family systems approach. Similar results around family violence misconceptions and training were also found by Saunders et al.<sup>199</sup>

Research also shows that many evaluators over-rely on limited information sources to make assessments – for example, only interviewing the parents and children for short periods of time; and failing to consult with extended family, teachers, psychologists, child protection workers, police and

<sup>188</sup> Pence et al, n 101, 9-10.

<sup>189</sup> Pence et al, n 101, 15-16.

<sup>190</sup> Pence et al, n 101, 19.

<sup>191</sup> Pence et al, n 101, 20.

<sup>192</sup> Pence et al, n 101, 20.

<sup>193</sup> Pence et al, n 101, 26-27. Jeffries, n 92, 11-12.

<sup>194</sup> Pence et al, n 101, 30.

<sup>195</sup> Pence et al, n 101, 30.

<sup>196</sup> Jeffries, n 92, 12.

<sup>197</sup> Jeffries, n 92, 12.

<sup>198</sup> Saunders, Faller and Tolman (2012), n 168.

<sup>199</sup> Saunders, Faller and Tolman (2012), n 168; Jeffries, n 92, 12.



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others involved in the children's lives.<sup>200</sup> Research by Bow and Boxer however, calls into question this claim, as well as lack of training arguments.<sup>201</sup> Their results from a survey of custody evaluators ( $n=115$ ) revealed adequate training and the use of multiple sources of data collection. Yet, in spite of this, "robust, specialized domestic violence instruments, tests, and questionnaires were underutilized".<sup>202</sup>

Bow and Boxer's research is more than 10 years old and was undertaken before the mainstream conceptualisation of family violence as coercive control. Further, the level of information gathered lacked the detail of more recent studies. For example, Bow and Boxer's claim that training was adequate was premised on the fact that evaluators, on average, over an undisclosed period of time, attended four seminars (median) and read a median of 18 articles/books.<sup>203</sup> They did not consider the content of this training or explore the relationship between training, beliefs and recommendations. Indeed, a large proportion of evaluators still said that they would make recommendations for children to have extensive contact (ie, sole or joint custody) with perpetrators in cases where the violence was not considered mutual.<sup>204</sup>

Studies of victim's experiences provide additional insight into the report writing process and its impacts on parents and their children. To date, two studies, one undertaken in the UK and the other in the US, included interviews with female victims of family violence.<sup>205</sup> The results of this research emulate those reported in the studies of evaluators.<sup>206</sup>

In the UK, the equivalent of Australia's family reports are known as expert reports. As in Australia and the US, these reports play a vital role in ensuring outcomes are safe for adults and children in family law proceedings. After conducting in-depth interviews with women who were victims of family violence ( $n=34$ ), Coy et al reported a generally negative perception of the report writing process and recommendations resulting in potentially risky outcomes for women and their children.<sup>207</sup> All the women interviewed wanted their child(ren) to have contact with their fathers and develop or maintain a strong relationship with them. However, these women also wanted assurances that both they and their children would be physically and emotionally safe. Nonetheless, the expert reports frequently failed to reflect these concerns. This situation was analysed as resulting from the inadequate amount of time report writers spent with the women and their children. The outcome, as perceived by the women interviewed, were recommendations that put adult and child victims at further risk of harm. More specifically, concerns were expressed that report writers:

- (1) minimised ex-partners' violence;
- (2) down-played the impacts of living with family violence on children;
- (3) separated men's violence from their fathering;
- (4) prioritised contact between violent men and their children with subsequent inadequate attention to the consequential harms and risks;
- (5) paid inadequate attention to women's ongoing needs for safety and welfare;
- (6) failed to understand the impact of victimisation on women's parenting; and
- (7) appeared to be convinced by abusive men's accounts despite the fact that domestic violence perpetrators are highly skilled manipulators.<sup>208</sup>

<sup>200</sup> Saunders, Faller and Tolman (2012), n 168.

<sup>201</sup> Bow and Boxer, n 168, 1394.

<sup>202</sup> Bow and Boxer, n 168, 1400; Jeffries, n 92, 12.

<sup>203</sup> Bow and Boxer, n 168, 1400.

<sup>204</sup> Bow and Boxer, n 168, 1403; Jeffries, n 92, 12.

<sup>205</sup> Saunders, Faller and Tolman (2012), n 168; Coy, Scott and Tweedale, n 17.

<sup>206</sup> Jeffries, n 92, 12.

<sup>207</sup> Coy, Scott and Tweedale, n 17, 54-60.

<sup>208</sup> Jeffries, n 92, 13.

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Similar issues with the custodial evaluation process and outcomes were noted by women interviewed by Saunders et al in the US ( $n=24$ ).<sup>209</sup> Three themes related to negative outcomes resulting from inadequate custody evaluation reports emerged from victims' interviews:

- (1) family violence was ignored or minimised in custody evaluations and thus subsequent decisions;
- (2) there was an over-reliance on maternal mental health issues to assess survivors' credibility and parenting capacity; and
- (3) negative child custody outcomes attributed in part to limitations in the custody evaluation process, that is, the process was one-sided and incomplete because it relied on limited sources of information.<sup>210</sup>

## CONCLUSION

This article demonstrates that research into, and information about, family reports suggests that there are still challenges in dealing safely and effectively with allegations of family violence. It has also shown that family reports are critical documents which are used in the most complex parenting cases. Family reports are influential in both judicial decision-making and out-of-court processes, such as applications for legal aid and settlement negotiations. Family report writers operate in a complex world of law, formal guidelines, induction and training materials, social science literature, abusive family dynamics and damaged children. And they have the role of being the (court-appointed) experts – of synthesising information and social science for the court, the legal representatives and parties – and offering recommendations about what might be in the best interests of the child.

