
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,¹ 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”.² 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.³ In 2006, major reforms to the Australian family law system⁴ were implemented with the intention of better supporting the involvement of both parents in children’s lives after

* Dr Rachael Field, Professor of Law, School of Law, Bond University. Dr Samantha Jeffries, Senior Lecturer, School of Criminology and Criminal Justice/Griffith Criminology Institute, Griffith University. Zoe Rathus, Senior Lecturer, School of Law, Griffith University. Angela Lynch, Women’s Legal Service (Qld). The authors would like to express their thanks and appreciation to the Australian Institute of Judicial Administration for their funding and support of the pilot research project.

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

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

³ 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



separation, protecting children from the harm of violence and abuse, and changing “the culture of family breakdown from litigation to cooperation”.⁵ 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.⁶ 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”,⁷ a conclusion supported by a number of other reports.⁸ Two national frameworks – The National Plan to Reduce Violence Against Women and their Children 2010-22,⁹ and the National Framework for Protecting Australia’s Children 2009-2020¹⁰ – demonstrated that there was strong concern in government and the community about the effectiveness of systemic responses to family violence and child protection.¹¹ 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”.¹²

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 2012.¹³ As a result of those reforms, the Act specifically requires the court to deal expeditiously with allegations of family violence,¹⁴ 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.

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

⁵ 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).

⁶ 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).

⁷ 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.

⁸ 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).

⁹ 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).

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

¹¹ This Plan was endorsed by the Council of Australian Governments in 2010.

¹² 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).

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

¹⁴ *Family Law Act 1975* (Cth) ss 67ZBA, 67ZBB.

whether a child has been or is at risk of being exposed to child abuse, neglect or family violence.¹⁵ Further, Pt VII of the Act¹⁶ 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.¹⁷ 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".¹⁸ This means that when a family court¹⁹ 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.²⁰

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".²¹ 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.²² 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.²³ 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

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

¹⁶ This part deals with parenting matters.

¹⁷ 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>; 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.

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

¹⁹ 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.

²⁰ 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.

²¹ Kaspiew et al (2009), n 3, 317.

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

²³ Shea Hart, n 3, 33.

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.²⁴ 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*,²⁵ and the *Family Violence Best Practice Principles*²⁶ 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 consultants²⁷ with qualifications in social work or psychology,²⁸ and must have at least five years' practice experience in a "related field".²⁹ Some family report writers are employees of the family courts, some are employed at legal aid offices,³⁰ 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.³¹ However, family report writers must still provide their formal qualifications.³²

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

²⁴ 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.

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

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

²⁷ 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.

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

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

³⁰ 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.

³¹ 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.)

³² This is done by appending a curriculum vitae to their report.

providing an independent, “comprehensive and impartial appraisal of the family”, “from a social science and non-partisan perspective”.³³ 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”.³⁴ 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,³⁵ to ascertain the views of the child and include the views of the child in their report.³⁶ However, a report writer cannot compel a child to express his or her views.³⁷

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.³⁸ 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.³⁹ 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”.⁴⁰ 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.⁴¹ 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.⁴²

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.⁴³ 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”⁴⁴ and “the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence”.⁴⁵ As noted in the Introduction above,

³³ Hemphill and Hugall, n 25, 7.

³⁴ Hemphill and Hugall, n 25, 7.

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

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

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

³⁸ 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>.

³⁹ Legal Aid Queensland, n 39.

⁴⁰ Legal Aid Queensland, n 39.

⁴¹ Legal Aid Queensland, n 39.

⁴² Legal Aid Queensland, n 39.

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

⁴⁴ *Family law Act 1975* (Cth) s 60CC(2)(a).

⁴⁵ *Family law Act 1975* (Cth) s 60CC(2)(b).

the Act states that greater weight is to be given to the latter consideration,⁴⁶ 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.⁴⁷ These tensions arguably present challenges for forensic social scientists working with separated families in the context of the family law system.⁴⁸

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.⁴⁹ 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

⁴⁶ *Family law Act 1975* (Cth) s 60CC(2A).

