

## SHIFTING LANGUAGE AND MEANINGS BETWEEN SOCIAL SCIENCE AND THE LAW: DEFINING FAMILY VIOLENCE

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### I INTRODUCTION

This article explores the complex relationship between social science and the law through the lens of the 2011 amendments to the *Family Law Act 1975* (Cth) ('FLA'), particularly the definition of 'family violence' which was introduced. There was no definition of family violence in the *FLA* until 1996,<sup>1</sup> despite a growing public discourse regarding the issue in Australia during the 1980s,<sup>2</sup> and the introduction of domestic violence protection order legislation in every state and territory over that decade.<sup>3</sup> The definition that became operative in 1996 was subsequently amended in 2006 when major parenting reforms were introduced,<sup>4</sup> and in 2011 it was entirely re-fashioned. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) ('Amendment Act') (which did not become operational until June 2012) was the first time family

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Note: On 12 April 2013, the name of the Federal Magistrates Court of Australia was changed to the Federal Circuit Court of Australia and the presiding judicial officers, federal magistrates, became judges. Because this article was largely written before those changes and the cases cited used the old language, this article has retained the old terms.

1 When the *Family Law Reform Act 1995* (Cth) commenced operation.

2 See, eg, NSW Task Force on Domestic Violence, *Report of New South Wales Task Force on Domestic Violence to Honourable N K Wran QC, MP Premier of New South Wales* (Women's Co-ordination Unit, Sydney, 1981); Jocelyne A Scutt, *Even in the Best of Homes: Violence in the Family* (Penguin Books, 1983); Julie Stubbs and Alison Wallace, 'Protecting Victims of Domestic Violence?' in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Lawbook, 1988); Queensland Domestic Violence Task Force, *Beyond These Walls: Report of the Queensland Domestic Violence Task Force to The Honourable Peter McKechnie, M L A, Minister for Family Services and Welfare Housing* (Department of Family Services, Brisbane, 1988).

3 Family Violence Professional Education Taskforce, *Family Violence: Everybody's Business, Somebody's Life* (Federation Press, 1991) 181. The first was South Australia in 1982 and the last was the Northern Territory in 1989.

4 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

violence was the central subject of reform of the *FLA*. The aim of the federal government was to improve the family law system's response to family violence and a key aspect of the amendments was the new detailed definition of family violence intended 'to better capture harmful behaviour' than had occurred under the former legislation.<sup>5</sup>

This article argues that the prescriptive structure of the definition, requiring overarching features of coercion, control or fear, and the linguistic links of coercion and control to the American typology literature about family violence renders it vulnerable to a different, and possibly narrower, interpretation than the legislature intended. This literature has its own set of shifting definitions and meanings developed through the research of a number of, predominately American, scholars. Lawyers and judges who limit the meaning of the definition by invoking the typology literature may misinterpret their clients' instructions or the evidence before them. As will be demonstrated, social science is complex, changeable and contested, and its application is fraught with difficulties. A narrow definition may exclude some women and children who have experienced abuse but cannot prove to the satisfaction of the court that they were coerced or controlled by the abuse or that they were in fear. These can be subtle concepts to prove and invite contestation by the alleged perpetrator by either denying the allegations or arguing that, even if he did do what is alleged, it did not involve coercion, control or fear.

It has been remarked that 'understanding that definitions are formed and reformed through a process of inclusion and exclusion reveals that power is in play in the act of naming.'<sup>6</sup> It is argued in this article that the new definition has the power to include or exclude families and family members in terms of being assessed as affected by 'family violence', but perhaps that power may play out in ways not anticipated by the legislature. For those who are excluded, the family violence procedural provisions will not be triggered,<sup>7</sup> protective provisions within part VII of the *FLA* (the parenting order sections)<sup>8</sup> will not be enlivened and inappropriate parenting orders could be made in terms of both (shared) parental responsibility and parenting time.<sup>9</sup>

Part II of the article describes selected American typology literature, with an emphasis on works that have gained attention in Australia. It briefly raises criticisms of the typology approach and proposes that this approach responds to the socio-legal climate in the United States ('US') rather than solving gaps in the Australian system. Examples of Australia's broad public policy and legislative position about family violence are discussed. Part III describes the history and

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

6 Helen MacDonald, *What's in a Name? Definitions and Domestic Violence* (Domestic Violence and Incest Resource Centre, 1998) 4.

7 *FLA* s 60J.

8 See, eg, rebutting the presumption that equal shared parental responsibility is in the best interests of children: *FLA* s 61DA(2); giving weight to protecting children from harm: *FLA* ss 60CC(2)(b), (2A).

9 *FLA* ss 61DA, 65DAA.

development of the *Amendment Act* definition of ‘family violence’,<sup>10</sup> revealing the gendered nature of this debate. It outlines the structure of the definition section and the influence of the Final Report of the Australian Law Reform Commission and New South Wales Law Reform Commission on family violence and the legal system (‘*National Legal Response Report*’) on its formulation.<sup>11</sup>

Part IV discusses how the definition may be interpreted and discusses three issues. First, it reveals how the definition’s prescriptive structure requires the characteristics of coercion, control or fear to be present, despite the list of examples, which suggests that a wide range of behaviours was intended to be caught. Second, it analyses how the phrase ‘coerces or controls a member of the person’s family’ might be read. Finally, it suggests that there is a real possibility it will be understood in light of the typology literature, which has been somewhat embedded in Australian family law ‘culture of practice’.<sup>12</sup> A number of cases are discussed to illustrate early interpretations.

Part V canvasses five problems with conflating the typology literature and the law, establishing that there could be serious consequences if misunderstandings of social science contribute to misapplications of the law. Again, some cases are considered to demonstrate the penetration of the concepts of this literature into Australian jurisprudence.

Although contemporary family law policy owes much to the social sciences, these problems illustrate the complex relationship between social science and the law, and the risks of inappropriately merging the two disciplines. This article concludes by recommending an inquiry into the appropriate use of social science research in family law with broad consultation throughout the family law community.

## II THE FAMILY VIOLENCE ‘TYPOLOGY’ LITERATURE AND ITS PLACE IN AUSTRALIA

### A The Typology Literature

The typology literature emanated from the US in the 1980s,<sup>13</sup> and has been a dynamic area of scholarship and critical part of a growing conversation that not all family violence is the same. The approach has ‘far-reaching implications for court processes, treatment, educational programs for professionals, and for social and legal policy.’<sup>14</sup>

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10 *FLA* s 4AB.

11 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Final Report (2010) vol 1.

12 This borrows from the idea of communities of legal practice discussed in Lynn Mather, Craig A McEwen and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001) 10.

13 *National Legal Response Report*, above n 11, 280.

14 Joan B Kelly and Michael P Johnson, ‘Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) 46 *Family Court Review* 476, 477.

Some of the early work regarding differentiation stems from Janet Johnston and Linda Campbell, whose proposed application of these ideas to custody cases has been characterised as a ‘conceptual breakthrough’.<sup>15</sup> In 1993 they identified five typologies or categories of violence: ‘on-going or episodic male battering, female-initiated violence, male-controlling interactive violence, separation-engendered or post-divorce trauma, and psychotic and paranoid reactions.’<sup>16</sup> Exemplifying the changeability of science, the following year Amy Holtzworth-Munroe and Gregory Stuart proposed three categories: ‘family only, dysphoric/borderline, and generally violent/antisocial.’<sup>17</sup> The categories and descriptions have continued to be debated, developed and finessed over time. In 2006, Ellen Pence, co-founder of the internationally recognised Duluth Domestic Abuse Intervention Project,<sup>18</sup> and her collaborator, Shamita Das Dasgupta, developed a set of five typologies of family violence: battering, resistive/reactive violence, situational violence, pathological violence and anti-social violence.<sup>19</sup>

The typology literature came to the attention of the Australian family law community in 2007, when it was canvassed in a benchmarking report by the Australian Institute of Family Studies (*AIFS Report*) which investigated how family violence allegations were dealt with in the family courts prior to the major 2006 amendments to the *FLA*.<sup>20</sup> The report explained the idea of ‘increased differentiation’<sup>21</sup> of family violence and canvassed the work of many scholars,

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15 William G Austin and Leslie M Drozd, ‘Intimate Partner Violence and Child Custody Evaluation, Part I: Theoretical Framework, Forensic Model, and Assessment Issues’ (2012) 9 *Journal of Child Custody* 250, 257. See Janet R Johnston and Linda E G Campbell, ‘A Clinical Typology of Interparental Violence in Disputed-Custody Divorces’ (1993) 63 *American Journal of Orthopsychiatry* 190.

16 Janet R Johnston and Linda E G Campbell, ‘Parent–Child Relationships in Domestic Violence Families Disputing Custody’ (1993) 31 *Family and Conciliation Courts Review* 282, 283.

17 Amy Holtzworth-Munroe and Gregory L Stuart, ‘Typologies of Male Batterers: Three Subtypes and the Differences among Them’ (1994) 116 *Psychological Bulletin* 476, 481.

18 The Duluth Domestic Abuse Intervention Project is internationally acknowledged as a practice leader in programs for families experiencing family violence. In particular, their models have demonstrated the benefits of an integrated approach across sectors and they have developed a series of illustrative ‘wheels’ that depict the dynamics of violence and abuse in the family. The Duluth ‘Power and Control Wheel’ has been regularly used at training programs in Australia: see Domestic Abuse Intervention Programs, *The Duluth Model* (2011) <<http://www.theduluthmodel.org>>.

19 Ellen Pence and Shamita Das Dasgupta, ‘Re-Examining “Battering”: Are All Acts of Violence against Intimate Partners the Same?’ (Praxis International, 2006) 5–14 <<http://www.praxisinternational.org/files/praxis/files/ReexaminingBattering.pdf>>.