In terms of the law, family report writers must follow the elements of the Act, and will be instructed to advise the court in relation to the primary considerations of the best interests of children, the benefit of meaningful post-separation relationships with both parents, and the need to protect children from harm. Despite priority having been given to protection, these two ideas create an obvious tension in family reports where there are allegations of family violence and the children still appear to have solid relationships with both parents. The reasons why children might seem to have a strong relationship with a violent and/or abusive parent were discussed above.

Family report writers now have a set of Assessment Standards to follow, but they were only launched very recently in 2015. There are also other relevant guidelines, including the *Family Violence Best Practice Principles* and an array of training materials and resources, but there are issues of differential requirements for family report writers, in terms of engaging with the materials and resources available, depending on whether they are employed by the court or appointed under reg 7.<sup>211</sup> These documents provide comprehensive information about how to deal with family violence in the report writing process, but in fact little is known about how family report writers engaged with them. The existing Australian research suggests that there has been inconsistent quality in family reports in the past, despite the growing availability of guidelines and resources. Hemphill's research indicated that family report writers may have difficulty translating knowledge gained from this information about family violence into recommendations. A complicating issue here is fact-finding. What can a family report writer conclude about what has happened in a particular family – as any good social scientist might – and what must be left to the judge?

This article has also shown that family violence is extremely complex and can be difficult to understand. There are many aspects of it that are multifaceted and confusing. For example, the victim can easily appear to be hysterical or lying; while the perpetrator may present as charming and reasonable. There is a significant need for family report writers to understand these complexities – including the deep impact of non-physical violence; the co-occurrence of family violence and child abuse; the effect on children of exposure to family violence; the dangers associated with the act of separation; the limited parenting capacity of perpetrators; and the ongoing impact on the victim at the time of assessment.

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<sup>209</sup> Saunders, Faller and Tolman (2012), n 168, 102-109.

<sup>210</sup> Jeffries, n 92, 13.

<sup>211</sup> *Family Law Regulations 1984* (Cth).

Field, Jeffries, Rathus and Lynch

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However, research in both Australia and overseas shows that family report writers do not always understand family violence at the level required. Sometimes they ignore or minimise it. In fact mothers have often been re-framed as hostile and difficult – behaviour which, in Australia, is likely to place them in direct opposition to the first primary consideration – because such mothers may not enthusiastically facilitate the children’s ongoing meaningful relationship with their father. The available research seems to indicate that since the 2011 family violence reforms, family violence is more frequently discussed in family reports, but there has been little change in the overall outcomes of cases.

International research reveals the ways in which family report writers’ beliefs become relevant to how they view particular situations. Some believe that women often make up allegations of abuse to further their case, while others believe this is rare. This is likely to influence how a family report writer hears the narrative of a victim and whether she is represented as logical and protective, or hysterical and obstructive. Some tend to see family violence as mutual conflict, particularly where there has been no physical violence. Many studies showed a poor understanding of coercive control.

This article has set out the legal framework and research on family reports and family violence as it currently stands in Australia. The government and the family courts have already taken a number of steps towards improving family violence laws and family reports. The 2011 amendments were intended to bring attention to family violence cases – and this seems to have occurred. In terms of family reports, the courts have launched the Assessment Standards, published the Best Practice Principles, and provided induction, training and resources for family report writers. Further detailed research into family violence and family reports is required to understand the strengths in the current system and what could be done to improve it.





## **Association of Family and Conciliation Courts**

# **Guidelines for Examining Intimate Partner Violence:**

## **A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation**

# **Association of Family and Conciliation Courts**

## **Guidelines for Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation**

**Approved by the AFCC Board of Directors  
April 9, 2016**

## **Guidelines for Examining Intimate Partner Violence:**

A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation

### **Introduction**

The Model Standards of Practice for Child Custody Evaluation (Model Standards)<sup>1</sup> were adopted by the Association of Family and Conciliation Courts (AFCC) in 2006. These Guidelines for Examining Intimate Partner Violence (Guidelines) supplement the Model Standards with respect to the evaluation of child custody and access cases where intimate partner violence may be an issue.<sup>2</sup>

Allegations of intimate partner violence are common among custody-litigating families, and custody evaluators face special challenges when conducting evaluations in this context. Model Standard 5.11 states that evaluations involving allegations of domestic violence require specialized knowledge and training as well as the use of a “generally recognized systematic approach to assessment of such issues as domestic violence...”<sup>3</sup> These Guidelines help custody evaluators identify intimate partner violence and examine the possible effects on children, parenting, and co-parenting.

An evaluator using a systematic approach formulates multiple hypotheses that are informed by research and arise from the facts of the case. The evaluator independently investigates and analyzes each hypothesis. These Guidelines only address hypotheses related to intimate partner violence. They do not alter or diminish the need to form, investigate, and analyze other hypotheses. At the end of the custody evaluation process, the evaluator combines and synthesizes information on all of the hypotheses to form an integrated picture of the family.

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<sup>1</sup> Task force for Model Standards of Practice for Child Custody Evaluation, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70 (2007). See also David A. Martindale, *Reporter’s Foreword to the Association of Family and Conciliation Court’s Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 61 (2007). The child custody evaluation process is defined in Model Standard P.1. as: “the compilation of information and the formulation of opinions pertaining to the custody or parenting of a child and the dissemination of that information and those opinions to the court, to the litigants, and to the litigants’ attorneys.”

