CHAPTER

5

FAMILY VIOLENCE

5.1 INTRODUCTION

The purpose of this chapter is to provide the background for understanding the relevance of family violence to family law, including an overview of the empirical evidence in relation to its nature, scope and extent. The chapter also includes an introduction to the way family violence is dealt with in the *Family Law Act 1975* (Cth) (*FLA*) following legislative amendment in 2012, and an overview of the purpose and form of the other relevant state- and territory-based legal frameworks.

Underpinning this chapter, and its location early in the book, is the fact that an understanding of the issues raised by violence and abuse is critical to any discussion of law and policy relating to families. In the past three decades, empirical research has begun to establish the scope and nature of the different kinds of abuse that occur in many families. More recently, these issues have become prominent on the policy agendas of governments

at both state and federal levels.[1] Family violence has also become a central focus in the development of policy and program responses in family law, following three reports that were released in 2010 which highlighted the extent to which family violence and safety concerns for children and adults are relevant among separated parents[2] and the need to strengthen systemic responses to these issues.[3]

People affected by family violence and/or child abuse are the core client base of the formal parts of the federal family law system: family dispute resolution services, lawyers and courts.[4] Family violence and child abuse, which frequently occur together, are dealt with by multiple and intersecting—and at times conflicting—legal frameworks.[5] Potentially, a woman who experiences family violence will find that up to five legal frameworks are relevant to her situation. State and territory law (in various statutes and through common law principles) may come into play to address immediate safety (civil protection orders); prosecution of the perpetrator; compensation through victim of crime schemes aimed at providing access to financial recompense via a state fund;[6] compensation or damages from the perpetrator through private civil actions (uncommon in practice); and child protection legislation if she has a child who is directly or indirectly exposed, to the extent that state and territory child protection departments may have cause to intervene. Federal law, principally the *FLA*, will be relevant when it comes to sorting out post-separation parenting and financial arrangements. In addition, interaction with a range of other federal laws and agencies—including Centrelink and the Department of Human Services—Child Support (DHS-CS)—may occur, with the family violence being relevant in a range of ways to the services she accesses. For example, when applying for benefits (Family Tax Benefit) through Department of Human Services—Centrelink, the family violence may be a factor that will relieve her of the obligation to seek child support from the perpetrator (11.3.3.1).

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1 Commonwealth Government, Department of Families, Housing, Community Services and Indigenous Affairs and Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children, Including the First Three-Year Action Plan*, Council of Australian Governments, Canberra, 2011 (National Plan). Attempts to develop a national response have a long history. For an example of the formulation of a national legal template for domestic violence laws, see Domestic Violence Legislation Working Group (Australia), *Model Domestic Violence Laws Report*, April 1999. See also Australian Government, Attorney-General's Department, The Family Law Violence Strategy, February 2006; Rob Hulls and Victorian Government, Department of Justice, *New Directions for the Victorian Justice System 2004–2014 Attorney-General's Justice Statement*, Department of Justice, Melbourne, 2004.

2 Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009, <www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf>.

3 Richard Chisholm, *Family Courts Violence Review*, Attorney-General's Department, Canberra, 2009; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, Attorney-General's Department, Canberra, 2009.

4 See, e.g., John De Maio, Rae Kaspiew, Diana Smart, Jessie Dunstan and Sharnee Moore, *Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Measures) Act 2011*, Australian Institute of Family Studies, Melbourne, 2014, <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/SRSP_Report.pdf>; Lixia Qu and Ruth Weston, *Parenting Dynamics after Separation: A Follow-Up Study of Parents Who Separated After the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2010.

5 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response, Final Report*, Australian Law Reform Commission and NSW Law Reform Commission, Sydney, 2010.

6 For an overview of these schemes see Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper 8, Australian Domestic and Family Violence Clearinghouse, 2010, <www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_8.pdf>, 28 April 2014.

Because of the Constitutional issues discussed in Chapter 2, power to legislate in relation to family violence does not fall purely within the purview of either the federal or state parliaments. As a result, the adoption of differing approaches among different governments at state, territory and federal levels, legislative policy in areas relevant to family violence and child abuse has developed in an uneven and piecemeal way. Since 2007, there has been significant work done through federally initiated and state- and territory-supported processes to bring policy approaches to both family violence and child abuse closer into national alignment, culminating with the Council of Australian Governments endorsing the National Plan to Reduce Violence against Women and Their Children (National Plan) in February 2011.[7]

From 2010, the need to improve responses to parents and children affected by violence has become a priority in the federal family law sphere, through legislative amendments (the *Family Law Amendment (Family Violence and Other Matters) Act 2011* (Cth): 5.7.1) intended to place increased emphasis on identifying and responding to concerns about family violence and child safety[8] and program developments (for example, coordinated family dispute resolution[9]) aimed at providing services developed specifically for the needs of this client group. Attention has also been directed towards ensuring that more effective processes for screening for family violence are applied across the family law system, through the development of a family violence professional development package (AVERT)[10] and a screening risk and risk assessment tool intended to be applied by professionals across the family law system.[11] Our discussion suggests, however, that despite positive change there is still much work to be done in improving awareness of and responses to family violence.

5.2 RECENT DEVELOPMENTS

Recent attempts to measure the cost of family violence are a reflection of greater concern at the level of government policy and growing awareness of the effects that violence and abuse in families have on the community at large. In 2002–03, Access Economics estimated the costs of family violence in Australia in that financial year to be $8.1 billion.[12] Projections based on the Access Economics methodology produced by KPMG in 2009 estimated that, unless the incidence of family violence is reduced, costs to the Australian economy in

7 The report that led to the endorsement of the National Plan was: National Council to Reduce Violence against Women and Their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children*, 2009–2021, Department of Families, Housing, Community Services and Indigenous Affairs, Canberra, 2009.

8 Commonwealth Parliament, *House of Representatives, Explanatory Memorandum, Family Law legislation Amendment (Family Violence and other Measures)* Act 2011, Commonwealth Parliament, Canberra, 2011.

9 See, e.g., Rae Kaspiew John De Maio, Julie Deblaquiere and Briony Horsfall, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases: Final Report*, Australian Institute of Family Studies, Melbourne, 2012.

10 AVERT Family Violence, <www.avertfamilyviolence.com.au>.

11 Jennifer McIntosh and Claire Ralfs, *The DOORS Detection of Overall Risk Screen Framework*, Attorney-General's Department, Canberra, 2012.

12 Access Economics, *The Cost of Domestic Violence to the Australian Economy: Part 1*, Commonwealth of Australia, Office of the Status of Women, Canberra, 2004, p vii.

2021–22 will be $15.6 billion.[13] These cost estimates take into account pain, suffering and premature mortality; health system costs; production costs from absenteeism; consumption costs; administrative costs based on the justice system; therapeutic support needs created by family violence; and the costs related to the payment of government benefits.[14] The bulk of the cost burden, reflecting estimates for pain, suffering and premature mortality, is borne directly by victims ($8.1 billion).[15] In 2004, a VicHealth Report found that 'intimate partner violence' (the terminology adopted in the report) is the leading contributor to death, disability and illness in Victorian women aged 15–44 years, being responsible for more of the disease burden than many well-known risk factors such as high blood pressure, smoking and obesity.[16]

In 2010, the National Plan to Reduce Violence against Women and Their Children (National Plan) was agreed to by the Commonwealth Government and all state and territory governments. The National Plan to Reduce Violence against Women and the Children came to fruition through a Council of Australian Governments process. It sets out 'national targets' for action in six areas: community safety; respectful relationships; strengthening Indigenous communities; effective service responses for women and children experiencing violence; effective justice system responses; and developing strategies to change perpetrator behaviour and hold perpetrators to account. A 12-year time frame for implementing actions to support the targets is set out in the National Plan, with the high level goals of reducing the extent to which family violence and sexual assault occur.

The National Plan developed out of work done by an expert group convened by the Federal Government in 2007, the National Council to Reduce Violence against Women and Their Children,[17] which was tasked to develop strategies to reduce violence against women and children. This Council's report, *The Time for Action*,[18] highlighted the fact that 'separation from the perpetrator of violence and abuse is a primary safety strategy advocated by child protection workers who sometimes threaten removal of children from the home if action to separate is not taken. Issues of family violence and child abuse are therefore central, not peripheral, issues in the family law area'.[19] Together with other significant reports, including *The Family Courts Violence Review* by The Honourable Professor Richard Chisholm (*Family Courts Violence Review*) and the Family Law Council's *Improving Responses to Family Violence in the Family Law System* (FLC, *Improving Responses*),[20] this work has created the impetus for enhancing the family law system's ability to identify and respond to family violence. Among the measures identified as necessary in these reports

13 The KPMG estimates were produced to support the work of the National Council to Reduce Violence against Women and Their Children; National Council to Reduce Violence against Women and Their Children, above n 7, p 77.