20 Lawrie Moloney et al, ‘Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study’ (Research Report No 15, Australian Institute of Family Studies, 2007).

21 *Ibid* 5.

particularly that of Michael Johnson.<sup>22</sup> At that time, Johnson's work involved three typologies: intimate terrorism, violent resistance and situational couple violence.<sup>23</sup>

According to the *AIFS Report*, Johnson considered intimate terrorism to be 'strongly gendered in origin and ... linked to questions of control associated with patriarchal assumptions and a patriarchal culture.'<sup>24</sup> On the other hand, situational couple violence was described as 'being characterised by a greater sense of reciprocity ... not fundamentally gendered in its origins' although gender issues such as physical strength differences play a role in harm inflicted.<sup>25</sup> Johnson contended that intimate terrorism was 'discontinuously related to' situational couple violence.<sup>26</sup> As will be argued, one of the causes of the 'wide chasm and loud debate'<sup>27</sup> between social science researchers and women's advocates about the use of typologies is the lack of recognition of likely overlap between intimate terrorism (now generally called 'coercive controlling violence') and situational couple violence. This may allow these categories to be misapplied and the relevance of violent behaviour to be minimised in violence judged to be 'situational couple violence'.

In 2008 (after the *AIFS Report*), Johnson published an article with Joan Kelly,<sup>28</sup> which has arguably become quite central to the Australian family law system's understanding of the typologies. The article changed the label 'intimate terrorism' to 'coercive controlling violence',<sup>29</sup> and added a new category to develop this list:<sup>30</sup>

- **Coercive controlling violence** – 'a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners',<sup>31</sup>

22 The research they discussed included: Michael P Johnson, 'Domestic Violence: It's Not about Gender – Or Is It?' (2005) 67 *Journal of Marriage and Family* 1126; Michael P Johnson and Kathleen J Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and Family* 948; Johnston and Campbell, above n 16; Holtzworth-Munroe and Stuart, above n 17. Some criticise the approach: see, eg, David M Fergusson, L John Horwood and Elizabeth M Ridder, 'Rejoinder' (2005) 67 *Journal of Marriage and Family* 1131; Michael S Kimmel, "'Gender Symmetry" in Domestic Violence: A Substantive and Methodological Research Review' (2002) 8 *Violence against Women* 1332; Nancy VerSteegh, 'Differentiating Types of Domestic Violence: Implications for Child Custody' (2005) 65 *Louisiana Law Review* 1379.

23 Moloney et al, above n 20, 6.

24 Ibid.

25 Ibid.

26 Ibid.

27 Austin and Drozd, above n 15, 256.

28 Kelly and Johnson, above n 14. This article was published in a special edition of the *Family Court Review* which followed America's Wingspread Conference which brought together a select group of family violence scholars and practitioners to discuss family violence.

29 Ibid 749. This occurred because a reluctance to use the term 'intimate terrorism' was revealed at the Wingspread Conference. It had been previously termed 'patriarchal terrorism'.

30 Ibid 477. They mention a fifth category, 'mutual violent control', but do not describe it.

31 Ibid 478.

- **Violent resistance** – reacting violently to a partner who uses coercive controlling violence;<sup>32</sup>
- **Situational couple violence** – ‘does not have its basis in the dynamic of power and control’<sup>33</sup> but results from ‘situations or arguments between partners that escalate on occasion into physical violence’;<sup>34</sup> and
- **Separation-instigated violence** – violence that first occurs in a relationship after the couple have separated.<sup>35</sup>

American scholars, William Austin and Leslie Drozd, recently dubbed Kelly and Johnson’s four typologies ‘the new consensus’, noting that this and similar models have ‘been favourably received by the field’.<sup>36</sup> Despite this, they argued that acceptance of the typologies as relevant to custody cases ‘has been premature’ and asserted that the categories are ‘better viewed as heuristic frameworks for descriptive purposes.’<sup>37</sup> Austin and Drozd present a ‘revised typology’ model, renaming, fusing and adding to the categories.<sup>38</sup>

In their view, the categories are only descriptive; they cannot explain or predict,<sup>39</sup> so they have also built a ‘violence risk assessment’ into their model. This involves ‘10 key behavioural dimensions’ to be considered, such as exposure of children to violence and substance and alcohol abuse.<sup>40</sup> They present a comprehensive, complex and thought-provoking model. The purpose here is not to evaluate the critique these scholars bring to Johnson’s approach or to determine the value or accuracy of their model, but rather to suggest that this material demonstrates the complex, changeable and contested nature of social science. It is a sophisticated and specialised discipline, which cannot be easily transported into law.

## B Context and Use of Typology Research in Australia

Despite the on-going debate in the scientific community since the 2007 *AIFS Report*, ‘the trend towards the application of typologies of violence has grown in momentum within the family law sector’ in Australia.<sup>41</sup> It has captured some

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32 Ibid 479.

33 Ibid.

34 Ibid 485.

35 Ibid 479.

36 Austin and Drozd, above n 15, 259.

37 Ibid 262.

38 Ibid 272–6. The five categories they propose are: coercive controlling, intrusive, authoritarian violence; conflict-instigated, situation-specific violence; separation-associated violence; substance abuse associated violence; and major mental disorder-associated violence.

39 Ibid 262.

40 Ibid 279–85.

41 Beth Tinning, ‘Working with the Family Law Sector: Exploring Domestic Violence as a Form of “Coercive Controlling Violence”’ (Newsletter No 40, Australian Domestic and Family Violence Clearinghouse, 2010) 1.

judicial attention,<sup>42</sup> is used in professional training and resources,<sup>43</sup> referred to at conferences,<sup>44</sup> and the 2008 article by Kelly and Johnson was central to a family law case that went on appeal regarding the use of social science literature by judges.<sup>45</sup>

The same article is also referenced in the Family Courts' *Family Violence Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* ('*Best Practice Principles*'),<sup>46</sup> a voluntary guide for judges to follow in cases involving family violence.<sup>47</sup> The *Best Practice Principles* is a joint publication of the Family Court of Australia and the (now) Federal Circuit Court of Australia and is publicly available on their websites.<sup>48</sup> They provide a useful resource for judges and draw on a wide range of social science research with the typology literature playing a key role in describing family violence. Kelly and Johnson are cited to explain that '[o]ne well known classification system holds that violence generally can be defined as being within four categories' and the four categories above are set out.<sup>49</sup>

In the context of legal professional responsibility and ethical decision-making, scholars have observed the development of 'loose networks of interdependent lawyers who establish shared expectations for conduct'.<sup>50</sup> In the same vein, perhaps particular ideas or theories can gain undue prominence, and

42 See *Carlton & Carlton* [2008] FMCAfam 440; *Carrow & Burke* [2009] FMCAfam 603; *Kucera & Kucera* [2009] FMCAfam 1032; *Watkins & Minnow* [2010] FamCA 1059; *Dafae & Dafae* [2011] FMCAfam 151. Except for *Carlton & Carlton*, these cases are cited in Jane Wangmann, 'From Theory to Practice – Typologies and the Family Law System in Australia: A Preliminary Exploration' (Speech delivered at the Seminar on Typologies of Intimate Partner Abuse: Theory and Practice, Centre for Domestic and Family Violence Research, Brisbane, 21 February 2013).

43 The Commonwealth Attorney-General released a resource for professionals working across the family law system in 2012. It cites Kelly and Johnson, above n 14, and sets out the four types of family violence. See Jennifer McIntosh and Claire Ralfs, *The Family Laws DOORS: Detection and Overall Risk Screen (DOORS) Handbook* (Australian Institute of Social Relations, Family Transitions and Attorney-General's Department, 2012) 133.

44 Tom Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at the Australian Institute for Judicial Administration Family Violence Conference, Brisbane, 1–3 October 2009); Janet Johnston, 'Strategies for Resolving Inter-professional Differences in Understanding and Responding to Family Violence to Improve Outcomes for Families: Lessons Learned from the Wingspread Conference' (Speech delivered at the Family and Relationship Services Australia Conference, Sydney, 24–26 November 2009); Jacqueline Beall, 'The Impact of Conflict and Family Violence on Parenting Capacity and Child Development' (Speech delivered at the Doing Justice for Young People – Issues and Challenges for Judicial Administration in Australia and New Zealand Conference, Brisbane, 24 August 2012).

45 *Maluka v Maluka* [2009] FamCA 647; *Maluka v Maluka* (2011) 45 Fam LR 129. This case was discussed in some detail in Zoe Rathus, 'A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making' (2012) 26 *Australian Journal of Family Law* 81.

46 Family Violence Committee, Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (2013).

47 See *Cameron and Walker* [2010] FLC 93–445 cited in the Family Violence Committee, above n 46.

48 Family Violence Committee, above n 46, 6. As noted at the commencement of this article, the Federal Magistrates Court of Australia was renamed the Federal Circuit Court of Australia on 12 April 2013.

49 Ibid.

50 Mather, McEwen and Maiman, above n 12, 10.

even credibility, through familiarity and repetition in a ‘community of practice’ such as family law. The typology literature has arguably achieved this in Australia.

But there has been quite vocal criticism of the literature in Australia and abroad.<sup>51</sup> In response to the *AIFS Report*, Jane Wangmann noted one reason why the typology approach might not be well suited to the Australian context was because of the seemingly obligatory presence of physical violence which Johnson assumed for ‘intimate terrorism’ (as he called it then). In a later comprehensive review, she suggested that the typology concepts may ‘play out differently in Australia’ where there has been a broader recognition of non-physical family violence for many years.<sup>52</sup> Perhaps they were developed in a subtly different cultural and policy context to Australia and endeavour to fill gaps that do not exist in Australia in quite the same way.