<sup>2</sup> The drafting task force is sponsored by the Association of Family and Conciliation Courts (AFCC) in collaboration with the National Council of Juvenile and Family Court Judges (NCJFCJ) and in consultation with the Battered Women’s Justice Project (BWJP). Task force members are: Nancy Ver Steegh, Reporter, Mitchell Hamline School of Law; Hon. Dale Koch, (Ret.), Co-chair; Hon. Gail Perlman (Ret.) Co-chair; William G. Austin, Private Practice; Firoza Chic Dabby-Chinoy, Asian Pacific Institute on Gender-Based Violence; Gabrielle Davis, Battered Women’s Justice Project; Robin M. Deutsch, Center of Excellence for Children, Families and the Law, William James College; Leslie M. Drozd, Private Practice; Kathryn Kuehnle (deceased), Private Practice; Loretta Frederick, Battered Women’s Justice Project; Amy Holtzworth-Munroe, Indiana University; and Arnold T. Shienvold, Riegler Shienvold & Associates. Participating staff members are: Eryn Branch, National Council of Juvenile and Family Court Judges; Peter Salem, Association of Family and Conciliation Courts; and Maureen Sheeran, National Council of Juvenile and Family Court Judges.

<sup>3</sup> Model Standard 5.11. (“Special issues such as allegations of domestic violence, substance abuse, alienating behaviors, sexual abuse; relocation requests; and, sexual orientation issues require specialized knowledge and training. Evaluators shall only conduct assessments in areas in which they are competent.”)

The Guidelines describe and recommend systematic practices for evaluation but they do not endorse specific tools, protocols, or models. An evaluator may exercise judgment about whether existing tools, protocols, and models are consistent with the approach taken in the Guidelines. The Guidelines do not constitute a training curriculum on intimate partner violence. Consequently, an evaluator is advised to seek additional intimate partner violence-specific training or supervision. The Guidelines reflect aspirational goals for child custody evaluators rather than mandatory thresholds.

### Guiding Principles

The Guidelines encourage an evaluator to effectuate the following principles:

***Prioritize the safety and wellbeing of children and parents.*** The overarching goal of the evaluation process is to achieve the best possible outcomes for families. An evaluator plays a key role in preserving, protecting, and promoting safe, healthy, and functional relationships and living arrangements during and following separation.

***Ensure an informed, fair, and accountable process.*** An evaluator plays a key role in informing the parties about the nature and purpose of the evaluation process, including how information will be used and to whom it will be disclosed. The evaluator establishes a fair and accountable process culminating in a written report that describes the information collected on intimate partner violence, explains how the information was analyzed and synthesized, and directly links the information to recommendations.

***Focus on the individual family.*** Another goal of evaluation is to respond to the particular needs and circumstances of individual families, without any preconceived ideas about whether or not intimate partner violence exists and if so, who has done what to whom, or what the implications of intimate partner violence might be for children, parenting, and co-parenting. An evaluator plays a key role in screening for, and where appropriate, investigating, analyzing, and synthesizing information related to intimate partner violence on a case-by-case basis.

### Overview

The Guidelines incorporate a broad view of intimate partner violence that includes physically, sexually, economically, psychologically, and coercively controlling aggressive behaviors.

- **Physically aggressive behaviors** involve the intentional use of physical force with the potential for causing injury, harm, disability, or death.
- **Sexually aggressive behaviors** involve unwanted sexual activity that occurs without consent through the use of force, threats, deception, or exploitation.

- **Economically aggressive behaviors** involve the use of financial means to intentionally diminish or deprive another of economic security, stability, standing, or self-sufficiency.
- **Psychologically aggressive behaviors** involve intentional harm to emotional safety, security, or wellbeing.
- **Coercively controlling behaviors** involve harmful conduct that subordinates the will of another through violence, intimidation, intrusiveness, isolation, and/or control.

These behaviors may occur alone or in combination. They vary from family to family in terms of:

- Frequency
- Recency
- Severity
- Directionality
- Pattern
- Intention
- Circumstance, and
- Consequence

These variables combine to explain the context within which intimate partner violence occurs.

The context within which intimate partner violence occurs differs from case to case. For example, in some relationships disagreements escalate into physical violence as the result of poor impulse control or poor conflict management skills. In other instances, violence is associated with substance abuse and/or mental illness. Sometimes, violence can be a reaction to the stress of separation or divorce without any history of violence or propensity for future violence. In some cases, violence is used to prevent or protect against real or perceived threats or risk of harm. In other relationships one partner exercises power to intimidate, isolate, denigrate, control and subordinate the other partner, frequently resulting in significant fear, trauma, disempowerment, and/or entrapment. Other permutations are also possible.

The impact of intimate partner violence on children and parenting also differs from case to case. Children have unique experiences of and reactions to intimate partner violence, and it affects them in different ways. Parents similarly have unique experiences and reactions to intimate partner violence that have differing effects on the way they parent and their capacity to co-parent.

Consequently, the presence or absence of a particular form or context of aggression does not, in and of itself, dictate a particular parenting outcome. A deeper individualized analysis is required to determine the impact of the aggression and its

context on children, parenting, and co-parenting. These Guidelines describe the contours of that analysis.

### **Prioritize the Safety and Wellbeing of Children and Parents**

#### **1. Safety First. A child custody evaluator should make the safety of the child, the parties, and other involved individuals the highest priority in the evaluation process.**

Families, the court, and the community rely on the knowledge and judgment of an evaluator regarding the safety of those involved in an evaluation. Some persons who have committed intimate partner violence pose a continuing risk that may be heightened by the scrutiny and stress inherent in the information collection and evaluation process.

***Prior to undertaking an evaluation***, and in keeping with the Model Standards, a custody evaluator should be familiar with applicable professional ethical requirements, codes of conduct, state laws and regulations, and local procedures governing responses to and reporting of suspected danger. An evaluator maintains awareness of relevant community resources for family members experiencing or exposed to intimate partner violence.