14 Access Economics, above n 12, pp 6–7.

15 KPMG, above n 13, p 8.

16 Victorian Health Promotion Foundation, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence*, Victorian Health Promotion Foundation, Carlton South, 2004, p 10.

17 National Plan, above n 1, p 4.

18 National Council to Reduce Violence against Women and Their Children, above n 7.

19 ibid., p 101.

20 Richard Chisholm above n 3; Family Law Council, above n 3. The *Family Courts Violence Review* was instigated after Darcey Freeman (age five) was murdered by her father in January 2009, p 18.

were better screening and identification measures for family violence cases, better legislative support for disclosure of concerns about family violence and child safety, and better coordination among the different services that women and children affected by family violence engage with.

The work of the National Council to Reduce Violence against Women and Their Children gave rise to two further significant pieces of analysis by the Australian Law Reform Commission (ALRC). One report considered the intersection of legal frameworks specifically dealing with family violence at federal, state and territory level (the 2010 ALRC *Family Violence* report).[21] The other examined how family violence was dealt with in a range of other Commonwealth laws, such as those involving social security, migration and child support (the 2011 ALRC *Family Violence and Commonwealth Laws* report).[22] The ALRC *Family Violence* report addresses the fragmentation of frameworks dealing with family violence across states and territories. Expanding on a theme explored in the first edition of this text, it highlighted the implications of the operation of discrete silos dealing with different aspects of family violence in different ways and for different purposes from the perspective of those using the system:

> the problems faced by victims require engagement with several parts of the system. Consequently ... these people could be referred from court to court, and agency to agency, with the risk that they may fall into the gaps in the system and not obtain the legal solutions—and the protection—that they require.[23]

In order to address the gaps and fragmentation that make the system difficult to use from a client perspective, the ALRC made 187 separate recommendations[24] underpinned by a conceptual approach based on four principles: seamlessness, accessibility, fairness and effectiveness.[25] Some of these recommendations have been implemented (see the discussion below) but many remain under consideration.[26]

5.3 WHAT IS FAMILY VIOLENCE?

A core recommendation from the ALRC *Family Violence* report was to align definitions of family violence used in state and territory family violence frameworks and in the *FLA*, with the goal of moving towards 'a common interpretive framework' to establish 'a shared understanding of what constitutes family violence across these legislative schemes'.[27] This principle was also a core element of the ALRC *Family Violence and Commonwealth Laws*

21 Australian Law Reform Commission and NSW Law Reform Commission, above n 5.
22 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks, Final Report*, Australian Law Reform Commission, Sydney, 2011.
23 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 52.
24 ibid., p 49.
25 ibid., p 53.
26 Australian Government, *Government Response to the Australian and NSW Law Reform Commission: Family Violence—A National Legal Response*, June 2013, <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/AusGovernmentResponsetotheAusandNSWLRCReportFamilyViolence-anationallegalresponse.PDF>, 28 April 2014.
27 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 55.

recommendations.[28] Also central was the Commission's preferred definition of family violence in ALRC *Family Violence*: 'family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful'.[29] This statement was to be supported by a non-exhaustive series of examples, namely physical violence; sexual assault and other sexually abusive behaviour; economic abuse; emotional or psychological abuse; stalking; kidnapping or deprivation of liberty; damage of property; causing injury or death to an animal; and causing a child to be exposed to family violence.

In 2012, amendments to the *FLA*[30] (the 2012 family violence amendments) were made that widened the definition along similar, though not identical, lines to those proposed by the ALRC Family Violence Report. Before discussing this new *FLA* definition in greater depth, it is necessary to acknowledge that contemporary definitions of family violence have behind them debates that have extended over decades regarding the appropriate terminology to describe violence that is perpetrated within families and intimate relationships. Indeed, the label applied to such violence has been a key issue in feminist struggles to bring it out of the shadow of the private sphere, where historically it remained as a vestige of the era when husbands had the right to use physical force to discipline not only their children but also their wives.[31] According to feminist arguments, the historical lack of visibility of such violence in public discourse, in policy and in the legal system served to reinforce the gendered imbalances in power that its physical enactment in private relationships perpetuated.[32] Among the descriptors commonly applied in various contexts are 'family violence', 'domestic violence', 'family and domestic violence' and 'intimate partner violence' (a term particularly common in United States (US) psychological literature). Each of these terms is seen to have strengths and drawbacks. A central concern in developing and applying terminology has been to recognise that the behaviour being described occurs in the context of relationships—familial and intimate—but not to allow the words acknowledging this to suggest the behaviour is somehow less serious than violence that occurs in other contexts.

Two other features of developing understandings of family violence are also crucial to the material discussed in this chapter and the contemporary definitions described in this section. The first is that family violence is not a unitary phenomenon. Not only does it vary in form, intensity and impact, but the way it occurs and is experienced differs for different individuals and groups in society.[33] A significant influence on contemporary thought about family violence is a socio-ecological approach, which holds that violence occurs as a result of an interplay between a range of factors relevant at four levels: individual, family, community and society. In addition to gender, other issues arising from these four levels of

28 Australian Law Reform Commission, above n 22, p 11.

29 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 55.

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

31 Renata Alexander, *Domestic Violence in Australia: The Legal Response*, 3rd edn, Federation Press, Annandale, NSW, 2002, p 7.

32 See, e.g., National Committee on Violence against Women, *National Strategy on Violence against Women*, Commonwealth of Australia, Canberra, 1992.

33 See, e.g., Dale Bagshaw and Donna Chung, 'Gender, Politics and Research: Male and Female Violence in Intimate Relationships' (2000) 8 *Women against Violence: An Australian Feminist Journal* 4.

influence may be relevant to whether and how violence occurs in any particular context. These include biology, socio-economic status, culture, community values and individual characteristics such as mental ill-health and substance abuse.[34]

In Australia, this interplay between the four levels of influence can be seen in a range of contexts. Among the groups recognised to be at higher risk of experiencing family violence are Aboriginal and Torres Strait Islander women (see further below)[35] and young women.[36] Other groups for whom the experience of, and response to, family violence raises issues different from those of other women include women from culturally and linguistically diverse communities[37] and women with disabilities.[38] For all these groups, the experience of family violence varies, requiring policy and practice approaches geared to recognising the particular issues that arise for that group, acknowledging that experiences also vary within each group. A further context in which family violence has particular significance is that of relationship breakdown, and this is discussed further at 5.4.

The other significant feature of contemporary understandings of family violence is the centrality of power and control to the perpetration and impact of family violence. Family violence is recognised to be a means of asserting dominance and control within a relationship, with a variety of physical and non-physical mechanisms being used, including manipulation and denial of access to economic resources, and psychological manipulation (for example, repeated insults designed to cause low self-worth).[39] For some people, particular issues—such as citizenship status or sexual identity—may become levers of dominance in an abusive relationship. For immigrant women, their citizenship status may make them vulnerable to manipulation. An abusive partner may exploit this status. In a

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34 DG Dutton, 'An Ecologically Nested Theory of Male Violence towards Intimates' (1985) 8 *International Journal of Women's Studies* 404; Lori Heise, 'Violence against Women: An Integrated, Ecological Framework' (1998) 4 *Violence against Women*, 262; L Dahlburg and E Krug, 'Violence—A Global Public Health Program' in E Krug (ed.), *World Report on Violence and Health*, World Health Organization, Geneva, 2002, pp 3–21; World Health Organization, *Preventing Intimate Partner and Sexual Violence against Women: Taking Action and Generating Evidence*, World Health Organization, Geneva, 2010; Victorian Health Promotion Foundation, *Preventing Violence before It Occurs: A Framework and Background Paper to Guide the Primary Prevention of Violence against Women in Victoria,* VicHealth, Carlton, 2007; National Council to Reduce Violence against Women and Their Children, above n 7; National Plan, above n 1.

35 A Day, A Francisco and R Jones, *Programs to Improve Interpersonal Safety In Indigenous Communities: Evidence and Issues*, Issues Paper No. 4. Produced for the Closing The Gap Clearinghouse, Australian Institute Of Health and Welfare, Canberra and Australian Institute Of Family Studies, Melbourne, 2013, p 2.