### C Australia’s Types of Family Violence

While the typology model was being developed by American sociologists and social scientists, during the 1980s and 1990s Australia arguably settled on its own view about types of domestic violence that seemingly had wide acceptance, at least at a general policy level. This included, from early on, the deep impact and long legacy of non-physical forms of domestic violence. One of the earliest Australian references to multiple forms of violence stems from a domestic violence conference staged by the Australian Institute of Criminology in 1985. South Australian refuge worker, Dawn Rowan, described the types of abuse seen at the shelter as physical, sexual, psychological, social and financial, and then explained how the ‘package’ is ‘accompanied by daily threats’ regarding the risks of leaving – losing the house and kids – and the brainwashing to ‘create in her a belief that she is the cause of the violence’.<sup>53</sup>

Non-physical violence has also been recognised in some state domestic violence protection order legislation since the 1980s.<sup>54</sup> For example, Queensland was one of the last states to introduce domestic violence protection order legislation but when it did, in 1989, the court was empowered to make a

51 See Alice Bailey, ‘Separating Safety from Situational Violence: Response to *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-Reform Exploratory Study*’ (2007) 77 *Family Matters* 26; Tinning, above n 41; Alice Bailey et al, ‘Typologies of Violence in Family Court Processes: Reflections from the Field’ (Paper presented at the 11<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 7–9 July 2010); Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, 2012); Victoria Frye et al, ‘The Distribution of and Factors Associated with Intimate Terrorism and Situational Couple Violence Among a Population-Based Sample of Urban Women in the United States’ (2006) 21 *Journal of Interpersonal Violence* 1286.

52 Jane Wangmann, ‘Different Types of Intimate Partner Violence – An Exploration of the Literature’ (Issues Paper No 22, Australian Domestic and Family Violence Clearinghouse, 2011) 14.

53 Dawn Rowan, ‘The Syndrome of Battered Women’ (Paper presented at the National Conference on Domestic Violence, Australian Institute of Criminology, Canberra, 11–15 November 1985) vol 1, 26–7.

54 Eg, Queensland’s first such Act permitted the court to make an order when certain kinds of conduct were likely to be repeated. This conduct included wilful damage to property, intimidation or serious harassment and indecent behaviour: *Domestic and Family Violence Protection Act 1989* (Qld) s 11 (repealed), now the *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

protection order in circumstances where there had been ‘intimidation or serious harassment’ of one spouse by the other or ‘indecent behaviour’ towards one spouse contrary to their wishes.<sup>55</sup> Thus the legal basis for obtaining a protection order did not require the presence of physical violence. Further, as recently as 2009, the National Council to Reduce Violence against Women and their Children listed ‘types’ of violence as emotional, verbal, social, economic, psychological, spiritual, physical and sexual.<sup>56</sup>

Kelly and Johnson suggest that (in the US) ‘domestic violence and battering have been used interchangeably by women’s advocates, domestic violence educators, and service providers for three decades, based on their belief that all incidents of domestic violence involve male battering’.<sup>57</sup> That is simply not how the family violence discourse has developed in Australia. It needs to be said that forms of family violence beyond the physical are recognised and discussed in the American literature,<sup>58</sup> but according to some scholars, they have been rendered somewhat invisible in the development of legal responses. In Australia, non-physical forms of family violence have been much more visible at policy and legislative levels.

### III HISTORY AND DEVELOPMENT OF THE NEW DEFINITION OF DOMESTIC VIOLENCE

Despite seemingly general acceptance of a wide description of domestic violence in Australia, for the first 20 years of its operation, the *FLA* contained no definition. The first two definitions of family violence, in 1996 and 2006, were devised in circumstances where family violence was not the centre of the reforms.<sup>59</sup> Instead, they were each part of larger packages of amendments aimed at increasing the role of both parents (especially fathers) in the lives of their children post-separation: ‘shared parenting’ in contemporary parlance. Both amending Acts were products of lengthy consultation processes which witnessed the competing demands of many diverse stakeholders in the family law policy-making arena, including lawyer groups, social scientists from various occupations,<sup>60</sup> community workers, fathers’ rights groups and women’s

55 *Domestic Violence (Family Protection) Act 1989* (Qld) ss 4(e), (f) as originally passed.

56 National Council to Reduce Violence against Women and Their Children, *Time for Action: The National Council’s Plan to Reduce Violence against Women and Their Children, 2009–2021* (Department of Families, Housing, Community Services and Indigenous Affairs, 2009) 186–7.

57 Kelly and Johnson, above n 14, 478.

58 Eg, Lenore Walker outlined the horrors of psychological abuse in her famous text: Lenore E Walker, *The Battered Woman* (Harper Collins, 1979); see also Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* (South End Press, 1982) ch 9.

59 *Family Law Reform Act 1995* (Cth); *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

60 These included private clinical practitioners, those employed by or engaged with the family law system, academics, and other researchers.

advocates.<sup>61</sup> The wording of the definition of domestic or family violence has proven to be a fertile territory for the ‘gender wars’ of family law policy over the years,<sup>62</sup> and the 2011 version is the latest iteration in this ongoing debate.

The 1996 definition of ‘family violence’ entered the *FLA* via the *Family Law Reform Act 1995* (Cth) (*FLRA*), which also entrenched into the legislation the idea that a child had a right to contact with both parents.<sup>63</sup> By this time, fathers’ rights groups were making demands for joint custody,<sup>64</sup> but much work was also being conducted around women’s rights. The federal government established the National Committee on Violence against Women in 1990 and the Australian Law Reform Commission’s Inquiry on *Women and Equality before the Law* published a series of reports in 1994.<sup>65</sup>

The *FLRA* was the product of a lengthy consultation process and it eventually contained the following definition of family violence:

**family violence** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal wellbeing or safety.<sup>66</sup>

That definition operated for a decade, until the next major set of amendments began their journey in the wake of the 2003 Inquiry into Child Custody Arrangements in the Event of Family Separation, which was announced by the

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61 Family law reforms generally reflect some compromises amongst the ideas and ideologies offered to the legislature by these diverse interest groups. This same type of compromise has been recognised in ‘custody’ statutes in the US: see Margaret F Brinig, ‘Does Parental Autonomy Require Equal Custody at Divorce?’ (2005) 65 *Louisiana Law Review* 1345, 1348. See the lists of submissions received from witnesses who appeared before the Senate Legal and Constitutional Affairs Legislation Committee for their Report on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, which are set out in Appendices 1 and 2.

62 For discussions on this battleground, see Helen Rhoades, ‘Children’s Needs and “Gender Wars”: The Paradox of Parenting Law Reform’ (2010) 24 *Australian Journal of Family Law* 160; Miranda Kaye and Julia Tolmie, ‘Fathers’ Rights Groups in Australia and Their Engagement with Issues in Family Law’ (1998) 12 *Australian Journal of Family Law* 19.

63 *FLA* s 60B introduced a new objects and principles section which reinforced the idea of a right to contact. It has been argued that this new legislation created a ‘pro-contact culture’ that sometimes emphasised the right to contact over the best interests of the child: see Kathryn Rendell, Zoe Rathus and Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family* (Women’s Legal Service, Annerley, 2000). An analysis of judicial decision-making in interim hearings before and after the reforms showed a shift from the principle issue being *whether* contact should take place to *how* to maintain contact until the final hearing: Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (University of Sydney and Family Court of Australia, 2000) 79.

64 Rhoades, above n 62.

65 Australian Law Reform Commission, *Equality before the Law*, Interim Report No 67 (1994); Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994) pt 1; Australian Law Reform Commission, *Equality before the Law: Women’s Equality*, Report 69 (1994) pt 2.

66 *Family Law Reform Act 1995* (Cth) s 60D(1).

then Prime Minister John Howard in June 2003.<sup>67</sup> The original Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) proposed no changes to the definition, but fathers' rights groups had obtained traction on a claim that women make up and exaggerate allegations of violence as a tactic in children's cases.<sup>68</sup> When the Exposure Draft was referred to the House of Representatives the fathers' rights groups mounted an apparently convincing case for this view and, based on this, the Committee decided that 'the definition of family violence would be better qualified by inserting an objective element [into the existing definition]'.<sup>69</sup> By the time the Bill was referred to the Senate Committee,<sup>70</sup> the word 'reasonably' had been inserted into the existing definition in two places:

*family violence* means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family *reasonably* to fear for, or *reasonably* to be apprehensive about, his or her personal wellbeing or safety.<sup>71</sup>

Groups who work with women victims of family violence 'expressed concern' to the Senate Committee 'at the objective requirement being imported into the definition', arguing that it 'sends an unfortunate message to the community' and that it may be difficult for women to prove family violence when they are relying on a series of incidents, each of which may seem quite trivial separately.<sup>72</sup> But the words became part of the *FLA* and this definition demonstrates, perfectly, the contested and sometimes gendered territory of naming and defining.

While the 1995 and 2006 definitions were parts of wider reforms, the 2011 *Amendment Act* was specifically about family violence and a new definition became central to the discussion. This Act was the result of a rigorous consultation process, which commenced with an Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010 (Cth) and corresponding

67 The announcement was made in the House of Representatives on 24 June 2003 and the inquiry was referred to the House of Representatives Standing Committee on Family and Community Affairs: see House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) 1.

68 See House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005) 35–8. The groups cited in the Report included Dads in Distress, Lone Fathers Association, Men's Confraternity, Shared Parenting Council of Australia ('SPCA' – an umbrella group for a number of fathers' rights groups), and Michael Green QC on behalf of the SPCA: see generally Rhoades, above n 62.

69 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 30–4. The groups cited in the Report included Dads in Distress, Lone Fathers Association, Men's Confraternity, SPCA, and Michael Green QC on behalf of the SPCA.