An evaluator strives to become familiar with known indicators of risk, danger, and potential lethality. The presence of the following risk factors does not conclusively establish that harm will occur in the future; nor does their absence guarantee that future harm from domestic abuse will not occur:

- (a) High levels of violence, injury, and increases in violence, such as: increases in frequency and/or severity, attempted strangulation, forced sex, and/or assault during pregnancy;
- (b) Threats, willingness, and means for lethal violence, such as: threat to kill, threatened or attempted suicide, threat to harm children, threat of or harm to pets, belief in capacity to kill, fear and perception of danger by a parent who is the target of abuse, access to firearms, and/or use or threat to use a lethal weapon;
- (c) Excessive control, jealousy, or obsession, such as: control of daily activities, isolation, stalking and/or obsessive monitoring or tracking, and/or violent or constant jealousy;
- (d) Unwillingness to accept responsibility and/or willingness to evade the law, such as: avoidance of arrest for domestic violence or violation of a protection order;
- (e) Psychological and substance problems, such as: alcohol misuse, illegal drug use, and/or major mental illness; and/or
- (f) Other factors predicting risk and lethality, such as: recent separation, unemployment, and/or the presence of children in the home who are not biologically related to a partner who uses intimate partner violence.

***At the beginning of the evaluation process***, an evaluator endeavors to manage and attempt to enhance safety by informing the parties and collateral witnesses orally and in writing about the evaluator's likely response, pursuant to the evaluator's professional ethical requirements, to safety concerns that may arise during the course of the evaluation.

***During the evaluation,*** an evaluator monitors and remains attuned to suspected safety issues that may be present or arise. This obligation is necessarily family-specific, and a range of responses could be necessary and appropriate. For example, in some cases an evaluator will be legally mandated to report concerns. In other situations, an evaluator might, without affirming or disaffirming allegations, take more or less assertive steps to enhance safety.

Whenever safety could be an issue, an evaluator should be mindful of professional and legal obligations, seek supervision and consultation when he or she deems it appropriate, and consider the extent to which various responses and alterations in processes and procedures may increase or decrease danger. An evaluator aspires to prioritize safety while also maintaining neutrality.

The collection of information could be compromised if the parties and/or collateral witnesses are fearful, intimidated, or concerned about retaliation, child protection, or criminal repercussions. In such cases, an evaluator aspires to specifically address and account for missing and incomplete information in the final report. An evaluator avoids making a recommendation when the information collected is not sufficient to support it.

***When the evaluation has been written,*** a custody evaluator strives to anticipate and plan for heightened risk resulting from communication of the information collected and the evaluator's analysis, synthesis, and recommendations. Consequently, an evaluator works with the court and other involved professionals to plan the method of communication to the parties to minimize the potential for violence, retribution, child abduction, suicide, and/or other harm. For example, an evaluator may need to contact the court for guidance, provide advance notice of communication, assure that a safety plan is in place, and/or explain the limitations of the evaluation process, findings, and recommendations.

## **2. Universal and Ongoing Screening. A child custody evaluator follows an intimate partner violence screening protocol in every case, including those where no allegations or judicial findings of intimate partner violence have been made.**

An evaluator may not assume that intimate partner violence is present or absent in a case. The purpose of screening is to identify information, behaviors, or disclosures indicating that intimate partner violence is or may be an issue.<sup>4</sup> Screening is an ongoing process rather than a one-time event.

If intimate partner violence is alleged or detected, the evaluator's role is to investigate any indications of intimate partner violence pursuant to Guidelines 7, 8, 9, and 10. An evaluator remains alert to indications of intimate partner violence during the remainder of the evaluation and, if signs of intimate partner violence emerge, proceeds with Guidelines 7, 8, 9, and 10.

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<sup>4</sup> Sometimes an evaluator is aware that intimate partner violence is an issue before implementing a screening protocol. For example, lawyers and other family law professionals also have an obligation to screen for intimate partner violence and allegations of intimate partner violence may appear in pleadings and other documents. In some cases, an evaluator may be specifically appointed to make parenting recommendations in light of intimate partner violence.

An evaluator strives to remain alert for potential intimate partner violence carried out by a parent or a new partner of a parent, or through an extended family member, child, sibling, or other third party. An evaluator may screen both parents and any other individuals (such as step-parents, partners, grandparents, extended family members, et al.) who have significant contact with the child.

An effective screening protocol is structured to promote safe and informed disclosures. An evaluator inquires about specific behaviors, multiple forms of abuse across time, and the existence of risk factors.

- An evaluator structures screening to promote **safe and informed disclosure** of intimate partner violence. An evaluator conducts individual and private face-to-face interviews when feasible. An evaluator endeavors to provide persons being screened with the information detailed in Guideline 6 (below) so they can make informed and voluntary decisions about whether to disclose intimate partner violence and to what extent.
- An evaluator aspires to make **behaviorally specific inquiries** about concrete acts (like hitting, pushing, or strangling) and patterns of behaviors (like interfering with social connections, appropriating or denying access to resources, and undermining personal autonomy) as opposed to making inquiries about abstract concepts (like domestic violence, abuse or conflict).
- An evaluator seeks information on **multiple forms of intimate partner violence** including physical, sexual, economic, psychological, and coercive controlling behaviors of adults and children as well as threats and actions based on immigration status.
- An evaluator strives to remain attuned to **ongoing and past intimate partner violence**. Without understanding the dynamics and context of past intimate partner violence, an evaluator is less likely to comprehend the nature and level of present and future risk for family members. Past violence is a significant risk factor for future violence. Furthermore, the form, frequency, and severity of intimate partner violence may change over time.