36 Australian Bureau of Statistics (ABS), *Personal Safety Survey Australia 2005 (Reissue),* Catalogue no. 4906.0, ABS, Melbourne, <www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20%28reissue%29.pdf>, 29 April 2014, p 6; See also for sexual and physical violence: Anthony Morgan and Hannah Chadwick, 'Key Issues in Domestic Violence', *Research in Practice Summary Paper No. 7,* Australian Institute of Criminology, Canberra, <www.aic.gov.au/documents/5/6/E/%7B56E09295-AF88-4998-A083-B7CCD925B540%7Drip07_001.pdf> 30 April 2014; ABS, *Personal Safety Survey Australia 2012*, Catalogue No. 4906.0, ABS, Melbourne, available at <www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>.

37 See, e.g., Nafiseh Ghafournia, 'Battered at Home, Played Down in Policy: Migrant Women and Domestic Violence in Australia' (2011) 16 *Aggression and Violence Behavior* 207.

38 See, e.g., S B Plummer and P Findlay, 'Women with Disabilities' Experience with Physical and Sexual Abuse Review of the Literature and Implications for the Field' (2012) 13 *Trauma, Violence and Abuse*, 15 (originally published online 8 November 2011), available at <http://tva.sagepub.com/content/13/1/15.abstract>.

39 See, e.g., discussion in Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 188, 5.6–5.12.

same-sex relationship, threats to 'out' a partner to family, friends or in a work context may be a means of exerting control.

These understandings are reflected in the recently amended definition in the *FLA*, which was part of a series of legislative amendments designed to improve the family law system's response to family violence.[40] These amendments are discussed substantively in Chapters 6 and 8; however, the definition is introduced here, since it is relevant to the forthcoming discussion. The new definition in section 4AB reads:

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

The family violence definition in the *FLA* is applicable in any situation where the court is required to consider the relevance of violence. The main such contexts are applications for injunctions (under section 114 and section 68B), applications for parenting orders under Part VII, and property-related applications under Part VIII (spouses) and Part VIIIAB (de facto partners). Significantly, a history of family violence and/or abuse is relevant to some extent in determining the procedural pathway, as explained in Chapter 7 with cases involving such issues theoretically being exempt from compulsory family dispute resolution.[41]

As noted, the new definition reflects the contemporary knowledge base on family violence, recognising that a range of different behaviours can constitute family violence, including physical abuse, sexual abuse, emotional and psychological abuse, and behaviours designed to exert power by restricting the target's access to financial resources and social,

40 Commonwealth Parliament, Explanatory Memorandum, to the above n 8.
41 *FLA* s 60I(9); *Family Law Rules 2004* (Cth) r 1.05(2)(a).

familial and cultural resources. It differs from the previous *FLA* definition in several ways. First, it explicitly recognises non-physical forms of abuse. Second, it refers to behaviour designed to cause control, coercion or fear (rather than 'fear' or 'apprehension'). Third, it eliminates any explicit reference to the state of mind of the target (the previous definition required fear or apprehension to be felt 'reasonably' given the circumstances of the target). Fourth, it includes a non-exhaustive enumeration of examples of family violence, referring explicitly to behaviours that may or may not have been recognised as family violence under the previous definition, such as 'repeated derogatory taunts' where these result in fear, coercion or control, implicitly requiring consideration of the subjective state of mind of the target.

The new definition has several interrelated drivers. Most broadly, it is consistent with shifts in social attitudes, tracked by surveys examining social attitudes to family violence between 1995 and 2009.[42] The National Community Attitudes towards Violence against Women Survey found a significant change in community attitudes to non-physical forms of violence, which even in 1995 were viewed by a majority of the sample as family violence. In relation to 'criticising a partner to make them feel bad or useless', for example, agreement that this was domestic violence increased from 71 per cent of the sample in 1995 to 85 per cent in 2009.[43] The proportion of the sample agreeing that behaviours linked to control were domestic violence increased by 10 percentage points over the same period: 62 per cent affirming in relation to denial of money in 1995 compared to 72 per cent in 2009 and 74 per cent affirming in relation to controlling contact with family or friends in 1995 compared to 84 per cent in 2009. Empirical evidence also demonstrates that, often, physical and other types of abuse occur together, but that any of these forms may also occur independently of the others, as the discussion in the next section shows.

More narrowly, the new *FLA* definition responds to discussions in three of the significant analyses of policy and practice that have been produced in the past four years: the Family Courts Family Violence Review,[44] the ALRC *Family Violence* report[45] and the Family Law Council *Improving Responses Report*.[46] The latter two reports each put forward similar rationales for new definitions based on contemporary knowledge about the variety of forms family violence might take and the need to bring federal definitions into line with those applied in state- and territory-based family violence frameworks.[47]

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42 Research on social attitudes indicates that views within the community about family violence have shifted in recent decades and that attitudes that may be described as 'violence-supportive' are less prevalent than they were 15 years ago. The National Community Attitudes towards Violence against Women Survey 2009 involved 10,000 participants and was conducted by a consortium comprising VicHealth, the Social Research Centre, and the Australian Institute of Criminology. The findings of the survey, which build on surveys previously conducted with Victorian samples (2006) and national samples (1995) reveal shifts in several important areas: Kiah McGregor, *National Community Attitudes towards Violence against Women Survey 2009*, Project Technical Report, Australian Institute of Criminology, Canberra, 2009.

43 ibid., p 22.

44 Chisholm, above n 3.

45 Australian Law Reform Commission and NSW Law Reform Commission, above n 5.

46 Family Law Council, above n 3.

47 Australian Law Reform Commission above n 5, Chapter 6; Family Law Council above n 3, Rec 1.

Despite these imperatives for the new definition, some aspects of it have raised concern. In particular, the need to establish that the behaviour resulted in coercion, control or fear has the potential to operate in a limiting way. Depending on the approach taken by practitioners and decision makers, these elements may be difficult to establish from an evidentiary perspective, particularly since they may have no physical or external manifestation. In a detailed analysis of the definition and its drafting history, Zoe Rathus notes that two contradictory sets of aims were being pursued by family law system stakeholders in the processes that preceded the enactment of the legislation.[48] Family violence advocates and service providers were seeking an inclusive definition to capture non-physical types of abuse. In contrast, some academics and lawyers were concerned to avoid an overinclusive definition that would not cast the net so widely that less harmful behaviours would be captured. Paradoxically, each of the groups supported the framework on the basis that it met their concerns.[49] This underlines the potential for varying interpretations of the definition to be applied. Rathus suggests that 'the pre-conditions of coercion, control or fear may have set the bar higher than anticipated'.[50]

5.4 SCOPE, EXTENT AND THE SIGNIFICANCE OF CONTEXT

In recent years, the empirical evidence base on the occurrence of family violence has expanded significantly, providing better insight into prevalence and incidence than has been available before. This discussion provides an overview of recent empirical evidence on the prevalence of family violence among separated families and the extent to which it is sustained after separation. In order to expand on the point made earlier about the way violence varies according to context, the discussion also considers family violence in the specific contexts of relationship breakdown and Aboriginal and Torres Strait Islander communities.

In introducing the discussion of the empirical evidence base, however, it is also critical to acknowledge the complexities that arise in endeavouring to assess the extent of family violence and to understand its impact. These questions are methodologically and socially complicated. From a methodological perspective, the debates surrounding the measurement of family violence are longstanding and ever developing.[51] One of the key areas of debate arises from the way that gendered patterns in relation to perpetrating and experiencing family violence are reflected in some large-scale, quantitative studies when standard survey-based questions are asked. Such approaches tend to produce results suggesting that men and women perpetrate violence to a similar extent; however, what is often missing from

48 Zoe Rathus, 'Shifting Language and Meaning between Social Science and the Law: Defining Family Violence' (2013) 36 (2) *University of New South Wales Law Journal*, 359.

49 ibid., 376.

50 ibid., 376.

51 Dale Bagshaw and Donna Chung, above n 33; Kelsey Hegarty, Robert Bush, Mary C Sheehan, 'The Composite Abuse Scale: Further Development and Assessment of Reliability and Validity of a Multi-Dimensional Partner Abuse Measure in Clinical Settings' (2005) 20 (5) *Violence and Victims*, 529; Marion Hester, *Who Does What to Whom? Gender and Domestic Violence Perpetrators,* University of Bristol in association with the Northern Rock Foundation, Bristol, 2009, <www.nr-foundation.org.uk/wp-content/uploads/2011/07/Who-Does-What-to-Whom.pdf>; Australian Bureau of Statistics, *Defining the Data Challenge of Family and Domestic Violence and Sexual Violence,* 2013, Catalogue No. 4529.0, </www.abs.gov.au/ausstats/abs@.nsf/mf/4529.0/>.

studies like these are data that allow us to understand the nuances of dynamics surrounding aggressive and defensive acts, their impact and effect and the intent behind physically aggressive or economically, socially, or psychologically oppressive acts.