70 Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth).

71 Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) sch 1 pt 1 item 3 (emphasis added).

72 Senate Legal and Constitutional Legislation Committee, above n 69, 31.

Consultation Paper being released by the federal Attorney-General, the Hon Robert McClelland MP, in November 2010.<sup>73</sup> This was the same month that he released the *National Legal Response Report* about family violence – which had also been the subject of wide-ranging public consultation.<sup>74</sup>

The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) and accompanying Explanatory Memorandum was subsequently introduced to the House of Representatives in March 2011.<sup>75</sup> Presumably this Bill took into account some of the submissions that had been received on the Exposure Draft, although these submissions were not made public. Curiously, the original Explanatory Memorandum made no mention of the Australian and New South Wales law reform commissions' *National Legal Response Report*<sup>76</sup> despite its obvious relevance to the legislation. The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report.<sup>77</sup> Submissions were sought and a one-day public hearing with invited witnesses occurred. The list of witnesses demonstrates the continuing gendered nature of the debate.<sup>78</sup> The Senate published its Report in August<sup>79</sup> and there were further Explanatory Memoranda (which referenced the commissions' report).<sup>80</sup> The resulting *Amendment Act* became operative in June 2012.

But the plethora of background material relevant to the *Amendment Act* is even broader than this direct consultation process. Many evaluations and reports had been commissioned and published since the shared parenting amendments commenced in 2006 and the Replacement Explanatory Memorandum claimed

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73 Robert McClelland, 'Exposure Draft: Family Law Amendment (Family Violence) Bill 2010' (Consultation Paper, Attorney-General's Department, 2010).

74 *National Legal Response Report*, above n 11.

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

76 Above n 11.

77 Selection of Bills Committee, Senate, *Report No 4* (2011).

78 Witnesses included representatives from the Lone Fathers Association Australia, Men's Rights Agency, Dads in Distress Support Services, Women's Legal Services Australia, Council of Single Mothers and their Children as well as official players such as the Family Court of Australia, the Attorney-General's Department and the Law Council of Australia: see Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Program* (8 July 2011) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/completed\\_inquiries/2010-13/family\\_law\\_familyviolence/hearings/080711.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/family_law_familyviolence/hearings/080711.htm)>.

79 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011).

80 Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth); Supplementary Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth). The Replacement Explanatory Memorandum and the Supplementary Explanatory Memorandum was tabled in the Senate on 13 October 2011 and 22 November 2011, respectively.

that the Bill responded to and drew from several of these.<sup>81</sup> After the tragic homicide of a young girl by her father in 2009 in the wake of parenting proceedings in the family courts, the federal government commissioned Professor Richard Chisholm AM to undertake a '[r]eview of legislation, practice and procedures relating to family violence in the family courts'.<sup>82</sup> Although a number of his recommendations were implemented in the *Amendment Act*, his report did not recommend any change to the definition of family violence.<sup>83</sup>

Therefore, one of the most influential documents in terms of the definition was the *National Legal Response Report*, which concluded that the existing definition was 'too narrow' and that it was 'important that the definition expressly recognise that certain types of non-physical conduct – including economic abuse and psychological abuse' may fall within a wider definition.<sup>84</sup> It is clear that the Commissions intended the definition they recommended to expand on the existing one, and the Replacement Explanatory Memorandum evinces an intention to 'cover a wide range of behaviour'<sup>85</sup> and 'encompass[] ... patterns of family violence and single events'.<sup>86</sup> The *Amendment Act* ultimately adopted a definition similar to the one recommended by the Commissions.<sup>87</sup> Through these amendments the *FLA* now defines 'family violence' in section 4AB as:

- (1) [V]iolent, 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):

81 See Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 1. The reports named include: Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Richard Chisholm, 'Family Courts Violence Review' (Report, Public Affairs Unit, Australian Government Attorney-General's Department, 2009) ('*Chisholm Review*'); Family Violence Committee, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Family Law Council, Australian Government Attorney-General's Department, 2009); Dale Bagshaw et al, Monash University, University of South Australia and James Cook University, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006* (Report, Australian Government Attorney-General's Department, 2010); Judy Cashmore et al, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Jennifer McIntosh et al, Family Transitions, *Post-Separation Parenting Arrangements and Developmental Outcomes for Infants and Children: Collected Reports* (Report, Australian Government Attorney-General's Department, Canberra, 2010); *National Legal Response Report*, above n 11.

82 Chisholm, above n 81, 18.

83 Ibid. Recommendations implemented included repealing the 'friendly' parent provision (s 60CC(3)(c)) and a problematic costs provision (s 117AB) which were reported to silence women from speaking about family violence they had experienced.

84 *National Legal Response Report*, above n 11, 277.

85 Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 5.

86 Ibid.

87 *National Legal Response Report*, above n 11, 280, Recommendations 4–6.

- 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 ...
- i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- j) unlawful[] ... [deprivation of liberty].<sup>88</sup>

This definition appears at first blush to address a legislative intent to present a broad definition, but it could be interpreted more narrowly than anticipated.

#### IV INTERPRETATION OF THE NEW DEFINITION

In analysing whether section 4AB of the *FLA* will be interpreted widely or narrowly, it is suggested that there are three issues that bear consideration: its structure, the meaning given to ‘coerces’ or ‘controls’ and possible conflation with the typology literature. These will be examined in turn.

##### A Interpretation Created by Structure

Professor Patrick Parkinson has succinctly explained the limitations of this definition created by the structure. Due to the drafting of section 4AB, the meaning and application of the words ‘coerces or controls’ or ‘causes the [person] to be fearful’ in sub-section (1) have critical significance to its interpretation:

The most important point to be noted is that the definition is contained entirely in sub-section (1). Sub-section (2) provides illustrations of conduct that may fall within the definition, but evidence of conduct that could fall within one of the examples given in subsection (2) does not mean, *per se*, that the definition is satisfied.<sup>89</sup>

In other words, to constitute family violence as now defined, it is mandatory that there be coercion, control or fear. If at least one of those features is not present, abusive behaviour is just that – abusive behaviour – not ‘family violence’. It is hard to predict how those pre-requisites will affect the interpretation of the section. Perhaps they will encourage people to describe non-physical abusive conduct they have experienced, informed by the wideranging behaviour described in section 4AB(2) examples, and thereby extend the legal

<sup>88</sup> *FLA*. Some of these examples have been summarised.

<sup>89</sup> Patrick Parkinson, ‘The 2011 Family Violence Amendments: What Difference Will They Make?’ (2012) 22(2) *Australian Family Lawyer* 1, 5.

understanding of family violence. Justice Strickland<sup>90</sup> has undertaken extra-curial research on the effects of the 2011 amendments. In his survey conducted with registrars, 31 per cent thought that family violence allegations were being made more frequently in affidavits filed in the family courts since the changes because of the expanded definition of family violence. They reported that there were more allegations of financial and emotional abuse and psychological and controlling behaviour than purely physical abuse.<sup>91</sup>

In the case of *Carra & Schultz*,<sup>92</sup> to which the amendments apply, Hughes FM was faced with the father's proposition that the mother had committed family violence by refusing to allow him to spend time and communicate with their six-year-old daughter, except through occasional telephone calls. This was based on the example contained in section 4AB(2)(i) of 'preventing [him] from making or keeping connections with his ... family'. Her Honour confirmed that only subsections (1) and (3) formed the operative part of the section and suggested that the example was 'directed at' situations accompanied by coercion or control such as 'keeping [a person] ... in a state of social and/or emotional isolation by cutting them off from family and friends.'<sup>93</sup> She found no evidence that the father was 'coerced, controlled or felt fearful'.<sup>94</sup> This seems to be a useful invocation of the pre-requisites that has prevented a spurious claim from achieving credibility.

But it may be that these required features would present an evidentiary hurdle too high for some victims, negating the legislative intent. Where behaviours in the list of examples are proved to have occurred but the victim cannot prove that the features of coercion, control or fear were also present, then the behaviours were not 'family violence'.<sup>95</sup> The subtle nuances of coercion, control and fear may be problematic to prove given the difficulties some victims have disclosing family violence and the reported poor pleading of family violence, which means that 'legal advice and legal decision-making may often be taking place in the context of widespread factual uncertainty'.<sup>96</sup> How many times must a woman be hit before it will be accepted by a court that she fears being hit again? Or how much budgetary restriction must be exercised by a breadwinner before it will be found to be controlling?

At the time of publication of this article, there is little guiding jurisprudence regarding the interpretation of the *Amendment Act* because the amendments only

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90 Sitting member of the Full Court of the Family Court of Australia.

91 Justice Steven Strickland, 'A Judicial Perspective on the Australian Family Violence Reforms 12 Months On' (Paper presented at 50th Annual Conference of the Association of Family and Conciliation Courts, Los Angeles, California, 29 May – 1 June 2013) 24–5.

92 [2012] FMCAfam 930.

93 Ibid [7].

94 Ibid.

95 The 2006 requirement for the fear to be 'reasonable' has been removed. This raises the possibility that the second aspect of the definition may be interpreted slightly differently, with a more subjective approach.

The ALRC Report noted that the Chisholm Review stated that the 'correct interpretation' of the reasonableness requirement in the old section took context into account in any event: *National Legal Response Report*, above n 11, 279.

96 Moloney et al, above n 20, viii.

apply to proceedings filed after 7 June 2012. Therefore, most of the available judgments relate to interim hearings where the evidence had not been tested. *Longer & Longer*<sup>97</sup> is a final decision in a case filed before the commencement date. Federal Magistrate Terry correctly noted that, therefore, the old law applied and used it to determine that the father had committed family violence and the mother had potentially done so too.<sup>98</sup> But she also gave judicial attention to the concepts of coercion and control, which is instructive given that the amendments had been in force for over eight months at the time.