### **Ensure an Informed, Fair, and Accountable Process**

#### **3. Knowledge and Skills. A child custody evaluator needs in-depth knowledge of the nature, dynamics, and impact of intimate partner violence.**

Because intimate partner violence frequently occurs in custody-litigating families and because it may be unidentified and difficult to detect, a custody evaluator will inevitably be involved in cases where intimate partner violence is or becomes an issue. Consequently, every child custody evaluator should endeavor to:

- (a) Understand the jurisdiction's intimate partner violence-related law;
- (b) Interview adults and children regarding intimate partner violence using interview strategies that are consistent with published research addressing adult and children interviewing techniques and children's responses to various forms of questions;



- (c) Identify any intimate partner violence that is occurring and understand its nature and context;
- (d) Identify risk and lethality factors and undertake an assessment of present and future risk in cases in which intimate partner violence is detected;
- (e) Understand the overlap of intimate partner violence with child maltreatment, including physical abuse, sexual abuse, emotional abuse, and neglect;
- (f) Analyze the impact, if any, on the best interests of children, of any intimate partner violence that is detected;
- (g) Determine the impact, if any, on the parenting of each parent, of any intimate partner violence that is detected;
- (h) Link the dynamics and impact of any intimate partner violence that is detected to custody and access arrangements; and
- (i) Use understanding of cultural differences to improve intimate partner violence-related interventions and recommendations.

If an evaluator determines that his or her knowledge is deficient in any of the foregoing areas, the evaluator should seek relevant training, supervision, and/or professional consultation.

**4. Systematic Approach. A child custody evaluator adopts and aspires to consistently follow a systematic approach to evaluation whenever intimate partner violence could be involved.**

Employing a systematic approach to evaluation of intimate partner violence enhances quality and accountability, and ultimately renders an evaluator's report more useful to the parties and the court. Adopting such an approach can prevent the imposition of an evaluator's personal assumptions, biases, and beliefs, and make more apparent any misapplication of dominant cultural norms and values related to intimate partner violence.

An evaluator attempts to distinguish the purpose and function of screening (Guideline 2) from that of assessment (Guidelines 7, 8, 9, 10, 11, and 12). If screening or other information indicates that intimate partner violence could be an issue, the evaluator endeavors to perform an assessment that separates the tasks of information collection, analysis, and synthesis. An evaluator strives to make recommendations that explicitly link and account for the effect of intimate partner violence, if any, on children, parenting, and co-parenting.

An evaluator using a systematic approach performs a direct, independent analysis of intimate partner violence that is separate and distinct from the assessment and/or influence of other allegations raised in the evaluation, including claims about mental health, substance abuse, alienation, and/or parental gatekeeping. An evaluator focuses on the context of the intimate partner violence and the ramifications for safety, parenting, co-parenting, and child wellbeing (as opposed to exclusive examination of specific incidents of physical violence).

**5. Mitigation of Bias. A child custody evaluator strives to recognize his or her gender, cultural, and other biases related to intimate partner violence, and take active steps to alleviate the influence of bias on the evaluation process.**

An evaluator endeavors to be alert to and avoid:

- (a) Imposition of personal assumptions, biases, and beliefs about intimate partner violence and parenting and co-parenting;
- (b) Misapplication of dominant cultural norms and values related to intimate partner violence which include biases based on race, class, socioeconomic status, sexual orientation, religion, ethnicity, English proficiency, and/or immigration status of the parties;
- (c) Application of gender-based stereotypes and role expectations that can normalize abuse and discrimination;
- (d) Consideration of hypotheses that are not informed by existing research data on intimate partner violence; and
- (e) Use and/or misapplication of ‘cultural explanations’ offered by parties to justify (i) maternal and/or paternal inequality and devaluation, (ii) attitudes to divorce that stigmatize parents, and/or (iii) roles and practices that elevate or diminish the authority and social connections of either parent.

An evaluator’s efforts to limit the impact of bias may include, but are not limited to: self-assessment, continued collection of information, updating central hypotheses, and seeking professional consultation.

**6. Explanations and Disclosures. A child custody evaluator enhances safety by informing parents and collateral witnesses that the information they share about intimate partner violence may be disclosed to the court and the parties by the evaluator.**

An evaluator endeavors to explain the following in an effort to promote informed decision making by parents and witnesses about whether and what to disclose to an evaluator:

- (a) The evaluator’s role and function;
- (b) The purpose and importance of inquiring about intimate partner violence;
- (c) How disclosed information about intimate partner violence will be used;
- (d) With whom, at what time, and in what form disclosed information about intimate partner violence will be shared;
- (e) The scope and limits of confidentiality as determined by relevant law and the evaluator’s respective professional standards and guidelines, including any mandatory reporting requirements related to child maltreatment, vulnerable adult maltreatment, or the threat of harm to self or others;
- (f) The scope and limits of confidentiality if sign or spoken language interpreters are used for parties who are deaf or hard of hearing, or have limited English proficiency; and
- (g) Who will receive copies of the written evaluation.

**Focus on the Individual Family:**  
**Information Collection, Investigation, Analysis, and Synthesis**

**7. Information Collection: Challenges.** A child custody evaluator employs a rigorous multi-method and multi-source protocol that anticipates challenges associated with investigating the effects of intimate partner violence on children, parenting, and co-parenting.

An evaluator may expect to invest substantial time and energy conducting a vigilant and thorough investigation of the impact of intimate partner violence on children and parenting. Evaluators may encounter challenges associated with information collection about intimate partner violence.

***A person who uses intimate partner violence may deny or minimize it.*** A parent or partner who commits intimate partner violence may seek to avoid criminal and child custody-related repercussions. Such a person may feel entitled to employ intimate partner violence and/or may not view behavior as abusive.