Overall, the evidence indicates that women are predominantly the victims of family violence and men predominantly the perpetrators. Men can also be victims and women can also be perpetrators, though this is much less common, as recent Australian Bureau of Statistics (ABS) data show. The ABS Personal Safety Survey 2012 reveals that 17 per cent of all women and 5.3 per cent of all men aged 18 years and over had experienced violence by a partner since the age of 15.[52] The data suggest a relative level of stability in prevalence over time, with 1.5 per cent of all women reporting experiencing violence by a partner in the preceding 12 months in both the 2005 and 2012 Personal Safety Surveys.[53] The statistic for men is 0.4 per cent in 2005 and 0.6 per cent in 2012; however, the ABS notes that the differences in these figures are not statistically significant. Most women who reported experiencing emotional abuse by a current or former partner also reported experiencing anxiety or fear as a result (76 per cent and 62 per cent respectively). Just under half of the men (46 per cent) who reported experiencing emotional abuse by a previous partner also reported experiencing anxiety or fear as a result.[54]

Two large-scale quantitative studies of separated parents by the Australian Institute of Family Studies (AIFS) have contributed significantly to the knowledge base on family violence in recent years. The first study, the Longitudinal Study of Separated Families (hereafter AIFS LSSF) has collected three waves of data, reinterviewing parents who separated shortly after the 2006 family law amendments at intervals of 18 months or so, based on an initial sample of 10,000 parents.[55] More recently, the Survey of Recently Separated Parents 2012 (AIFS SRSP 2012) examined the experiences of parents who separated between 31 July 2010 and 31 December 2011, based on a sample of 611 parents.[56] Each of these studies shows that a reported experience of family violence is more common than not among separated parents, revealing similar levels of prevalence before separation and in the recent post-separation period, although exact percentages differ marginally, probably due to slightly different sampling strategies being applied.[57] For simplicity, this discussion reports the SRSP findings. In the SRSP, the proportion of parents who did *not* report experiencing violence before or during separation was 41 per cent of fathers and 31.6 per cent of mothers. Physical hurt before or during separation was reported by 16 per cent of fathers and 23.5 per cent of mothers. Emotional abuse was reported by 43 per cent of fathers and 45 per cent of mothers.[58]

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52 Australian Bureau of Statistics (ABS), *Personal Safety Survey 2012*, Catalogue No. 4906.0, <www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12012?OpenDocument> 30 April 2014, Table C.

53 ibid., Table 21.

54 ibid., Table 33. For women, this refers to where a male previous partner or male current partner was nominated and, for men, where female previous partner or female current partner was nominated.

55 Qu and Weston, above n 4; Lixia Qu, Ruth Weston, Lawrie Moloney, Rae Kaspiew, and Jessie Dunstan, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies, Melbourne, 2014.

56 De Maio et al., above n 4.

57 Kaspiew et al., above n 2, Table 2.2; De Maio et al., above n 4, Table 2.3 and footnote 13.

58 De Maio et al., above n 4, Table 2.4.

Findings from the analysis of the subsequent two waves of data from the LSSF (Waves 2 and 3) provide an understanding of how the post-separation experience of family violence may continue over the longer term. Findings from Wave 3 demonstrate that family violence extends beyond the immediate separation period for a significant proportion of separated parents.[59] Forty-four per cent of mothers and 37.8 per cent of fathers reported experiencing some form of family violence in the 12 months prior to the Wave 3 data collection, reflecting a period some four to five years after separation. Emotional abuse accounted for most of this with only 2.2 per cent of mothers and 1.5 per cent of fathers reporting physical hurt in the preceding 12 months.[60]

As the socio-ecological perspective referred to above emphasises, it is also clear that different groups in the population have different experiences of violence and that it is important to understand the context in which violence occurs. There is an expanding body of literature that attempts to grapple theoretically and empirically with family violence within different cultural, economic and geographical groups, and in same-sex relationships.[61] Commenting on empirical research undertaken in South Australia in 1999 exploring experiences of family violence and the effectiveness of service provision, social work academic Dale Bagshaw and colleagues observe that '[c]ulture, location, sexuality, gender and class were critical factors in how people living in domestic violence understood their experiences and the effectiveness of service responses'.[62]

One context that exemplifies the points made by Bagshaw is that of Indigenous women and communities. Research conducted over many years has highlighted the complexity of achieving protection from family violence through legal mechanisms for Aboriginal and Torres Strait Islander women.[63] The elements that comprise family violence in the Indigenous context mean that family violence as a phenomenon is significantly different in Indigenous communities from that in non-Indigenous communities. An accepted conceptualisation in this context acknowledges that family violence potentially involves a wide range of relatives and 'kin', perpetrators and victims may be individuals or groups, the

59 Qu et al., above n 55, Table 3.5.

60 Qu et al., 2014, above n 55, Table 3.5.

61 A useful starting point for considering the needs of diverse groups is in Dale Bagshaw, Donna Chung, Murray Couch, Sandra Lilburn and Ben Wadham, *Reshaping Responses to Domestic Violence*, University of South Australia, Adelaide, 2000. In relation to sexuality, Bagshaw et al. note that examining violence in same-sex relationships provides 'an opportunity to place domestic violence within a broader context of violence in intimate relationships and consider how power and control may be understood in new ways. In particular, heterosexual dominance, homophobia and social constructions of gender could provide important theoretical entry points for extending current explanations rather than merely accommodating gay and lesbian domestic violence into mainstream theory': p 109. People with disabilities are also more vulnerable to violence and face significant barriers to obtaining assistance: see, e.g., Chris Jennings, *Triple Disadvantage: Out of Sight, Out of Mind: Violence against Women with Disabilities Project*, Domestic Violence and Incest Resource Centre, Collingwood, 2003; Victorian Law Reform Commission, *Review of Family Violence Laws Report*, Victorian Law Reform Commission, Melbourne, 2006, pp 37–41.

62 Bagshaw et al., above n 61, p 6. See also Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 735, 770.

63 For example, Harry Blagg, 'Restorative Justice and Aboriginal Family Violence: Opening a Space for Healing', in Heather Strang and John Braithwaite, *Restorative Justice and Family Violence*, Cambridge University Press, Cambridge and Port Melbourne Vic, 2002, pp 191–205.

acts involved may be physical, psychological, social, economic or sexual in nature and some family violence may be sustained over a significant period of time.[64]

As also referred to earlier, the extent of family violence is more significant.[65] From an Aboriginal and Torres Strait Islander perspective, the nature and extent of family violence can be attributed to the damage caused by colonisation, which dispossessed Indigenous peoples from their land, fractured their relationship with culture and wreaked havoc in communities through the forcible removal of children from their families.[66] The relationship of Aboriginal and Torres Strait Islander peoples to the legal system is problematic for a number of reasons stemming from Australia's history of colonisation and its aftermath, which have seen Indigenous peoples overrepresented in the criminal justice system to a very significant extent.[67] Similarly, historically and now, Indigenous children have been much more likely to be removed from their families on child protection grounds than non-Indigenous children.[68] These two issues underpin a reluctance among many Aboriginal and Torres Strait Islander people to engage with the legal system. The reasons for this reluctance may inhibit victims from seeking protection due to concerns about encountering inappropriate and possibly racist responses and exposing the perpetrator to such responses. Chris Cunneen summarises these concerns about engaging with the criminal justice system in this way:

> There are fears by the aggrieved concerning the outcomes of a legal intervention on the perpetrator. These fears include that their spouse may be subject to discrimination if incarcerated, or that incarceration might lead to death in custody. Further there is a view that incarceration does not change men's behaviour and further depletes the community of men.[69]

These issues underpin an understanding that different approaches to family violence as it occurs in Aboriginal and Torres Strait Islander communities are required from those in non-Indigenous contexts. An example of this can be seen in the National Plan's approach, which has an Indigenous-specific element that focuses on building leadership capacity and enhancing economic participation for Indigenous women.[70]

From a socio-ecological standpoint, a further context in which family violence raises particular issues that are especially significant in family law is relationship breakdown.

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64 Chris Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities*, University of New South Wales, Sydney, 2010, p 40, citing P memmott, R Stacy, C Chambers, C Keys, *Violence in Indigenous Communities*, 2001, Attorney General's Department, Canberra, p 34.

65 Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators Report 2011*, Productivity Commission, Canberra, part 4.1.

66 For example, Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from the Families,* Human Rights and Equal Opportunity Commission, Canberra, 1997, p 3.