The mother's allegations included a number of incidents in which the father had slapped her face, grabbed her hair and throat and pushed her on to a bed (after she threw cargo pants at him), and in 2009 he struck on her the side of the head, although it transpired that she had just pushed a computer lid down on his fingers during an argument.<sup>99</sup> She also described abuse of a more psychological nature and maintained that the father was 'a violent and coercive and controlling man.'<sup>100</sup> She claimed that he owned guns, would not allow her to put her name on bank accounts or drive the car, resented her studies and disconnected the internet when she had assignments due.<sup>101</sup> She said he belittled her, calling her 'stupid, lazy selfish, person with no morals'.<sup>102</sup> The father admitted to the 2009 incident but also made allegations of violence by the mother, including throwing things, scratching him, slapping and punching him.<sup>103</sup> He said she called him 'a dickhead, prick, fuckwit and similar.'<sup>104</sup>

Although her Honour applied the old definition of family violence, she nevertheless harnessed the mother's argument about coercion and control, but reversed it, holding that the father had *not* 'engaged in coercive or controlling violence or engaged in a reign of terror to get his own way'.<sup>105</sup> This was despite accepting that he was a 'rigid' man who would have been difficult to live with.<sup>106</sup> In this case it is likely that both parties committed family violence under the old definition, but there is arguably a difference in the nature of their violence that suggests that, under the new law, only the father's behaviour might be seen to have those required features of coercion, control or fear. Instead, those features were used to find that the father's behaviour was not in that category. Taken to its logical conclusion, this would result in a finding that the behaviour was not family violence under the new section, unless the behaviour was proved to have caused fear.<sup>107</sup>

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97 [2013] FMCAfam 257 ('*Longer*').

98 *Ibid* [233].

99 *Ibid* [67].

100 *Ibid* [60].

101 *Ibid* [68], [69].

102 *Ibid* [71].

103 *Ibid* [75], [76].

104 *Ibid* [78].

105 *Ibid* [96].

106 *Ibid* [97].

107 In Part V of this article, the unacknowledged role of the typology literature in the case will be canvassed.

The 2010 Exposure Draft had proposed quite a different structure. There was no overarching requirement of coercion, control or fear, commencing with a list of behaviours that fell within the definition:

*family violence* means behaviour by a person (the *first person*) towards a member of the person's family (the *second person*) that:

- (a) causes death or personal injury; or
- (b) is an assault; or
- (c) is a sexual assault, or another form of sexually coercive behaviour; or
- (d) torments, intimidates or harasses the second person, including (for example) where that effect on the second person is caused by:
  - (i) repeated derogatory taunts, including racial taunts; or
  - (ii) intentionally causing damage to, or destruction of, property; or
  - (iii) intentionally causing death or injury to an animal ...<sup>108</sup>

It was only after this list that the requirement for coercion and control became an essential feature in a further sub-section which contained a range of behaviours such as denying financial autonomy and support, social isolation and deprivation of liberty. Behaviour that caused fear was a separate item again.<sup>109</sup> This shape for a definition is quite similar to some of the definitions contained in state domestic violence protection order legislations. For example, the Victorian model, which was often referred to positively by respondents to the *National Legal Response Report*,<sup>110</sup> lists behaviour which is physically or sexually, emotionally or psychologically, or economically abusive,<sup>111</sup> as separate items from behaviour that 'is coercive' or 'in any other way controls or dominates the family member and causes [them] to feel fear for the safety or wellbeing of [themselves or another]'.<sup>112</sup>

But between the 2010 Exposure Draft and the *Amendment Act*, there was a significant change to the definition that seems to have been influenced by the *National Legal Response Report*. The Commissions first reported on their consultations regarding definitions of family violence for state domestic violence protection order legislation and, given the strong support for consistency across state and federal laws, those consultations were also considered in respect of the *FLA*. In terms of the nature of the definition '[t]here was overwhelming support' for an approach that included the idea that family violence is behaviour that 'coerces, controls or dominates' or causes fear to a family member.<sup>113</sup> Stakeholders considered these words would make the definition more inclusive, ensuring that 'all aspects of an abusive relationship are caught by the legislation'.<sup>114</sup>

108 Exposure Draft, Family Law Amendment (Family Violence) Bill 2010 (Cth) 3–4.

109 McClelland, above n 73, 14.

110 *National Legal Response Report*, above n 11, 274.

111 *Family Violence Protection Act 2008* (Vic) ss 5(1)(a)(i)–(iii).

112 *Family Violence Protection Act 2008* (Vic) ss 5(1)(a)(v)–(vi).

113 *National Legal Response Report*, above n 11, 207.

114 *Ibid* 208. This comment was made regarding state legislation but the Commissions carried these ideas into their work on the *FLA*.

It was also suggested that the context for such violence should be explicit, particularly as ‘legislative definitions are progressively broadened’.<sup>115</sup> Professor Parkinson strongly supported this approach because he was concerned about any definition that created ‘discrete categories of violence provable by reference to specific incidents or behaviours outside’ of such a context, noting the significant ‘net-widening effects’.<sup>116</sup> Professor Chisholm later echoed these sentiments. Commenting on the 2010 Bill (which was similar to the 2010 Exposure Draft), he explained that the lack of an ‘overarching requirement, for example that the behaviour is used to coerce or dominate, or that it causes fear or apprehension’ meant that the definition ‘includes all sorts of things that are not sensibly regarded as family violence.’<sup>117</sup>

By the time the 2011 Bill was under consideration by the Senate Legal and Constitutional Affairs Legislation Committee, the definition was the one that would be inserted in the *Amendment Act*. Professor Parkinson put forward new words which he suggested incorporated ‘an element of intent to address the perceived ambiguity of the proposed phrase, “coerces or controls”’.<sup>118</sup> In arguing against this idea at the Senate hearings, the representative from Women’s Legal Services Australia explained that:

What [we are] really trying to do by emphasising that connection between *coercion* and *control*, and *fear*, ... is to attempt to define and obtain a nuanced understanding of what is family violence. As legal professionals working within the court system, we often see cases where the court grapples to clearly define or understand what is family violence.<sup>119</sup>

It is possible that there were two distinct and almost opposite sets of reasons for supporting this overarching framework. The family violence advocates and other service providers were seeking a more *inclusive* definition that captured the non-physical, often deeply traumatic types of abuse perpetrated, while some lawyers and academics were seeking to be *exclusive*: to ensure that some types of violence that might occur in a family were not caught.<sup>120</sup> It is clear though, that generally, respondents did not want every instance of abusive behaviour to be captured and agreed that coercion and control are often the characteristics that transform abusive behaviour in the family into something very damaging to family members.

It is suggested, however, that the pre-conditions of coercion, control or fear, may have set the bar higher than many anticipated. Perhaps even some of those

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115 Ibid 209, citing Jane Wangmann, *Submission FV 107* (25 June 2010).

116 Ibid, citing Patrick Parkinson, *Submission FV 104* (5 June 2010).

117 Richard Chisholm, ‘Legislating about Family Violence: The Family Law Amendment (Family Violence) Bill 2010’ (2010) 24 *Australian Journal of Family Law* 283, 291. He provided examples such as a parent injuring a child in a motor vehicle accident: at 290.

118 Senate Legal and Constitutional Affairs Legislation Committee, above n 77, 37. This suggested definition was ‘*family violence* means aggressive, threatening or other such behaviour by a person that is *intended* to coerce or control a member of the person’s family (the *family member*), or that causes the family member to be fearful’ (emphasis added).

119 Ibid (emphasis added).

120 For discussion, see *ibid* 32–9.

who supported that wording had not completely anticipated what it might mean for those concepts to become an essential feature within a legal definition. Whatever kind of abuse is being described by a victim of family violence, coercion, control or fear will also have to be deposed to in affidavits, described to family report writers and other experts and portrayed via the challenging medium of oral testimony, including cross-examination. As *Longer* demonstrated, this may be difficult for some victims of family violence.

### B Meaning Given to ‘Coerces’ or ‘Controls’

Many of the supporters of the words ‘coerces’ and ‘controls’ in the definition were no doubt drawing on a 30-year history of an understanding that domestic and family violence is much more than physical violence. Use of the phrase ‘coercive control’ stretches back to Rebecca and Russell Dobash in Scotland in the 1970s. Their early writings on family violence derived from their research as the first refuges for ‘battered women’ were opening.<sup>121</sup> Dobash and Dobash could find very little literature on the topic so they started talking to the women establishing these refuges and the original residents. In their classic text published in 1979, *Violence against Wives: A Case against the Patriarchy*,<sup>122</sup> they asserted that:

The beginning of an adequate analysis of violence between husbands and wives is the consideration of the history of the family, of the status of women therein, and of violence directed against them. This analysis will substantiate our claim that violence in the family should be understood primarily as *coercive control*.<sup>123</sup>

So is this how the new definition will be read, in this context of a deeply held understanding of the subtleties of family violence? Will it bring into play for judges and others in the family law system what Evan Stark describes as the ‘micro-regulating’ of a partner’s behaviour?<sup>124</sup> The language of coercion and control was employed by people working in the area to educate victims, practitioners, policymakers and the community generally about the more insidious, hidden aspects of family. Its aim was to *include* families, to allow women to identify that the abuse they lived with was family violence, and therefore unacceptable. But as part of a legislated definition it may, ironically, *exclude* victims who cannot prove coercive or controlling behaviour or fear, even where there has been violence or abuse.