⁴⁷ 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 Naraq, *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.

⁴⁸ 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.

⁴⁹ Parkinson, n 20, 5.

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".⁵⁰

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".⁵¹ 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".⁵² 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".⁵³ 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".⁵⁴

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".⁵⁵ 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",⁵⁶ 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".⁵⁷

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

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

⁵¹ Hemphill and Hugall, n 25, 9.

⁵² 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.

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

⁵⁴ Hemphill and Hugall, n 25, 24.

⁵⁵ Hemphill and Hugall, n 25, 11: principle 6(e).

⁵⁶ Family Violence Committee of the Family Court of Australia, n 26, 2.

⁵⁷ Family Violence Committee of the Family Court of Australia, n 26, 13.

between the types of violence”.⁵⁸ 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.⁵⁹

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”.⁶⁰ 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,⁶¹ 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.⁶² In particular, there is concern about the potential for misunderstanding and inappropriately categorising abusive behaviour as either situational couple violence,⁶³ or separation instigated violence.⁶⁴ 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”.⁶⁵ 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.⁶⁶

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.

⁵⁸ Family Violence Committee of the Family Court of Australia, n 26, 6.

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

⁶⁰ Family Violence Committee of the Family Court of Australia, n 26, 6.

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

⁶² 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 Rathus, “Shifting Language and Meanings between Social Science and the Law: Defining Family Violence” (2013) 36 UNSWLJ 359. See also Z Rathus, “A Call for Clarity in the Use of Social Science Research in Family Law Decision-making” (2012) 26 AJFL 81.

⁶³ 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.

⁶⁴ 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.

⁶⁵ 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>>.

⁶⁶ Association of Family and Conciliation Courts, n 66, 3.

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.⁶⁷ There is no equivalent requirement for social workers, however both professions have codes of conduct, practice guidelines and other documents which must be followed.⁶⁸

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”.⁶⁹ 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 2015.⁷⁰

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.⁷¹ 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”.⁷² 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,⁷³ arguably

⁶⁷ 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>>.

⁶⁸ 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>>.

⁶⁹ Senate Finance and Public Administration References Committee, n 22.

⁷⁰ Senate Finance and Public Administration References Committee, n 22.

⁷¹ 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.

⁷² Lennings, n 72.

⁷³ 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.

partly as the result of quite successful public lobbying by fathers' rights groups.⁷⁴ But this is a heated debate in the social science community and the domestic violence sector.⁷⁵ 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."⁷⁶

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.⁷⁷ 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 2017.⁷⁸

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.⁷⁹ 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.⁸⁰ At its

⁷⁴ 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).

⁷⁵ 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.

⁷⁶ Lennings, n 72.

⁷⁷ 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].

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

⁷⁹ 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.

⁸⁰ 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.

most extreme, this may have lethal consequences for adult victims and/or their children.⁸¹ 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,⁸² 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”.⁸³ 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”.⁸⁴ 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).⁸⁵ 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.⁸⁶ 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.⁸⁷ 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

⁸¹ Laing, n 81, 2.

⁸² Shea Hart, n 3, 33.

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

⁸⁴ 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.

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

⁸⁶ Stark, n 84.

⁸⁷ 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.

between psychological abuse and increased physical health problems such as arthritis, chronic pain, migraines and stomach ulcers.⁸⁸ 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.⁸⁹

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,⁹⁰ and second, witnessing and living with IPV is a form of child abuse.⁹¹ As a result of this research, there is growing recognition that the perpetration of IPV is itself a child protection issue.⁹²

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.⁹³ 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.⁹⁴ The crime of filicide is perhaps the most deplorable illustration of the nexus between IPV and child abuse.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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

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

⁸⁹ Stark, n 84, 276-277.

⁹⁰ 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.

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

⁹² Jeffries, Field and Bond, n 92; Jeffries, n 92.