***A person subjected to intimate partner violence may minimize or fail to disclose intimate partner violence even when long-standing and severe.*** Reasons for this vary, but may include:

- (a) Fear that a partner who has used intimate partner violence will retaliate for disclosures;
- (b) Fear that a partner who has used intimate partner violence will carry out threats to harm children;
- (c) Concern about loss of custody to the other parent or the child welfare system;
- (d) Reticence to discuss sexual coercion and assault;
- (e) Fear of not being believed;
- (f) Not viewing oneself as the subject of intimate partner violence or not believing that it rises to a level of concern;
- (g) Fear that use of violence and other protective actions in response to a pattern of coercive-controlling behaviors will be viewed out of context;
- (h) Isolation from financial, social, and other resources (including barriers created by culture, geography, and language);
- (i) Fear of system involvement due to immigration status or previous experience with the justice system;
- (j) Fear that, particularly in a same-sex relationship, an evaluator will not differentiate a partner subjected to intimate partner violence from a partner who commits it;
- (k) Previous experience disclosing intimate partner violence or other trauma which was met with blame, disbelief, or punishment;
- (l) Concern about being faulted or stigmatized by friends, family, employers, or community;
- (m) Cultural norms regarding shame and public disclosure, preservation of family honor, and marriage norms that do not recognize marital rape;
- (n) Advice from attorneys, friends, and advocates that disclosing intimate partner violence in the context of custody proceedings will be perceived as manipulative;

- (o) Not appreciating the relevance of intimate partner violence to a custody evaluation; and/or
- (p) Fear that disclosure will escalate conflict, extend the litigation, and increase cost.

***Delayed disclosure of intimate partner violence does not indicate lack of credibility.*** As discussed above, parties have many reasons to delay disclosure.

***A traumatized party may react or respond unexpectedly to evaluator inquiry.*** A party traumatized by abuse may experience short- and long-term effects of abuse that include memory loss, processing difficulties, and atypical presentation of affect.

***Intimate partner violence may not be documented in photos, medical records, police reports, protective orders, or through eyewitnesses.*** Intimate partner violence is often hidden from view and those subjected to it may believe that preserving evidence, seeking medical attention, calling the police, or seeking a protective order may increase risk. An evaluator should, nevertheless, seek information from sources such as, but not limited to: collateral observers; police reports; criminal records; driving records; records regarding possession of weapons; child protective services reports; medical and dental reports; mental health reports, including psychological testing; previous investigative reports; and school records.

***Coercive controlling behaviors may exist in the absence of past or recent physical violence.*** Coercive controlling behaviors may involve a variety of tactics such as threats, intimidation, economic abuse, manipulation of children, sexual coercion, etc., used for the purpose of subjugating the person targeted. A person using coercive controlling behaviors may not need to resort to physical violence to achieve this.

***A child may deny or minimize or react in ways not anticipated by an evaluator.*** Thorough investigation, as discussed in Guideline 9, is needed to understand children's reactions.

***A parent subjected to intimate partner violence may engage in protective parenting that is only understood in the context of the intimate partner violence.*** Investigation and analysis of parenting is explored in Guidelines 10 and 11.

***Standard psychological testing is not useful for the purpose of identifying whether intimate partner violence has occurred and/or whether a given parent has committed or been subjected to intimate partner violence.***<sup>5</sup>

**8. Information Collection: Intimate Partner Violence.** To obtain a full understanding of the events and circumstances, an evaluator strives to investigate and collect information concerning: (a) the nature of aggression; (b) the frequency, severity, and context of intimate partner violence; (c) whether one or both parties are responsible for the aggression; and (d) various risk factors for lethality, future violence, stalking, and abduction.

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<sup>5</sup> Psychological testing cannot be used to determine the presence or absence of intimate partner violence.

***The “nature of aggression”*** refers to physical, sexual, economical, and/or psychological aggression; coercive control; and/or abuse related to vulnerable immigration status.

***The “frequency, severity, and context of intimate partner violence”*** concerns who is doing what to whom, for what purpose, and to what effect, including the function (e.g., control) and the consequences (e.g., injury, fear of partner) of the violence.

***The “person or persons primarily responsible for the aggression”*** refers to the source of the threat, danger, or harm. The “person or persons primarily responsible for the aggression” may or may not be the first partner to use violence in an incident or in the relationship, but is the person or persons who use aggression offensively or instrumentally, as opposed to defensively or reactively. Distinguishing instrumental from defensive aggression requires careful consideration of the full context of the violence, rather than examining specific acts in isolation.

***“Various risk factors for lethality, future violence, stalking, and abduction”*** include but are not limited to those identified in Guideline 1 and listed below for the purpose of investigation:

- (a) High levels of violence, injury, and increases in violence, such as: increases in frequency and/or severity, attempted strangulation, forced sex, and/or assault during pregnancy;
- (b) Threats, willingness, and means for lethal violence, such as: threat to kill, threatened or attempted suicide, threat to harm children, threat of or harm to pets, belief in capacity to kill, fear and perception of danger by a parent who is the target of abuse, access to firearms, and/or use or threat to use lethal weapon;
- (c) Excessive control, jealousy, or obsession, such as: control of daily activities, isolation, stalking and/or obsessive monitoring or tracking, and/or violent or constant jealousy;
- (d) Unwillingness to accept responsibility and/or willingness to evade the law, such as: avoidance of arrest for domestic violence or violation of a protection order;
- (e) Psychological and substance problems, such as: alcohol misuse, illegal drug use, and/or major mental illness; and/or
- (f) Other factors predicting risk and lethality, such as: recent separation, unemployment, and/or the presence of children in the home who are not biologically related to a partner who uses intimate partner violence.

**9. Information Collection: The Child.** A child custody evaluator collects information concerning: (a) the child’s experience(s) of past and current intimate partner violence, if any; and (b) if the child has had such experience(s), the possible impact of intimate partner violence on the child’s health, safety, and wellbeing.