As noted, it is not yet possible to assess how the new definition is actually being interpreted and applied in the courts, lawyers’ offices and the rooms of other professionals in the family law system. The concerns expressed in this

121 Rebecca Emerson Dobash and Russell P Dobash, ‘Wives: The “Appropriate” Victims of Marital Violence’ (1978) in Raquel Kennedy Bergen, Jeffrey L Edleson and Claire M Renzetti (eds), *Violence against Women: Classic Papers* (Pearson Education, 2005) 184 <[www.mincava.umn.edu/classics](http://www.mincava.umn.edu/classics)>.

122 R Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (Free Press, 1979).

123 Ibid 15 (emphasis added).

124 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 229.

article may prove unfounded, however, even when affidavits detail conduct which is consistent with the section 4AB examples, they may not always tell the story sufficiently deftly for judges to find that coercion, control or fear existed.

### C Possible Conflation with the Typologies

It may be that the new definition sets up a more critical problem of interpretation than is created simply by its structure. The meaning could be even narrower and more exclusionary if those words are not understood in a way that draws from the foundational discourse around coercion and control and instead are inscribed with the specific meaning in the typologies literature. As discussed, the typology literature has permeated Australian jurisprudence,<sup>125</sup> professional training programs and the family courts' own *Best Practice Principles*.

Importantly the *National Legal Response Report* expressly rejected any connection between the typology literature and the definition, concluding that it was 'inappropriate for such typologies to be translated into legislative frameworks.'<sup>126</sup> Although it 'welcome[d] further research' of this nature it was mindful of the 'concerns that have been expressed about their relative under-development and potential for misunderstanding.'<sup>127</sup> Unfortunately, however, despite their misgivings about the literature, the definition recommended by the *Report*, and largely adopted by the government, mirrored the language of Kelly and Johnson – of coercive control – in the critical definitional sub-section.

The *Best Practice Principles* were amended in 2012 to take the new family violence amendments into account. Although they do not make a direct connection between the definition and the typology literature, as already noted, they use that literature and language to describe '[d]ifferent types of family violence'.<sup>128</sup> They also render it relevant to final order decision-making.<sup>129</sup> Lawyers and other professionals working in family law, who have read the typology literature and the *Best Practice Principles*, but not the *National Legal Response Report*, could understandably make a connection.

The potential of a link was given substance by Professor Parkinson in an article published in *Australian Family Lawyer* which is disseminated through the family law community, including to the almost 2500 diverse members of the Family Law Section of the Law Council of Australia. Parkinson stated that the 'definition derives from the now well-established understanding from social science research, that family violence is heterogeneous'<sup>130</sup> and went on to discuss various labels and descriptions of family violence from the typology literature.<sup>131</sup>

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125 Although it should be noted that there is a line of appellate authority, currently ending with *McGregor and McGregor* [2012] FamCAFC 69, which is critical of the use of social science research literature by judicial officers. For a discussion of these cases, see Rathus, above n 45.

126 *National Legal Response Report*, above n 11, 284.

127 *Ibid.*

128 Family Violence Committee, above n 46, 6–7.

129 *Ibid.* 19. This point is discussed in Part V.

130 Parkinson, above n 89, 6.

131 *Ibid.* 6–7.

He explained that Johnson has described the type of violence represented in the definition as ‘intimate terrorism’ (and cited a 2006 article of Johnson where that term was used).<sup>132</sup> He then equated this with coercive controlling violence.

Parkinson continued to merge the typology literature with the definition when he asserted that, if it had only referred to coercion or control, many other forms of family violence may be excluded because, on his account:

The majority of the violence revealed in community studies is not coercive controlling violence, but what researchers have variously classified as ‘conflict instigated violence’, ‘common couple violence’, ‘situational couple violence’ ‘interactive violence’ or, ‘violence driven by conflict’.<sup>133</sup>

This suggests that, in Parkinson’s view, only family violence which accords with Johnson’s version of coercive controlling violence could fall within the first aspect of the section 4AB(1) definition and it is only the second aspect – fear – that may allow Johnson’s three other types of family violence to be included. But Parkinson also surmised that perhaps ‘wherever there is coercive, controlling violence, there is also conduct that induces fear, in which case the new definition is no more expansive than the old.’<sup>134</sup> This does not seem to align with the intentions of the legislature.

But Parkinson is not the only informed commentator merging the definition with the typologies. In his insightful paper reporting on his research, Justice Strickland opines that:

The expanded definitions are having an effect on the way in which judicial officers are treating allegations of violence. That in my view is due in no small part to the statutory importation of typologies of violence, which has been achieved through the inclusion of reference to ‘coercion’, ‘control’ and ‘fear’.<sup>135</sup>

And Professor Chisholm delivered a seminar at the Australian Institute of Family Studies entitled *Family Law and Family Violence* in which he examined the *Amendment Act*. Analysing the use of the words ‘coerces and controls’ in section 4AB(1) he said:

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132 Ibid 7; Michael P Johnson, ‘Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence’ (2006) 12 *Violence against Women* 1003.

133 Parkinson, above n 89, 6.

134 Ibid 8. His position seems to be that wherever there is coercive and controlling violence there will always be fear but sometimes there can be fear without coercive and controlling violence. So the ‘fear’ factor of s 4AB(1) adds a dimension to the 2011 definition over just coercive control but the whole new definition may be no wider than the 2006 one which relied on causing fear. It is also notable that the old section required the person ‘reasonably to fear for, or reasonably to be *apprehensive* about, his or her personal wellbeing or safety’ while the new section makes no reference to apprehension (emphasis added). So although the reforms have removed the controversial qualifier of reasonableness, fear may be harder to prove than apprehension – which is presumably something less than fear. Thanks to one of my reviewers for pointing this out.

135 Strickland, above n 91, 44.

I think that's a deliberate language which reflects ... the literature on things like coercive, controlling violence or intimate terrorism, different scholars have used different terms and it seems that the definition intends to distinguish that from what is sometimes called, 'Couples violence'. I know these definitions are greatly contested but it seems to me that ... some distinction along those lines is what the Act has in mind.<sup>136</sup>

It is regrettable that a conflation of the typologies with the definition has been invited when it was expressly rejected by the Commissions and implicitly by the legislature when it largely adopted that definition.<sup>137</sup> This literature can become a lens through which judicial officers examine the evidence and understand and apply the law. When used in this way it may be quite dangerous for some victims of family violence in the family law system, particularly when it excludes their family experience as a site of family violence.

Lucinda Finley has hypothesised that law is a 'reductionist language' because of its 'dichotomous, polarised, either/or framework' which 'does not easily embrace complexity or nuance. Something either must be one way, or another.'<sup>138</sup> The law's propensity for dealing with categorisation in a blunt manner makes the typologies inappropriate for direct use in understanding the definition. But the mirrored language from the typology literature in the definition may tempt professionals to make a connection and, if this occurs, the definition may be largely restricted to Johnson's coercive controlling violence which is arguably no wider than the previous definition, narrower than the government intended and would exclude some families.<sup>139</sup> This is an outcome that family law professionals should guard against.

## V DANGERS OF USING TYPOLOGIES TO INTERPRET OR UNDERSTAND THE LAW

Five key reasons have been identified for discussion to demonstrate why it is problematic to draw the typologies into interpreting the law:

- there is a lack of clarity about whether the typologies are just different labels or a graduating scale;
- the categories create an exclusionary approach;
- their parameters are unclear;
- they are debated; and
- the consequences are significant.

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136 Richard Chisholm, 'Family Law and Family Violence' (Transcript of presentation delivered at the AIFS Seminar Series, Melbourne, May 2013) <<http://www.aifs.gov.au/institute/seminars/2013/chisholm/audio.html>>.

137 There is no mention of the typology literature in any of the three Explanatory Memoranda.

138 Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 902.

139 Particularly if Parkinson is right and where there is coercive control there is always fear.

The analysis below begins to unpack these reasons and consider some of the possible dangers of these categories as a basis for legal decision-making.

### A Are the ‘Types’ Just Different Labels or Are They a Graduating Scale?

An important question raised by use of the typology literature in parenting cases is whether Johnson’s categories are simply different labels for different kinds of family violence or whether they represent a graduating scale of seriousness. It is suggested that, although the typology scholars themselves may say that all the kinds of violence can be serious and cause injury or other trauma, there is a perception in the family law community in Australia that coercive and controlling violence is at the top of a scale. It must be remembered that the descriptor being used by Johnson for ‘coercive and controlling violence’ when he was cited in the 2007 *AIFS Report* was ‘intimate terrorism’.<sup>140</sup> Further, much of the typology literature uses the term ‘common couples violence’ for ‘situational couple violence’.<sup>141</sup> While the terms ‘intimate terrorism’ and ‘coercive controlling violence’ evoke images of very serious violence, the words ‘common’, ‘situational’ and ‘couples’ paint a seemingly less dangerous picture. This confusion about levels of seriousness is an aspect of the international translation process which has not been much explored in the critical debate.

The real concern is that the relevance of both situational couple violence and separation-instigated violence to parenting orders may be underestimated. These forms of violence can be very serious. According to Johnson, there is a wide scope of behaviour contained within the category of situational couple violence – a long continuum of violence from one single incident to ‘chronic and severe’ violence.<sup>142</sup> It is also well documented in the family violence literature that separation is one of the most dangerous times for women.<sup>143</sup> As noted, the minimising term ‘situational couple violence’ may conceal potential risks, while ‘separation-instigated violence’ may be misunderstood by some judges as being aberrant, relating to the ‘unhappy and conflicted situation of the parties of the time’ and be unlikely to be repeated.<sup>144</sup> If situational couple violence and separation-instigated violence are used as categories but misconceived as less

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140 Moloney et al, above n 20, 6.