67 SCRGSP, above n 65, part 4.12.

68 ibid., part 4.10; Australian Institute of Health Welfare, *Child Protection Quick Facts*, Online Resource, <www.aihw.gov.au/child-protection/#facts>, 28 April 2014: in 2011–12 Indigenous children, in comparison with non-Indigenous children, were eight times more likely to be the subject of substantiated abuse or neglect; 10 times as likely to be on a care and protection order; just over 10 times as likely to be in and out of home care.

69 Cunneen, above n 64, p 29.

70 National Plan, above n 1, National Outcome 3.

Family violence is associated with decisions to end a relationship.[71] However, the decision to end a violent relationship is not one that many women make easily. Renata Alexander notes that, in contemplating leaving violent men, women often face a 'stark choice between violence and poverty' due to the economic dependence that motherhood normally involves.[72] Such a choice, combined with the belief that children will suffer if families are not kept together, mean that separation is often 'an absolute last resort'.[73] A further factor that may exacerbate women's ambivalence about leaving violent relationships is that they may have been subject to threats about what may happen to them if they leave.[74] However, a desire to protect children from further exposure to ongoing or escalating violence has been shown to be a significant motivator in decisions to leave.[75]

The end of a relationship may not mean the end of the violence: it may mean the escalation, the continuation[76] or even the beginning of violence.[77] Women are at risk of many different types of assault, including physical assault, rape and murder.[78] Court action, including counter applications for civil protection orders and orders in relation to parenting matters, may also be a manifestation of an abusive ex-partner's attempt to regain or maintain control.[79] As Lesley Laing observes, '[a]fter separation, the children may find that, through issues of contact arrangements, they move from the periphery to the centre of the conflict'.[80]

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71 Dale Bagshaw, Thea Brown, Sarah Wendt, Alan Campbell, Elspeth McInnes, Beth Tinning, Becky Batagol, Adiva Sifris, Danielle Tyson, Joanne Baker and Paula Fernandez Arias, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006*, Attorney-General's Department, Canberra, 2010, Tables 19 and 20.

72 Alexander, above n 31, p 11.

73 ibid.

74 Robyn Edwards, *Staying Home, Leaving Violence: Promoting Choices for Women Leaving Abusive Partners*, Australian Domestic and Family Violence Clearinghouse, Sydney, 2004, p 12.

75 ibid., p 23.

76 C Walsh, SJ McIntyre, L Brodie, L Bugeja and S Hauge, *Victorian Systemic Review of Family Violence Deaths—First Report*, Coroners Court of Victoria, Melbourne, 2012, p 18; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999*, Research and Public Policy Series No. 28, Australian Institute of Criminology, Canberra, 2000.

77 Anna Ferrante, Frank Morgan, David Indermaur and Richard Harding, *Measuring the Extent of Domestic Violence*, Hawkins Press, Sydney, 1996, p 67; see also 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 Inc., Brisbane, 2002; Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1, 20; Beth Tinning, *Seeking Safety, Needing Support: A Report on the Requirements for Women Experiencing Domestic Violence and Accessing the Family Court*, Sera's Women's Shelter, Townsville, Queensland, 2006, p 74.

78 Walter DeKeseredy, McKenzie Rogness and Martin D Schwartz, 'Separation/divorce Sexual Assault: The Current State of Social Scientific Knowledge' (2004) 9 *Aggression and Violent Behaviour* 675.

79 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No. 3, 1994, [5.28]–[5.30] recommended that the Family Court should be 'more robust in refusing contact' in circumstances involving violence and continuing conflict: Recommendation 2.7. See also Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report 69, Part 1, [9.5]; Hunter, above n 62, 775; Rendell et al., above n 77, pp 48–9; and Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71, 77. The use of FLA s 118 orders (see 3.2.2.2) to curb the use of litigation against a background of domestic violence is discussed in Belinda Paxton, 'Domestic Violence and Abuse of Process' (2004) 17 *Australian Family Lawyer* 7.

80 Lesley Laing, *Children, Young People and Domestic Violence*, Australian Domestic and Family Violence Clearinghouse Research Paper 2, University of New South Wales, Sydney, 2002. See also Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 2nd ed. Sage Publications, Thousand Oaks, California, 2012.

Family violence can also be fatal and separation is recognised to be a time of heightened risk for filicide (the murder of a child by a parent)[81] and intimate partner homicide.[82] In Australia, however, the fragmentation of death review processes among the states and territories means that collation of national statistics on homicide is neither timely nor supportive of understanding the extent to which families affected had engaged with the federal family law system.[83]

Australian and overseas data show that although men are much more likely to die as a result of homicide than women, women are much more likely to die at the hands of family members, especially intimate partners, than men.[84] In Australia, in 2007–08, of the 80 intimate partner homicides that occurred, 77.5 per cent of victims were female and 22.5 per cent were male.[85] Similar proportions are evident in figures from Canada, New Zealand, the United Kingdom and the US.[86] A report by the Victorian Systemic Review of Family Violence Deaths (VSRFD) covering the period from 2000 to 2010 found that 288 out of at total 545 homicides in that period involved an intimate partner or other family member or were otherwise associated with family violence. Intimate partner homicides comprised 47 per cent of this group and parent–child homicides 26 per cent.[87] Most of the homicides of relevance to the VSRFD were committed by men: 79 per cent, compared with 21 per cent committed by women. Information confirming a history of family violence prior to the homicide was identified in 71 per cent of relevant homicides. Among 29 deaths that were caused by parents killing children, men were responsible for 16 homicides, women for 12, and one incident involved both parents. On the basis of the VSRFD homicide analysis and a wider literature review, the report highlights the following risk factors for homicide involving family members and intimate partners:

- a history of family violence in intimate partner homicides;
- recent or pending relationship separation;
- previous threats to kill;
- alcohol use;
- mental illness; and

81 Deborah Kirkwood and Mandy McKenzie, 'Filicide in the Context of Parental Separation' (2013) 27 *Australian Journal of Family Law* 78, 84.

82 Walsh et al., above n 76. See also Carolyn Walsh, *Come with Daddy: Child Murder-Suicide after Family Breakdown*, University of Western Australia Publishing, perth, 2005.

83 An informal list collated from media reports by South Australian academic Elspeth McInnes shows that, as at April 2014, 38 children had been killed by their fathers in the context of separation between January 1998 and January 2014. These figures do not include the deaths of Indiana (age three) and Savannah (age four) on 21 April 2014, who were allegedly killed by their father (who was separated from their mother) in Watsonia in Melbourne: *The Age*, 22 April 2014, or Luke Batty, who was killed by his father on 13 February 2014: *The Age* 14 February 2014. See also Mark Sachmann and Carolyn Johnson, 'The Relevance of Long Term Antecedents in Assessing the Risk of Familicide-Suicide Following Separation' (2014) 2 *Child Abuse Review* 130.

84 Walsh et al., above n 76. See also Carolyn Johnson, *Come with Daddy: Child Murder-Suicide after Family Breakdown*, University of Western Australia Publishing, perth, 2005; Thea Brown and Danielle Tyson, 'Filicide and Parental Separation and Divorce' (2014) 2 *Child Abuse Review* 79.

85 Walsh et al., above n 76, p 11.

86 ibid., p 11.

87 ibid., p 18. The other categories were other familial 12%, non-familial 8% and other sexual relationship 7%.

- sexual abuse: this factor is bi-directional, in that sexual abuse perpetration and victimisation are linked to committing and being subject to homicide.

The report highlights the difficult dynamics in connection with disclosing family violence:

> Among the range of deaths examined in this analysis, there was evidence of eight victims of family violence having denied or minimised their exposure to abuse when questioned by family, friends and service providers. In these situations, it appeared that victims held a range of concerns that prevented a full disclosure being made, For some victims, factors connected to their cultural background appeared to make it difficult to speak openly about abuse occurring at home. For others, concern over the possibility of exacerbating the situation or uncertainty as to how services would respond appeared to be most salient. Regrettably, in all of these situations, the difficulty victims faced in discussing their exposure to violence had the effect or curtailing intervention efforts, including not holding the perpetrator accountable for their behaviour.[88]

5.5 A SPECTRUM OF SEVERITY: RECENT AUSTRALIAN EVIDENCE AND IMPLICATIONS FOR PRACTICE

The discussion in this chapter so far has emphasised the point that family violence takes various forms. This section sets out recent Australia empirical evidence that demonstrates significant variations in the scope and extent of family violence in separated families. The AIFS SRSP establishes that family violence occurs across a spectrum of intensity with varying impacts on those who experience it. These findings resonate with an influential paradigm for describing family violence in terms of 'typologies', which has been a significant feature of US research and theory and which has had some influence on family law practice in Australia. However, concerns have been raised about the implications of this, and recent practice developments in risk assessment screening reinforce the importance of considering each case on its merits in light of the dynamic nature of risk.