***Child’s Exposure.*** An evaluator endeavors to collect information concerning a child’s past and continuing exposure to intimate partner violence by a parent or caregiver, including the extent of each child’s:

- (a) Exposure to intimate partner violence during pregnancy (developing fetus experiences intimate partner violence in utero);
- (b) Direct observation of intimate partner violence (eyewitness to violence, domination, denigration);
- (c) Indirect observation of intimate partner violence (ear-witness to abuse);
- (d) Direct intervention to stop intimate partner violence (calling for help, protecting a targeted parent);
- (e) Direct harm from intimate partner violence (physical, sexual, economic, emotional, and/or coercive control);
- (f) Direct participation in intimate partner violence (child joins in abuse and blaming of a targeted parent);
- (g) Exposure to abuse of a sibling;
- (h) Acting to protect a vulnerable sibling;
- (i) Witnessing effects of intimate partner violence (injuries, police and ambulance response, arrest, damaged property);
- (j) Experience of aftermath of intimate partner violence (life changes including relocation, separation, economic instability);
- (k) Forced separation from a targeted parent by an abusive parent and/or extended family;
- (l) Retreat from intimate partner violence (running away, hiding, pretending nothing is wrong);
- (m) Attempts to pacify the abusing parent by rejecting the other parent;
- (n) Knowledge of intimate partner violence obtained from other people; and/or
- (o) Awareness or seeming lack of awareness of intimate partner violence.

***Child's Reactions.*** An evaluator investigates and collects information concerning the child's reactions, if any, to intimate partner violence, which could include a wide variety of feelings and behavioral problems, and the longer-term impact on a child's psychological, behavioral, social, and academic functioning.

Possible reactions and problems resulting from exposure to violence may include developmental, behavioral, emotional, cognitive, and/or health-related reactions as well as issues in relationships, academic problems, and/or economic problems.

Children who have been exposed to intimate partner violence may identify with and show affection toward the abusive parent. Some children may show no obvious reactions while still struggling with exposure to intimate partner violence. Some resilient children may be minimally or not affected by their exposure.

Because children experience and react to intimate partner violence differently and because childhood symptoms may result from multiple stressors, an evaluator aspires to avoid drawing premature conclusions and focuses on collecting information about behaviors and events that pertain to each individual child.

**10. Information Collection: Parenting and Co-Parenting.** A child custody evaluator collects information related to the potential impact of intimate partner violence on each parent's capacity to parent and/or co-parent.

An evaluator strives to ascertain whether and how intimate partner violence influences each parent's capacity to parent and/or co-parent.

**Both Parents.** An evaluator aspires to collect information related to each parent's capacity, including that parent's past, present, and future willingness and ability to:

- (a) Sustain an emotionally close relationship with the child, share positive experiences with the child, and enjoy age appropriate activities together;
- (b) Remain attuned to the child and the child's separate and individual needs, apart from the parent's own needs;
- (c) Nurture the child physically, emotionally, culturally, and spiritually;
- (d) Protect and support the child's physical safety and emotional wellbeing, and meet the child's economic needs;
- (e) Assist the child in regulating behavior, thoughts, and feelings;
- (f) Provide age appropriate positive discipline and behavior management (e.g., monitoring of the child's activities and whereabouts, setting appropriate limits, using non-harsh, non-corporal punishment);
- (g) Respect, encourage, and facilitate the child's individuality, resilience, independence, and social development; and
- (h) Model appropriate behavior and communication.

**A parent who has used intimate partner violence.** An evaluator endeavors to collect information concerning the extent to which a parent who has committed intimate partner violence has and/or is likely to engage in the following problematic parenting behaviors:

- (a) Physical, sexual, emotional, and/or economic abuse;
- (b) Neglect;
- (c) Using a child as a tool of abuse;
- (d) Denying responsibility for the impact of abuse;
- (e) Ignoring a child's separate needs;
- (f) Undermining the other parent's ability to parent and the other parent's relationship with a child; and
- (g) Ongoing harassment of the other parent or child, including the use of court processes as a tool for harassment.

An evaluator seeks information about the extent to which a parent who has used intimate partner violence acknowledges the abuse, understands its consequences, remedies resulting harm, and demonstrates willingness and capacity to change.

**A parent against whom intimate partner violence has been used.** An evaluator collects information regarding the extent to which the parenting capacity of a parent who has been subject to intimate partner violence has been and/or is currently impacted or constrained as a result of the abuse, including whether that parent:

- (a) Bears heightened responsibility for protection of the child (monitoring and appeasing the other parent, shielding the child, intervening when the child is abused, regulating the child's behavior to avoid abuse, leaving with the child);

- (b) Bears heightened responsibility for care of the child (supplements inadequate care by the other parent, surreptitiously meets the child's needs); and
- (c) Experiences loss of control over his/her own parenting (navigating around the other parent's control, managing safety, being subject to scrutiny by the court, its designees, and agencies such as child protection, law enforcement, public housing, and social service providers, among others).

**Co-parenting.** An evaluator collects information about factors associated with safe and healthy co-parenting including the extent to which the parents have in the past and/or currently exhibit capacity for:

- (a) Safe involvement between parents, free from violence, threats of violence, and coercive control;
- (b) Healthy parent-child relationships, in which parents recognize and support the child's needs; the child feels safe, secure, and supported by both parents; and the child is able to give and receive love freely from both parents and their extended families;
- (c) Direct, constructive communication between the parents that is focused on the child;
- (d) Clear boundaries between the parents' role as parent and their role as partner; and
- (e) Learning healthier methods of co-parenting.

An evaluator aspires to also collect the above information concerning any individual who may play a caregiving role in a parenting plan.

Because intimate partner violence may impact parenting and co-parenting in different ways and under different circumstances, an evaluator aspires to avoid drawing premature conclusions and focuses on collecting information about behaviors and events related to parenting and co-parenting in each individual case.