141 Parkinson, above n 89, 6.

142 See Michael P Johnson, ‘Distinguishing among Types of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence’ (Speech delivered at the Seminar on Typologies of Intimate Partner Abuse: Theory and Practice, Centre for Domestic and Family Violence Research, Brisbane, February 2013).

143 See, eg, Jenny Mouzos and Catherine Rushforth, ‘Family Homicide in Australia’ (2003) 255 *Australian Institute of Criminology – Trends and Issues in Crime and Criminal Justice* 3; Jane Wangmann, ‘Different Types of Intimate Partner Violence? A Comment on the Australian Institute of Family Studies Report Examining Allegations of Family Violence in Child Proceedings under the Family Law Act’ (2008) 22 *Australian Journal of Family Law* 123, 137; Martha R Mahoney, ‘Legal Images of Battered Women: Redefining the Issue of Separation’ (1991) 90 *Michigan Law Review* 1.

144 *McAllister & Day* [2012] FMCAfam 863, [179] (Brown FM).

serious than coercive controlling violence, inappropriate and unsafe parenting orders may be made.

### B Categories Create an Exclusionary Approach

It will be recalled from Part II that Pence and Dasgupta, from the Duluth Domestic Abuse Intervention Project, developed a set of five typologies. As people who worked at the intersection of people's experience of violence and the legal system, they were acutely aware of the power of naming and understood the consequences of inclusion and exclusion:

Putting 'name' to an event, action, experience, or idea is a powerful act. 'Naming' is an act of defining and authenticating that provides the person or group, which has successfully conducted the naming, with the authority to say what something is and what it is not.<sup>145</sup>

But naming and categorising is precisely what the new definition does, particularly if conflated with the typology literature. Once categorised, consequences flow in terms of parenting orders that will affect and regulate real lives as lived by children, mothers, fathers and other family members. The notion of typologies presents an almost irresistible magnet to some judges. Deciding which description or label applies to a thing or an action is a recurring part of legal decision-making and thinking. Is it a lease or a licence? Is it self-defence or provocation? Is she an employee or a contractor? But these are legal concepts and the typologies are social science ones.

As will be seen, the typologies offer judges alternative categories or labels for violence – perhaps attracting findings such as that the violence in a particular case could not be coercive or controlling because it is situational couple violence.

### C The Categories Themselves Are Unclear

Even the boundaries of the categories are unclear. The *National Legal Response Report* rejected the typology literature as a direct part of the definition because of concerns about the meaning and parameters of each category and the problem of mutual exclusivity, noting that 'the task of defining the typologies with any degree of certainty and precision appropriate for legislative application is fraught with difficulties' and that 'legislative inclusion of the typologies could lead to a rigid and artificial hierarchy and, ... misapplication'.<sup>146</sup> In her review of the typology literature, Wangmann cautioned that 'misapplication of the typologies could jeopardise safety or mean that people are provided with inappropriate interventions'. It should not be assumed 'that the typologies draw "bright lines"', rather cases will be difficult to categorise.<sup>147</sup>

At a practice level, Beth Tinning suggests that domestic violence workers will have to engage carefully with their clients about the abuse they have experienced 'to diminish possibilities of CCV [coercive controlling violence]

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145 Pence and Dasgupta, above n 19.

146 *National Legal Response Report*, above n 11, 284.

147 Wangmann, above n 52, 17.

being incorrectly assessed as separation-instigated violence or situational couple violence.<sup>148</sup>

#### D The Categories Are Debated

Although, as noted in Part II, Austin and Drozd recently suggested there is a ‘new consensus’ about the typologies,<sup>149</sup> many scholars offer variations to and cautions about this approach and others debate the parameters and exclusivity of the types. This has serious consequences for families in the family law system if this literature forms the basis of a parenting order, particularly if the violence has been inaccurately labelled or minimised.

It is not surprising that one area of debate is around the distinction between coercive controlling violence and situational couple violence, given the somewhat obvious similarities and rather subtle differences offered in the typology literature. Both involve physical violence and perhaps loss of control, anger and verbal abuse. The differences are about pattern, frequency and power. Allie Bailey raised the concern that perpetrators may claim that if there was any violence it was ‘situational couple violence’.<sup>150</sup> It will be up to the victim to establish that what they experienced was ‘intimate terrorism’ or coercive controlling violence.<sup>151</sup> She suggested that ‘[t]here is a danger that most allegations of violence will be scaled to a lesser categorisation ... particularly likely given the well-recognised difficulties for victims in providing evidence about domestic violence.’<sup>152</sup>

Leigh Goodmark’s recent account of how the legal system deals with domestic violence in the US notes that, while Johnson has some support amongst scholars, ‘others question whether what [he] labels situational couple violence is really just nascent intimate terrorism, measured before the perpetrator becomes controlling enough to be counted in that category.’<sup>153</sup> This would suggest that legal decision-making that relies on the typology literature might conclude that certain family violence is *only* situational couple violence whereas it is really coercive control in waiting.<sup>154</sup> This could influence the nature of the parenting order by minimising one parent’s potential for violence.

Victoria Frye et al conducted their own research into ‘the distribution of factors that characterise intimate terrorism and situational couple violence’,<sup>155</sup> which contradicted the view espoused in much of the typology literature. This

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148 Tinning, above n 41, 4.

149 Austin and Drozd, above n 15, 259. Despite this pronouncement, as discussed in Part II of this article, they went on to propose a new model.

150 Bailey, above n 51, 27. This was in response to the 2007 *AIFS Report* that discussed the typology literature.

151 *Ibid.*

152 *Ibid.*

153 Goodmark, above n 51, 39.

154 Although, as will be discussed, little is really known about situational couple violence, its impact on children and its potential relevance to parenting cases.

155 Frye et al, above n 51, 1286.

demonstrated both the problem of creating categories and the persistent, but debated, emphasis on the relatively high prevalence of situational couple violence in the typology literature.<sup>156</sup> Frye et al concluded that ‘there may not be as sharp a demarcation<sup>157</sup> between coercive controlling violence and situational couple violence ‘as has been proposed’.<sup>158</sup> There may be more of a ‘continuum’ where controlling behaviours, injury and violence escalation ‘are just three factors that characterise the various forms of IPV [intimate partner violence] that may evolve over time in the course of a relationship.’<sup>159</sup> On the issue of prevalence, they concluded that situational couple violence which involved ‘physical assaults but little or no control is the form of violence that occurs *least frequently* at the population level.’<sup>160</sup>

Despite doubts about prevalence in the critical scholarship, much of the typology literature continues to claim that situational couple violence is the most common type.<sup>161</sup> This risks the possibility that lawyers who learn this statistic will tend to assess violence described by their clients as falling into this category. It may dissuade lawyers from asking more probing questions to determine what really happened/s in this family. But it is quite possible that clients who require the formal intervention of the family law system and raise violence are more likely to have experienced coercive or controlling violence than situational couple violence. At least it seems possible that coercive or controlling violence would be more common amongst this group than in the general community. If genuine situational couple violence has erupted once or twice between members of a couple, they may not even mention it. The typology literature would suggest that they might not see it as relevant at all. They do not generally fear their partner.<sup>162</sup> So if violence is raised in a family law context, perhaps there is a greater likelihood that it is coercive or controlling violence than the typology literature generally suggests.

Finally, little research has actually been conducted into the features or dynamics of situational couple violence.<sup>163</sup> Although it is a named category, its impact on children is not understood. It is known, however, that even general parental conflict impacts on children, so it seems likely that situational couple violence will be distressing for children and may influence their sense of safety or security with either or both parents, particularly if it was at the serious end of the continuum. But an assessment of situational couple violence by a judge may

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156 It is said to be by Kelly and Johnson, above n 14; repeated by Parkinson, above n 88; Austin and Drozd, above n 15.

157 Frye et al, above n 51, 1286.

158 Ibid 1303.

159 Ibid.

160 Ibid (emphasis added).

161 See Johnson, above n 142, where he described situational couple violence as being ‘by far the most common type’: at slide 12.

162 Kelly and Johnson, above n 14, 485.

163 Johnson, above n 142. He acknowledged that little was known about situational couple violence at this stage.

misdirect them towards an order that largely disregards or downplays the violence.

### E The Consequences Are Significant

Those who write about typologies are aware that serious consequences could flow from misapplication. Kelly and Johnson note that a ‘central concern of women’s advocates’ is that this approach ‘will lead to the reification or misapplication of typologies and that battering will, as a result, be missed’,<sup>164</sup> but still insist that their concepts are relevant to parenting cases.<sup>165</sup> Federal Magistrate Altobelli has also noted the ‘potentially serious’ consequences of ‘inaccurate differentiation’:

At one end of the spectrum there is the risk of endangering victims and their children. At the other end there is the danger of unnecessarily restricting parental contact with children.<sup>166</sup>

The use of the typologies in final order decision-making is officially encouraged in the *Best Practice Principles*. They suggest that judges should consider the extent to which any family violence, which has occurred, exhibits any of the features of the Kelly and Johnson four types of violence, as well as a range of other matters,<sup>167</sup> as these will assist to ‘identify violence that represents a real threat to the wellbeing of children, including in relation to appropriate role modeling [sic]’.<sup>168</sup> This is presented as being relevant to designing orders that ‘will keep the victim and child safe’.<sup>169</sup> The disturbing corollary is that misapplication could place the victim and child at risk.

*Labine & Labine*<sup>170</sup> shows the interweaving of the typologies into reasons for judgment by a federal magistrate. Both parties had made allegations of family violence against the other at an interim hearing. Federal Magistrate Brown cited section 4AB(1) of the *FLA* and, after some discussion of other relevant sections, he explained that family violence ‘is not homogenous in its qualities and implications for children’.<sup>171</sup> He went on to suggest that it ranged from ‘impulsive behaviour’ arising out of a ‘stressful situation, such as relationship breakdown’ and claimed this is called ‘*situational violence*’,<sup>172</sup> to ‘the other end of the spectrum’ where ‘*coercive and controlling behaviour*’ is ‘more systematic and deliberate, arising from a clear power imbalance’.<sup>173</sup>

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164 Kelly and Johnson, above n 14, 478.