The AIFS SRSP study included a very detailed analysis of the experiences of family violence in its emotional and physical manifestations. The following discussion focuses on relatively brief descriptions of some findings in key areas to highlight the extent to which experiences vary. Variability in the following areas is highlighted: first, variability in the extent to which emotional violence and physical hurt (before and during separation) are reported; second, the spectrum of intensity the analysis reveals; third, variations in the extent to which these forms of family violence occur together; and, last, the varying nature of the impacts reported. The discussion highlights some areas where differences in relation to gender are especially evident.

The AIFS SRSP analysis shows that the most common type of violence reported was emotional abuse (10 different types were measured)[89] with 58.2 per cent of fathers and

88 ibid., p 41.

89 De Maio et al., above n 4, Figure 3.1. They were: prevention tactics in relation to using telephone and car, contacting family or friends, or knowing about or accessing money; threating to harm pets (or harming them), the children, other family and friends, themselves or the parent interviewed; trying to force unwanted sexual activity; damaging and destroying property; and insulting with intent to shame, belittle or humiliate the respondent.

68.4 per cent of mothers reporting such experiences before or during separation. Particularly marked differences were evident in relation to reports of fathers and mothers regarding damaging or destroying property (19.2 per cent of fathers and 34.2 per cent of mothers) and attempting to force unwanted sexual activity (4.4 per cent of fathers and 16.5 per cent of mothers).[90]

In terms of intensity, an analysis based on a combined measure of the number of different types of emotional abuse and the frequency with which they reportedly occurred, and resulting in scores in five possible ranges, reveals a spectrum of intensity across the sample with scores in five possible ranges. A minority of parents across the sample (4.5 per cent) had scores placing them in the highest range, but at this level mothers outnumbered fathers by more than three to one. The proportion of parents in the second highest range of intensity was 8.9 per cent, with women outnumbering men in this range by five percentage points (6.1 per cent fathers, 11.5 per cent mothers). In the three lower ranges, differences between fathers and mothers were not particularly significant and the proportions of the sample that fell into these ranges were 17.4 per cent (third range), 14.3 per cent (fourth range) and 18 per cent (fifth range).[91]

In relation to the extent to which physical violence, emotional abuse and attempts to force unwanted sexual activity (considered separately in this analysis) occurred together (before or during separation), the AIFS SRSP findings show that mothers were four times more likely to report all three types of violence occurring together than fathers: 8.0 per cent compared with 1.8 per cent.[92]

The AIFS SRSP study also asked parents about the impact that experiences of physical hurt and/or emotional abuse before, during and since separation had on them. Measures of impact included adverse effects on mental health, decreases in levels of confidence and security, changes in social activities, time off work or study, impact on eating and sleeping. Very few parents reported no impact (4.4 per cent before or during separation). The majority of fathers (56.4 per cent before or during separation) reported one impact and the majority of mothers (53.2 per cent before or during separation) reported at least two of these impacts.[93]

Examining impact in a different way, through comparison of responses to various 'satisfaction with life' measures among parents who had and had not experienced family violence, the AIFS SRSP findings indicate that parents were less likely to be satisfied with their relationships with their children and in other domains (financial, feelings of safety, physical health and the well-being of their child) if they had experienced family violence. Negative effects were slightly stronger for physical hurt than emotional abuse, but each type of family violence was associated with lower levels of satisfaction.[94]

A further indication of the varying impact that an experience of family violence has is evident from the findings of AIFS LSSF on the connection between the quality of

90 ibid., Figure 3.1.
91 ibid., Figure 3.5.
92 ibid., Table 3.3.
93 ibid., Table 3.5.
94 ibid., Figure 7.14 (relationship with child), Figure 7.16 and Figure 7.17 (life domains).

the parents' relationship after separation and a history of family violence.[95] Parents who participated in the survey were asked to indicate which of five descriptors most accurately captured the nature of the relationship with their former partner at that time: friendly, cooperative, distant, lots of conflict and fearful. The first two of these descriptors are clearly positive, the third is ambiguous, and the two last descriptors are clearly negative. AIFS's analysis of these responses and reports of a history of emotional abuse or physical violence established that such histories do not preclude the subsequent characterisations of inter-parental relationships in positive terms; however, they are more likely to be associated with relationships in the clearly negative or ambiguous categories. Relationships were much more likely to be described in clearly positive terms where there was no reported history of emotional abuse or physical hurt. Parents were most likely to report friendly relationships where no violence was reported (52.5 per cent of fathers and 57.2 per cent of mothers) and least likely to choose this descriptor where physical violence was reported.[96]

While this new research confirms that, in the Australian population of separated parents, the experience of family violence varies in intensity, duration and impact and gendered patterns are evident in these areas, gaps in empirical evidence remain. One of the most significant is the extent to which experiences of physical hurt and emotional abuse cause fear, result in coercion and are motivated by a desire to control the target. AIFS research underway at the time of writing is examining this, and this evidence will shed further light on whether the new *FLA* definition appropriately responds to the social phenomenon it is dealing with.[97]

As noted earlier, the AIFS SRSP findings just described have some resonances with research and theories about 'typologies' of family violence mainly emanating from the US in the past 25 years. A number of different 'typologies' of violence, drawing on research, clinical experience and theory, have been developed in the past two decades. This body of work, dominated by US theorists, clinicians and researchers, seeks to understand and describe the nature of family violence and suggests that family violence is not a uniform phenomenon but that different forms exist. It underlines the methodological complexity referred to earlier, by demonstrating that the nature of family violence as a phenomenon also varies according to the characteristics of the data through which it being described. Findings about the scope, nature and extent of family violence will be shaped by the measures used and the samples being studied. Two of the typologies most commonly referred to are those developed by Michael Johnson and colleagues from Pennsylvania State University,[98] emanating from the discipline of women's studies within a sociology framework, and Janet Johnston and colleagues, who operate as researchers and clinicians primarily with separated parents and approach the question from a psychological perspective.[99] A third framework,

95 Kaspiew et al., 2009, above n 2, p 32.

96 Kaspiew et al., 2009, above n 2, p 32.

97 Information on this evaluation is available at <www.aifs.gov.au/efva>.

98 Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence*, North Eastern University Press, Boston, 2008.

99 Janet R Johnston and LEG Campbell, 'A Clinical Typology of Interpersonal Violence in Disputed-Custody Divorces' (1993) 63 *Journal of Orthopsychiatry* 190; see also Peter Jaffe, Janet Johnson, Claire Crooks and Nicholas Bala, 'Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans' (2008) 46(3) *Family Court Review* 500.

which has been given less attention in the Australian literature, emanates from practice-based domestic violence scholarship.[100]

Over his research career, Michael Johnson developed a typology based on four different categories of violence:[101] intimate terrorism (predominantly perpetrated by men), violent resistance (mainly women 'fighting back'), situational couple violence (men and women engaged in isolated instances of, or episodic violence in response to, particular events) and mutual violent control (men and women ('true mutuality of people fighting for control over the relationship')).[102] These typologies are based on a variety of empirical studies using different samples and methodologies.

Debate on the implications of this body of work for policy and practice in Australia has been longstanding[103] but it is clear that it has influence on some policy approaches[104] and on the way some practitioners operate. Arguably, typologies have been a significant paradigm through which family violence generally has been understood in recent family law discourses. Writing extra-judicially, for example, Federal Magistrate (as he then was) Altobelli argued for the need to apply differentiated understandings of family violence in family law practice, at the same time recognising that 'accurate differentiation depend[s] on the existence of clear evidence but also on the skills and experience of the one undertaking the differentiation.'[105]

As Altobelli acknowledges, a range of concerns has been expressed about the application of typologies in Australian practice.[106] At the broadest level is the concern that the theories have not been empirically validated in Australia.[107] Additionally, Jane Wangmann and Zoe Rathus argue that the American typology thinking reflects the way understandings of family violence have developed in that country, distinct from the way they have developed here. A key point in their argument is that Australian policy and legislative responses recognised non-physical forms of family violence much earlier than US ones.[108]

Wangmann, Rathus and others[109] have expressed longstanding concerns that, rather than supporting the application of a more sophisticated understanding of family violence and its implications for family law matters, ideas based on typologies may contribute to a

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100 Shamita Das Gupta, 'A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships' (2002) 8 *Violence against Women* 1364. For other examples of typologies, see Kerrie James, Beth Seddon and Jac Brown, *'Using It' or 'Losing It': Men's Constructions of Violence towards Their Female Partners*, Australian Domestic and Family Violence Clearinghouse Research Paper No. 1, Sydney, 2002; Neil Jacobson and John Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships*, Simon and Schuster, New York, 1998.