⁹³ *Family Law Act 1975* (Cth) s 4AB.

⁹⁴ 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.

⁹⁵ 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).

⁹⁶ 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.

⁹⁷ Domestic Violence Resource Centre Victoria, n 97, 63.

of the violence in other ways”.⁹⁸ 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”.⁹⁹ As there is a significant negative impact on children who live with the reality of IPV, and negative implications for their well-being,¹⁰⁰ IPV can be seen as a form of child abuse.¹⁰¹

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.¹⁰² As Jaffe, Lemon and Poisson express it, separation is not a “vaccination against domestic violence”.¹⁰³ 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”.¹⁰⁴ In addition, when violent fathers re-partner, many go on to abuse their new spouse.¹⁰⁵ This means that, despite parental separation, many children will continue living with violence.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ Furthermore, the literature confirms that in contrast to non-abusive parents, IPV perpetrators often parent in ways that are less than positive for children.¹⁰⁹ For example, they tend to be self-absorbed and this can result in negligent or irresponsible parenting.¹¹⁰ 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.¹¹¹ 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

⁹⁸ Parkinson and Humphreys, n 8, 148.

⁹⁹ 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).

¹⁰⁰ Australian Law Reform Commission and Law Reform Commission of NSW, n 8, 243.

¹⁰¹ Holt, Buckley and Whelan, n 81, 799.

¹⁰² Holt, Buckley and Whelan, n 81, 800; Laing, n 81, 2.

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

¹⁰⁴ Stark, n 84, 251.

¹⁰⁵ S Woffordt, D Mihalic and S Menard, “Continuities in Marital Violence” (1994) 9 *Journal of Family Violence* 195.

¹⁰⁶ Jaffe, Lemon and Poisson, n 105, 32.

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ 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 Kaspiw 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.

¹¹⁰ Jeffries, n 92, 4-5; Bancroft and Silverman, n 110, 7-11.

¹¹¹ 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.

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

Further, perpetrators are poor role models,¹¹⁵ and children who are exposed to IPV may grow up believing that such behaviour is acceptable.¹¹⁶ 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.¹¹⁷ 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".¹¹⁸

Perpetrators are possessive and perceive their (ex)partners as their property, a perception that may also extend to their children.¹¹⁹ Possessive parenting is linked to an increased risk of child physical and sexual abuse.¹²⁰ 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.¹²¹ 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".¹²² 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.¹²³

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

¹¹² 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.

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

¹¹⁴ 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.

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

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

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

¹¹⁸ Bancroft and Silverman, n 110, 51.

¹¹⁹ Jeffries, n 92, 4.

¹²⁰ Bancroft and Silverman, n 110, 11-13.

¹²¹ Meier, n 113, 706. See also, Jeffries, n 92, 4.

¹²² Jaffe, Lemon and Poisson, n 105, 31.

¹²³ 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.

pervade the lives of children who have a parent who perpetrates such violence.¹²⁴ 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.¹²⁵

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.¹²⁶ All these factors have the potential to impair parental capacity and detrimentally impact the victim’s relationship with the child.¹²⁷ 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.¹²⁸ 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.¹²⁹

Finally, it is important that family report writers understand the gendered nature of family violence.¹³⁰ 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.¹³¹ 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.¹³²

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

¹²⁴ Bancroft, n 114; Bancroft and Silverman, n 110; Pence et al, n 101, 22.

¹²⁵ Bancroft and Silverman, n 110, 52.

¹²⁶ Jeffries, 92, 4-5; Pence et al, n 101, 22.

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

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

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

¹³⁰ 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).

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

¹³² 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.

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.¹³³ 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.¹³⁴

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".¹³⁵ 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".¹³⁶

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.¹³⁷ She found that the "context of violence within the family was not central to the family report assessments".¹³⁸ 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".¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴² 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.¹⁴³ They were criticised for interfering, destabilising and sabotaging

¹³³ 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).

¹³⁴ 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>>.

¹³⁵ Moloney et al, n 3, 91.