165 Ibid 493.

166 Altobelli, above n 44, 19.

167 The matters listed are whether the violence includes: the use of coercion and threats, intimidation, emotional abuse, financial control, the use of children as means of controlling one party, the use of tactics to isolate one party or whether the perpetrator attempted to minimise or deny the violence, or blame another party: Family Violence Committee, above n 46, 20.

168 Ibid 19.

169 Ibid.

170 [2012] FMCAfam 1398.

171 Ibid [116].

172 Ibid.

173 Ibid [118].

Federal Magistrate Brown is clearly reflecting the typologies literature although he does not directly use that term and it is unclear whether he has sourced his ideas from the literature itself or the *Best Practice Principles*.<sup>174</sup> It is also difficult to understand his classification of the first violence he described where he seems to have combined separation-instigated violence with situational couple violence.<sup>175</sup> His depiction of coercive controlling violence is insightful but it suggests that proof may be difficult. Although reluctant to make findings at an interim hearing, Brown FM recorded that the most recent family violence described by the wife was at the time of separation, that was ‘a difficult and emotional [sic] fraught period of time, for both parties.’<sup>176</sup> He therefore reasoned that it seemed ‘unlikely that either party will re-engage in a violent altercation with the other’.<sup>177</sup>

This was a complex case at an interim stage with serious allegations of alcohol abuse by each of the parents against the other as well as allegations of and admissions about chronic marijuana use by the father. But the presiding judge was drawn into categorising the violence to something less than coercive controlling violence and making interim parenting orders which reflected that. He may be right, but if he is not it will be difficult for the mother to shift that categorisation at any final hearing, and virtually impossible to do so in the negotiations that will follow the interim hearing in an effort to avoid trial.

Recalling the case of *Longer* (to which the amendments did not apply) discussed in Part IV, perhaps one reason why Terry FM was comfortable with her finding that the father had not used coercive and controlling violence was because the typology research had crept, apparently unremarked, into the proceedings. The family report was prepared by ‘Dr H, a Regulation 7 Family Consultant of considerable experience’,<sup>178</sup> and the Federal Magistrate cited part of Dr H’s report, which said ‘[i]n *common couples conflict violence* physical and psychological aggression occurs only in response to conflict[,] does not escalate and may not always be gendered.’<sup>179</sup>

This seemed to facilitate her Honour’s statement that the ‘overall picture painted by the evidence was more of couple violence than coercive and controlling violence and I need to consider what ramifications this has for the orders I should make.’<sup>180</sup>

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174 Or even Parkinson, above n 89. This lack of transparency about his Honour’s sources is similar to his approach in *Baranski v Baranski* (2012) 259 FLR 122, which was criticised by the Full Court of the Family Court: see Rathus, above n 45.

175 Although, arguably, if the separation was not the first violence, then perhaps violence at separation could be situational couple violence.

176 *Labine & Labine* [2012] FMCAfam 1398, [122].

177 *Ibid* [123].

178 *Longer* [2013] FMCAfam 257, [23].

179 *Ibid* [88] (emphasis added). ‘Common couple violence’ is another term for situational couple violence. It is not possible to tell from the available case report if Dr H directly referenced the social science literature.

180 *Ibid* [234].

Federal Magistrate Terry was implicitly presented with a *choice* between common couples violence (non-coercive and controlling) *or* coercive and controlling violence. The mother's violent behaviour would have fitted neatly into her Honour's understanding of common couple violence and this may have clouded distinct and separate consideration of the real nature of the father's violence.

*Maluka v Maluka*<sup>181</sup> (decided well before the 2011 *Amendment Act*) is a family law parenting case that went on appeal regarding the use of the typology literature by the trial judge. Justice Benjamin informed the parties that he intended to rely on a number of articles in reaching his decision and reconvened the court for submissions about this. One of the articles was the 2008 Kelly and Johnson piece.<sup>182</sup> The mother's counsel neatly encapsulated the uncomfortable reality of reliance on these categories when consequences flow, saying: 'this article is a tick a box: if this, then that; then that.'<sup>183</sup>

If this kind of family violence, then that kind of risk, then that kind of parenting order.

## VI CONCLUSION

The new legislative definition of family violence is steeped in a long history of gendered and social science debate. It has been crafted in an amendment package focussed on improving the family law system's response to family violence and is comprehensive and nuanced. But the role it will play will be dependent on how it is interpreted and that may be partly influenced by the interplay between the social sciences and the law. This may pose a problem because the theories that have arguably been transported into the law (intentionally or not) are contested, underdeveloped, changeable and represent a narrow band of the vast social science research on family violence.

It is ironic that language originally employed to educate people about the insidious non-physical aspects of family violence and to help victims, practitioners and policy-makers to recognise and understand it may play a role in narrowing its meaning. Its early aim was to *include* families, to allow women to identify that the abuse they have been living with is family violence, and therefore unacceptable. Undoubtedly the legislature intended the definition to broaden the conduct that would fall within its ambit, but the pre-condition of coercion, control or fear may have set the bar higher than many anticipated and act to *exclude* some family members who need protection.

It is argued that if the definition is interpreted through the lens of the typology literature it will operate in an exclusionary manner. A judge using this approach will endeavour to decide *which* category of family violence applies in

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181 (2011) 45 Fam LR 129.

182 Above n 14.

183 Ibid 145.

the case before them, and has four choices offered by the social science associated with the definition: *coercive controlling violence*, *violent resistance*, *situational couple violence* and *separation-instigated violence*. In fact social science offers many other ways to think about the violence. To confound matters, the *FLA* now defines just one of those categories as family violence. So if the judge decides that the violence is situational couple violence or separation-instigated violence, it is not within the definition of family violence unless the victim can prove that she or he was or is fearful.

There are real consequences for families that result from these decisions in terms of parenting orders. It is not suggested that judges will then simply dismiss or ignore the evidence about violence. It is still relevant to the children's best interests, but if the violence is not 'family violence' the case may progress and be determined differently than one found to involve family violence. Certain procedural provisions will not be triggered, it will not be possible to rebut the presumption of equal shared parental responsibility on the basis of family violence, there will be impacts on how the consideration of children's best interests are applied,<sup>184</sup> and it is also likely to influence parenting time and arrangements for hand overs.<sup>185</sup>

To understand the problems associated with judges applying this section, it is instructive to consider two scenarios: a judge who is thinking of those words within a context of reading about family violence over many years and a judge who is informed mainly by the typology literature for meaning. Having made a finding that certain abuse has occurred in a relationship the first judge may ask themselves: Are there some features of coercion and control that I can identify here that mean that the abuse is family violence? (Although, as noted, even this may be quite difficult to prove.) On the other hand the second judge may ask: Is the abuse I see here coercive control or is it situational couple violence, or violent resistance or separation-instigated violence? Those incidents did not seem too serious ... and haven't I read that situational couple violence is the most common?

Many scholars have analysed the difficulties of law merging and operating effectively with other disciplines.<sup>186</sup> If the definition of family violence in the amended *FLA* is interpreted as related to typology literature, the potential for misapplication or incorrect assessment poses a risk to women and children who have been subjected to abuse. As German theoretician Gunter Teubner says:

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184 *FLA* ss 60I, 67ZBB, 69ZN(5), 61DA(2), 60CC(2), (2A), (3)(j), 60CG, 69ZN(5).

185 Chisholm notes that there four ways that the definition of family violence is relevant: as part of the general principles and objectives, in the primary considerations, as a best interest consideration and as affecting to the operation of the system: see Chisholm, above n 117.

186 See, eg, John Dewar, 'Regulating Families' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 82; Michael King and Christine Piper, *How the Law Thinks about Children* (Arena, 2<sup>nd</sup> ed, 1995).

[S]ocial science constructs are not only transformed or distorted, but constituted anew, if they are incorporated into legal discourse. They are not imported into the law bearing the label 'made in science,' but are reconstructed within the closed operational network of legal communications that gives them a meaning quite different from that of the social sciences.<sup>187</sup>

Contemporary family law has been greatly enhanced by our knowledge from the social sciences, and the community has benefited from this. But while advances in the social sciences can and should continue to inform social policy and ultimately family law, this is not at all the same as the legislature (or judges) dipping into the huge potpourri of social science about family violence and pulling out the typology literature. Such particular ideas have a place as a part of the discussion about family violence across the disciplines but lawyers must be cautious about transporting social science language into the legal system or thinking that the same words have the same meaning in the law as in social science.

Hopefully this definition will open new conversations between clients and their lawyers, counsellors and family dispute resolution practitioners and between litigants and judges. Instructions, information and evidence about family violence may be differently explored because the reforms sent a clear message about the importance of this issue in family law. But there is already some confusion about the relevance of the typology literature to the definition and questions about the appropriate use of social science literature in the family law system have been raised at appellate level and by the publication of the *Best Practice Principles*.

Consideration should be given to a broad inquiry into the use of social science in the family law system. The community of practice needs to be consulted on how and when social science research should be used and how a wide range of materials can be disseminated so that one view in this contested discipline does not develop inappropriate prominence. There seems to be significant interest in this issue amongst family law practitioners of all disciplines and such an inquiry would be welcomed. There is a long way to go towards understanding the growing and changing relationship of family law with the social sciences, and the interaction between new definition and the typology literature may provide a measure of where we are.

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187 Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law and Society Review* 727, 749 (references omitted).