101 Johnson, above n 98.

102 ibid., p 12.

103 For an early Australian critique, see Miranda Kaye, Julie Stubbs and Julia Tolmie, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence*, Research Report 1, Griffith University, Brisbane, June 2003.

104 See, e.g., the summary by Jane Wangmann, *Different Types of Intimate Partner Violence—An Exploration of the Literature*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 22, Sydney, 2011.

105 Tom Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (2009) 23 *Australian Journal of Family Law* 194, 206.

106 Kaye et al., above n 103; Wangmann, above n 104; Rathus, above n 48.

107 Wangmann, above n 104, Rathus, above n 48.

108 Wangmann, above n 104; Rathus, above n 48.

109 ibid., Kaye et al., above n 103.

less nuanced understanding of family violence being applied by practitioners. Rathus has argued that inappropriate assumptions may brought to clinical practice on the basis of the 'categories' described in the typologies. She argues that the common claim that most family violence is on the 'situational couple violence' spectrum may lead practitioners into applying an unhelpful set of preconceived ideas:

> [T]his 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.[110]

Rathus also argues that, if interpreted and applied through a lens based on the typologies literature, the new family violence definition in section 4AB will operate to narrow the band of cases that meet the definition, and consequently proceed through the procedural and legislative pathway designed for family violence cases (this concern was foreshadowed in the earlier discussion in 5.3).[111]

In this context, it is important to emphasise that the patterns identified in the AIFS SRSP research arise from a (near) representative population sample of separated parents: the data describe the spread of experiences among the general population of separated parents. As findings from the AIFS SRSP and LSSF studies also demonstrate, it is the families at the more complex end of the spectrum who engage with family law system services.[112] As discussed in Chapter 7 this evidence shows that the majority of separated parents work out their own arrangements with little or no use of the family law system.

Other empirical evidence reinforces the point that the parents who use court and family dispute resolution services are affected by a range of complex issues, including concerns about family violence and child safety.[113] Research based on family law courts' files shows that the majority of cases that proceed to court involve allegations of family violence and child abuse[114] and one study indicates that most of these cases reflect a severe level of violence, 'suggesting significantly injurious or abusive circumstances'.[115] Another study based on data derived from files handled by dispute resolution services ($n = 247$, based on a sample of cases that formed a comparison group for a pilot program relating to family violence) indicated that the professional involved in the case assessed the 'predominant aggressor' as the male party in 80.2 per cent of cases and the female party in 9.3 per cent of cases of cases.[116] The indication was that these cases are also at the more severe end of the spectrum, although they are not necessarily representative of all family dispute resolution (FDR) cases. This conclusion is supported by the report's findings that civil protection orders had

110 Rathus, above n 48, p 384.
111 ibid., p 387.
112 Qu and Weston, above n 4, Figure 4.10; De Maio et al., above n 4, part 4.3.
113 Kaspiew et al., 2009, above n 2; Kaspiew et al., 2012, above n 9.
114 Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112; Kaspiew et al., above n 2 p 314; Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Rishardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study*, Australian Institute of Family Studies, Melbourne, 2007.
115 Moloney et al., above n 114, p vii.
116 Kaspiew et al., 2012, above n 9, p 41. Data were missing or the determination could not be made for 10.5% of cases.

been obtained in more than half of the cases in this sample, that breach of civil protection orders proceedings had occurred in relation to just under a fifth of the sample, and criminal proceedings relating to family violence were relevant in about 19 per cent of cases.[117]

Thus, the spectrum of experience indicated by the general Australian population survey data—and suggested by the typological theories—does not reflect the experiences of family law system service users in Australia: evidence shows that many of the experiences of these parents are on the more severe end of the spectrum compared with the average population of separated parents.

The AIFS SRSP evidence, like the US typologies, confirms the variability of the experience of family violence. However, the experiences of clients in the family law system are more likely to resemble those of the parents whose experiences are at the more severe end of the spectrum in the broader population sample.

Recent research evidence has also shown the complexity involved in eliciting information about family violence and making clinical assessments about the implications of that history, reinforcing the necessity to proceed carefully when making clinical assessments. Among the issues that confront professionals in this task are the differing subjective experiences their clients describe, with some targets and probably more perpetrators not recognising some behaviours as family violence.[118] Also relevant are the strategies documented in empirical research and clinical literature of the tendency of perpetrators to minimise, mutualise, deny and blame the victim for the violence.[119]

In this context, a significant emerging emphasis in family law practice reinforces the need for effective screening and assessment processes and tools. This need was identified very clearly in the *Family Courts Violence Review*,[120] which called for a forensic infrastructure across the courts to support the identification and assessment of family violence histories, in recognition of the importance and complexity of this task. This was also a focus of the recommendations of the *Every Picture Report*, [121] which were not adopted.

In response to the *Family Courts Violence Review* recommendations and the ALRC *Family Violence* recommendations, the Attorney-General's Department auspiced the development of the DOORS risk assessment framework, which provides practitioners with an electronic 'toolbox' for screening and risk assessment on the basis of a multilayered approach that supports the development of an individualised understanding of the circumstances of each client and the features of their situation that may highlight the

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117 ibid., p 42.

118 See, e.g., Kaspiew et al., 2012, above n 9, Chapter 5.

119 See, e.g., Neil Blacklock, 'Domestic Violence: Working with Perpetrators, the Community and Its Institutions' (2001) 7 *Advances in Psychiatric Treatment* 65; James et al., above n 100; Jason Whiting, Timothy Parker and Austin Houghtaling, 'Explanations of a Violent Relationship: The Male Perpetrators Perspective' (2014) 29 *Journal of Family Violence*, 277; Amy Holtzworth-Munroe and Glenn Hutchinson, 'Attributing Negative Intent to Wife Behaviour: The Attribution of Maritally Violent versus Nonviolent Men' (1993) 102 *Journal of Abnormal Psychology* 206.

120 Chisholm, above n 3, p 152.

121 House Standing Committee on Family and Community Affairs, Parliament of Australia, House of Representatives, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements on the Event of Family Separation* (*Every Picture Report*), 2003, [2.22], available at <www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fca/childcustody/report.htm>, at 28 April 2014, Recommendation 16.

prospect of an elevated level of risk. The role of such assessments is multifaceted and critical: immediate and ongoing risk must be assessed, as must the implications of the history, for the most appropriate dispute resolution option and the parenting arrangements that will most effectively meet the child's needs. The lead author of the DOORS framework, Jennifer McIntosh, notes that 'risks to life, safety and wellbeing emerge for a spectrum of factors, some recent, and others historical ... Each factor can be understood as part of a continuum, and each, in turn may exert a protective or amplifying influence in the presence of other related factors'.[122] The DOORS framework focuses on five mutually influencing areas: the individual psychology of each parent; the nature of the ex-couple relationship; the history and nature of the current dispute; the development of the infant or child; and the extent to which social, cultural and professional support is available to each member of the family.[123]

As this discussion suggests, the complexity of identifying and assessing family violence, and the presence and implications of risk factors generally, is significant. Among the researchers who have identified this complexity are Elly Robinson and Lawrie Moloney,[124] who have raised a number of issues, including the need for the application of screening and assessment tools and processes to be accompanied by training and professional development to support the exercise of sound clinical judgment.

Some considerations of the place typologies have in Australian policy and practice have emphasised that although they may have some value in terms of education and understanding,[125] in a practice setting the guiding principle should be that nothing substitutes for a careful and nuanced clinical assessment.[126] The importance of this principle is reinforced by the evidence of the adverse impact of family violence on the well-being of adults (in aggregate terms, any experience has a negative impact) and children (5.6). Importantly, this evidence confirms that exposure over a sustained period leads to worse outcomes, as well as showing that any exposure has an adverse impact on well-being.

In summary, the discussion in this section has shown that family violence is more common than not among separated parents and that it varies substantially in frequency, severity and impact. Women are more than twice as likely as men to be victims at the more severe end of the spectrum. A body of work emanating from the US has sought to understand and describe family violence through the development of empirical and clinical 'typologies'. This work has had some influence in policy and practice in Australia, but

122 Jennifer McIntosh, *The Family Law DOORS: A New Whole of Family Approach to Risk Screening*, 6th World Congress on Family Law and Children's Rights, Sydney, March 19, 2013.

123 ibid.