¹³⁶ Moloney et al, n 3, 91; Jeffries, n 92, 8.

¹³⁷ Shea Hart, n 3.

¹³⁸ Shea Hart, n 3, 37.

¹³⁹ Shea Hart, n 3, 37.

¹⁴⁰ 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.

¹⁴¹ Shea Hart, n 3, 35-37; Jeffries, n 92, 8.

¹⁴² Shea Hart, n 3, 35-37.

¹⁴³ 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.

relationships between violent men and their children.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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 Services¹⁴⁸ at the Family Court of Australia at the time, Pam Hemphill.¹⁴⁹ 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.¹⁵⁰

Hemphill’s research consisted of a survey of family report writers and an analysis of two sets of $n=200$ documents, s 11F memoranda,¹⁵¹ 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.”¹⁵² 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”.¹⁵³

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

¹⁴⁴ Shea Hart, n 3, 35-37.

¹⁴⁵ Shea Hart, n 3, 35-37. See also, Jeffries, n 92, 8.

¹⁴⁶ Shea Hart, n 3, 37.

¹⁴⁷ Jeffries, n 92, 8.

¹⁴⁸ Child Dispute Services is the area in which family consultants work.

¹⁴⁹ Hemphill, n 135.

¹⁵⁰ Kaspiew et al (2015), n 3.

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

¹⁵² Hemphill, n 135, 20.

¹⁵³ Hemphill, n 135, 20.

jurisdiction of the court and the relevant judicial officer. As Justice John Faulks¹⁵⁴ 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.”¹⁵⁵

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”.¹⁵⁶ 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”,¹⁵⁷ and to situations “where family violence or abuse is established”.¹⁵⁸ 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.¹⁵⁹

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”.¹⁶⁰ 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;¹⁶¹ 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.¹⁶² 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

¹⁵⁴ Then Deputy Chief Justice of the Family Court of Australia

¹⁵⁵ 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).

¹⁵⁶ Lennings, n 72.

¹⁵⁷ Hemphill and Hugall, n 25, 24: principle 28(d).

¹⁵⁸ Hemphill and Hugall, n 25, 24: principle 27(b).

¹⁵⁹ Hemphill and Hugall, n 25, 24: principle 27(b).

¹⁶⁰ Hemphill, n 135, 22.

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

¹⁶² Kaspiew et al (2015), n 3.

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”.¹⁶³

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”.¹⁶⁴ 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.¹⁶⁵

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 US¹⁶⁶ and the UK.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰ 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

¹⁶³ Kaspiew et al (2015), n 3, 43.

¹⁶⁴ Kaspiew et al (2015), n 3, 65.

¹⁶⁵ Kaspiew et al (2015), n 3, 66.

¹⁶⁶ 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.

¹⁶⁷ Coy, Scott and Tweedale, n 17.

¹⁶⁸ Coy, Scott and Tweedale, n 17, 16-27.

¹⁶⁹ Jeffries, n 92, 9.

¹⁷⁰ Hans et al, n 168.

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".¹⁷¹

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".¹⁷² 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.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵

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".¹⁷⁶ 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".¹⁷⁷ Instead, the parental capacity of the victim was called into question with concerns expressed about the "emotional volatility of the victimized parent".¹⁷⁸ In addition, all the evaluators studied expressed "concerns about mothers making false or exaggerated domestic violence allegations – which were 'common and purpose-

¹⁷¹ Hans et al, n 168, 963-964; Jeffries, n 92, 9.

¹⁷² Davis et al, n 168, ii.

¹⁷³ Davis et al, n 168, 85.

¹⁷⁴ Davis et al, n 168, vii and 85; Jeffries, n 92, 9.

¹⁷⁵ Haselschwerdt, Hardesty and Hans, n 168, 1704; Jeffries, n 92, 10.

¹⁷⁶ Haselschwerdt, Hardesty and Hans, n 168, 1708.

¹⁷⁷ Haselschwerdt, Hardesty and Hans, n 168, 1709.