**11. Analysis of Information. A child custody evaluator strives to organize, summarize, and analyze the information collected and assess its sufficiency for determining the implications of intimate partner violence for children and parenting.**

During the process of analysis, the evaluator compiles and scrutinizes the intimate partner violence-related information that has been collected and begins to generate inferences. The evaluator uses a systematic process that includes the following steps:

1. List the information collected;
2. Summarize the information;
3. Identify and seek any information described in Guidelines 8, 9, and 10 that is missing or incomplete;
4. Describe and evaluate the accuracy, completeness, and relevance of the information collected;
5. Formulate and assess the plausibility of alternative hypotheses that are central to the case;
6. Review any assumptions made;



7. Review how information regarding intimate partner violence was gathered and weighed; and
8. Consult as needed with peers and/or experts on intimate partner violence and/or cultural issues.

An evaluator who implements a systematic and transparent process reduces the likelihood of bias and error and enhances the ability of the parties and the court to assess the sufficiency and reliability of the information collected and the reasonableness of an evaluator's analysis.

**12. Synthesis of Information. A child custody evaluator endeavors to explicitly link intimate partner violence-related information with parenting recommendations concerning decision making and child access.**

After analyzing the information collected, an evaluator determines its meaning, significance, and implications for children and parents. Given that issues, interactions, and dynamics in every family are unique, complex, and may occur in combination, it is important that evaluators consider the potential interactions of intimate partner violence, family dynamics, and other issues in the case.

***Synthesis Process.*** During the synthesis process, an evaluator aspires to:

- (a) Combine and organize information related to intimate partner violence into themes corresponding to the questions to be addressed and the hypotheses formulated and analyzed;
- (b) Draw inferences about the meaning of intimate partner violence for the questions explored during the evaluation;
- (c) Connect the implications of intimate partner violence with recommendations regarding a parenting plan and any interventions; and
- (d) Include specific recommendations regarding monitoring and enforceability when compliance may be an issue.

***Goals for Recommendations.*** An evaluator strives to make access and decision making recommendations that are consistent with the following goals:

- Prioritize the physical and emotional safety, and the economic security of children and parents subjected to intimate partner violence;
- Minimize opportunities for and risk of ongoing, intrusive post-separation abuse tactics;
- Support the autonomy of parents subjected to intimate partner violence; and
- Acknowledge and address the cause and consequential harm of intimate partner violence.

***Linking Intimate Partner Violence with Parenting Recommendations.*** The evaluator strives to determine what, if any, parenting arrangements would address the specific problems identified, consistent with goals discussed above. Because this determination is necessarily family-specific, the particular terms of parenting recommendations cannot be prescribed in

advance. The following are *examples* of recommendations that might promote these goals.

To prioritize the physical and emotional safety and economic security of children and parents subjected to intimate partner violence, an evaluator could recommend that a court:

- Limit decision making authority;
- Allocate areas of decision making authority;
- Establish a structure for communication;
- Limit physical access;
- Require neutral exchanges;
- Establish supervised parenting time;
- Require supervised exchanges;
- Suspend access;
- Structure payment for child-related expenses; and/or
- Strengthen a child's support system.

To minimize opportunities for and risk of ongoing, intrusive post-separation abuse tactics, an evaluator could recommend that a court:

- Structure the frequency, content, duration, and type of communication;
- Structure parent-child contact to minimize contact between parents;
- Establish neutral exchanges;
- Limit or carefully structure information sharing;
- Appoint a parenting coach with well-defined goals; and/or
- Appoint a neutral third party intervener with well-defined goals.

To support the autonomy of parents subjected to intimate partner violence, an evaluator could recommend that a court:

- Allocate areas of decision making authority;
- Minimize contact between parents;
- Discourage right of first refusal for intermittent child care;
- Structure information sharing;
- Structure communication;
- Define geographical locations for exercise of parenting time; and/or
- Limit access to sensitive information.

To acknowledge and address the cause and consequential harm of intimate partner violence, an evaluator could recommend that a court:

- Define initial goals for specific professional interventions and measures of compliance;
- Specify conditions for potential changes in the parenting plan;
- Minimize contact between parents;
- Allocate decision making authority;
- Structure the frequency, content, duration, and type of communication;
- Establish expectations for behavior (e.g. non-violence, alcohol and drug use, availability of weapons, etc.);
- Monitor compliance with court directives and recommended interventions;

- Require participation in intimate partner violence–specific education and/or a batterer intervention program; and/or
- Build skills with respect to communication, decision making, problem solving, and self-regulation.

***Conditions for Co-parenting.*** When considering the extent to which parents might share decision making and/or physical child custody, an evaluator endeavors to examine the implications, if any, of intimate partner violence including its effects on the following conditions for successful co-parenting.

- (a) *Safe Involvement Between Parents* is free from violence, threats of violence, and/or coercive control; stable and predictable; and focused on and responsive to the needs of the child.
- (b) *Healthy Parent-Child Relationships* are free from violence, threats of violence, and/or coercive control; age and developmentally appropriate; focused on and supportive of the child; based on mastery of basic parenting skills and parental decision making; and consistent with established rules and expectations.
- (c) *Cooperation Between Parents* requires mutual responsibility and shared authority; absence of violence, threats of violence, exploitation, and/or coercion; willingness to consider alternate viewpoints; capacity to recognize and respond to others' needs (emotional maturity); and ability to compromise and reach agreement on important issues. If other family caregivers are involved in parenting plans, these considerations would apply to them as well.
- (d) *Effective Communication Between Parents* is open and direct, civil and bi-directional, constructive (not harmful or damaging, and more than the mere sharing of information), and focused on the children.
- (e) *Clear Boundaries Between Partner and Parental Roles* means that parents are able to separate their role as parents from their role as partners; limits between partner and parental roles are clear and unambiguous.