¹⁷⁸ Haselschwerdt, Hardesty and Hans, n 168, 1709.

ful”¹⁷⁹ 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.¹⁸⁰

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”.¹⁸¹ 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.¹⁸²

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 custodial/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.¹⁸³

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”.¹⁸⁴ Rather, evaluators “did just the opposite” – they obscured, discounted or explained the family violence away.¹⁸⁵ 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”.¹⁸⁶
- (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.¹⁸⁷

¹⁷⁹ Haselschwerdt, Hardesty and Hans, n 168, 1709.

¹⁸⁰ Haselschwerdt, Hardesty and Hans, n 168, 1712; Jeffries, n 92, 10.

¹⁸¹ Haselschwerdt, Hardesty and Hans, n 168, 1704.

¹⁸² Haselschwerdt, Hardesty and Hans, n 168, 1704-1705; Jeffries, n 92, 10.

¹⁸³ Saunders, Tolman and Faller (2013), n 168, 479-480; Jeffries, n 92, 10.

¹⁸⁴ Pence et al, n 101, 5-6.

¹⁸⁵ Pence et al, n 101, 5-6; Jeffries, n 92, 10.

¹⁸⁶ Pence et al, n 101, 7-8.

¹⁸⁷ Pence et al, n 101, 8.

- (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”.¹⁸⁸
- (4) Some evaluators subsumed family violence under alternative frameworks, such as high conflict, mutual conflict or communication problems, or under a mental health framework.¹⁸⁹
- (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.¹⁹⁰
- (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.¹⁹¹
- (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”.¹⁹²
- (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”.¹⁹³

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”.¹⁹⁴ Instead, “evaluators’ recommendations seemed more tied to their own wishful thinking about the future than to the present realities of domestic violence”.¹⁹⁵ This was despite the fact that the violence reported in the case files involved ongoing coercively controlling violence.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹

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

¹⁸⁸ Pence et al, n 101, 9-10.

¹⁸⁹ Pence et al, n 101, 15-16.

¹⁹⁰ Pence et al, n 101, 19.

¹⁹¹ Pence et al, n 101, 20.

¹⁹² Pence et al, n 101, 20.

¹⁹³ Pence et al, n 101, 26-27. Jeffries, n 92, 11-12.

¹⁹⁴ Pence et al, n 101, 30.

¹⁹⁵ Pence et al, n 101, 30.

¹⁹⁶ Jeffries, n 92, 12.

¹⁹⁷ Jeffries, n 92, 12.

¹⁹⁸ Saunders, Faller and Tolman (2012), n 168.

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

others involved in the children's lives.²⁰⁰ Research by Bow and Boxer however, calls into question this claim, as well as lack of training arguments.²⁰¹ 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".²⁰²

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.²⁰³ 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.²⁰⁴

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.²⁰⁵ The results of this research emulate those reported in the studies of evaluators.²⁰⁶

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.²⁰⁷ 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.²⁰⁸

²⁰⁰ Saunders, Faller and Tolman (2012), n 168.

²⁰¹ Bow and Boxer, n 168, 1394.

²⁰² Bow and Boxer, n 168, 1400; Jeffries, n 92, 12.

²⁰³ Bow and Boxer, n 168, 1400.

²⁰⁴ Bow and Boxer, n 168, 1403; Jeffries, n 92, 12.

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

²⁰⁶ Jeffries, n 92, 12.

²⁰⁷ Coy, Scott and Tweedale, n 17, 54-60.

²⁰⁸ Jeffries, n 92, 13.

Similar issues with the custodial evaluation process and outcomes were noted by women interviewed by Saunders et al in the US ($n=24$).²⁰⁹ 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.²¹⁰

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 7.²¹¹ 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.

²⁰⁹ Saunders, Faller and Tolman (2012), n 168, 102-109.

²¹⁰ Jeffries, n 92, 13.

²¹¹ *Family Law Regulations 1984* (Cth).

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.