124 Elly Robinson and Lawrie Moloney, *Family Violence: Towards a Holistic Approach to Screening and Risk Assessment in Family Support Services*, Australian Family Relationships Clearinghouse Briefing No. 17, 2010; see also Bryan Rodgers, 'Screening for Family Violence: Some Comments Relating to Family Violence: *Towards a Holistic Approach to Screening and Risk Assessment* by Elly Robinson and Lawrie Moloney' *Family Relationships Quarterly*, No. 19, August 2011, available at <www.aifs.gov.au/afrc/pubs/newsletter/frq019/index.html>.

125 Wangmann, above n 104.

126 Rae Kaspiew and Lixia Qu, *Family Violence Among Separated Couples: Prevalence and Practice Implications*, Typologies of Intimate Partner Abuse—Theory and Practice Seminar, Queensland Centre for Domestic and Family Violence Research, Brisbane, Queensland, 21 February 2013, available at <www.aifs.gov.au/institute/pubs/papers/2013/kaspiew20130221/slides.html>.

concerns have also been raised about whether the application of ideas based on typologies may lead practitioners to make inappropriate clinical judgments. Research evidence shows that most of the parents who engage with the formal parts of the family law system—family dispute resolution and courts—have indicators that would suggest their experiences place them on the more severe end of the continuum of family violence. Recent developments such the availability of the DOORS screening and assessment tool, if adopted widely and used appropriately, have the potential to shift family law practice paradigms in relation to family violence to a focus on assessment of risk and better informed assessment of the implications of a history of family violence for ongoing parenting arrangements.

5.6 CHILDREN AND FAMILY VIOLENCE

Increasingly, research evidence is establishing the extent to which children are affected by family violence and this issue has become a direct focus of policy development. The impact may occur in two main ways: through witnessing family violence and through experiencing the effects of family violence within their families more broadly, even though they are not directly exposed.[127] Such experiences may include living in a generalised climate of stress and possibly fear and experiencing impaired care-giving from a parent subjected to family violence.[128] Some literature suggests that perpetrators of family violence are more likely to exhibit neglectful and authoritarian parenting behaviours,[129] which are less likely to lead to positive developmental outcomes in children.[130] Further, other types of child abuse are more likely to occur in families where there is adult-to-adult violence than in families where this does not occur.[131] The AIFS SRSP and LSSF studies, referred to earlier, provide new insight into the extent to which children are affected by family violence. In the AIFS LSSF Wave 1, of the parents who reported experiencing physical hurt before separation, 72 per cent of mothers and 63 per cent of fathers reported that the children witnessed this violence.[132] This issue was examined in more depth in the SRSP, with the findings showing that of the parents who reported experiencing physical or emotional abuse before or during separation, 53 per cent of fathers and 64 per cent of mothers said the children had witnessed the violence. In relation to the post-separation period, 43 per cent of fathers and 50 per cent

127 Kaspiew et al., above n 2, part 11.3; De Maio et al., above n 4, part 7.2.

128 Leah Bromfield, Alister Lamont, Robyn Parker and Briony Horsfall, *Issues for the Safety and Wellbeing of Children in Families With Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse, and Mental Health Problems*, National Child Protection Clearinghouse Issues Paper 33, Australian Institute of Family Studies, Melbourne, 2010.

129 Jennifer Hardesty, Megan Haselschwerdt and Michael Johnson, 'Domestic Violence and Child Custody' in Kathryn Kuehnle and Leslie Drozd (eds), *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press, New York, 2012, p 467.

130 For example, Paul Amato and J Gilbreth, 'Non-Resident Fathers and Children's Well-Being: A Meta-analysis' (1999) 61 *Journal of Marriage and Family*, 557; Jennifer Baxter and Diana Smart, *Fathering in Australia among Couple Families with Young Children*, Occasional Paper No. 37, FaHCSIA, Canberra ACT, 2010, <www.dss.gov.au/sites/default/files/documents/05_2012/op37.pdf>, 8 May 2014.

131 For example, Bromfield et al., 2010, above n 128.

132 Kaspiew et al., 2009, above n 2 p 26.

of mothers who reported experiencing physical or emotional violence said the children had witnessed it.[133]

Further concerning findings emerge from both studies about the proportion of parents who hold safety concerns for themselves and/or their children as a result of ongoing contact with the other parent. In each study, just under a fifth of parents reported holding such concerns.[134] In each study, the mothers were more likely to report current concerns for both themselves and their child than fathers and were also more likely than fathers to indicate that the person who was the source of the concerns was the other parent.[135] Fathers in each study were more likely than mothers to indicate that the other parent's partner was the source of the concerns.[136] Findings from Wave 3 of the LSSF show that for 4.7 per cent of families, concerns about safety arising from ongoing contact with the other parent were sustained over the three waves of the survey, reflecting a period of some five years.[137]

The AIFS research also shows that children who live in families where family violence occurs have lower well-being than children in homes where this does not occur,[138] adding to the established evidence base on the negative effects of family violence on children.[139] These effects are evident even in the absence of direct exposure, but where such exposure occurs, well-being outcomes are lower still.[140] Parents' accounts of the negative impact of witnessing family violence on their children show three particularly common effects. The effects most frequently named were stress, fear and anxiety. Two types of adverse impact on social behaviour were also raised: becoming socially disengaged and manifesting aggression and violence.[141] There is also a growing field of neurodevelopmental research showing that exposure to family violence may have permanent effects on the development of the brain in young children, especially in the absence of therapeutic intervention.[142]

It is also clear, however, that negative impacts are not uniform or inevitable. Some research suggests a degree of resilience, or ability to recover, among some groups of children;

133 De Maio et al., above n 4, part 3.7. Figure 3.9 (included in part 3.7) sets out further analysis according to type of violence witnessed by children (physical or unwanted sexual activity versus emotional abuse).

134 Kaspiew et al., above n 2, p 28: in the LSSF W1, 21% of mothers and 17% of fathers reported such concerns. The SRSP 2012 findings are similar, with 20.4% of mothers and 13.6% of fathers with concerns: De Maio et al., above n 4, Table 3.6.

135 Kaspiew et al., above n 2, p 28; De Maio et al., above n 4, parts 3.8 and 3.9.

136 For LSSF W1, 8.4% mothers had current safety concerns for both child and self cf 2.6% fathers and of those responding with safety concerns 92.3% mothers reported this was about the other parent cf 68.3% fathers: Kaspiew et al., above n 2, p 28; for SRSP, 8.0% mothers reported ongoing safety concerns for both the focus child and self cf 3.1% fathers, of those with safety concerns 92.9% mothers reported this was about the other parent cf 70.8% fathers: De Maio et al., above n 4, pp 38–9.

137 Qu et al., above n 55, Table 3.8.

138 De Maio et al., above n 4, p 91.

139 See Australian Domestic and Family Violence Clearinghouse, *The Impact of Domestic Violence on Children: A Literature Review*, The Benevolent Society, Sydney, 2011.

140 De Maio et al., above n 4, part 7.2.2.

141 ibid., part 7.2.3.

142 Bruce Perry, *Violence and Childhood: How Persisting Fear Can Alter the Developing Child's Brain* (a special ChildTrauma Academy website version of *The Neurodevelopmental Impact of Violence in Childhood*), <www.juconicomparte.org/recursos/Violence_and_Childhood_UkW4.pdf>, 28 April 2014.

however, the factors that support resilience and recovery are not well understood.[143] Factors such as age, temperament and wider family—including the quality of relationships between the child and non-violent family members—play a role.[144] As discussed in Chapter 6 an ongoing debate concerns the question of whether particular types of parenting arrangements promote or undermine healthy development in children generally, and in circumstances of conflict and violence particularly. There is evidence that shared care arrangements may not be optimal for children where there is high conflict,[145] but as yet the question of what types of parenting arrangements promote healthy development among children where damage from exposure to family violence has occurred is unanswered and research focusing on this question is just beginning.[146]

Since the 1980s there has been judicial acknowledgment of the relevance of family violence to making *FLA* parenting orders. Legislative recognition of the need to address children's exposure to family violence in the context of post-separation parenting arrangements has come more recently still. The 2012 amendments to Part VII of the *FLA* include provisions that recognise the implications of exposure to family violence. Such exposure (as well as being directly subjected to family violence) is recognised as a form of 'abuse' when it causes 'the child to suffer serious psychological harm' (*FLA* section 4). 'Exposure' is further defined in section 4AB as:

> (3) For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

Further, non-exhaustive examples are provided in section 4AB(4):

> (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
>
> (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
>
> (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

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143 Gayla Margolin, 'Children's Exposure to Violence: Exploring Developmental Pathways to Diverse Outcomes' (2005) 20 *Journal of Interpersonal Violence* 72; Australian Domestic and Family Violence Clearinghouse, *The Impact of Domestic Violence on Children: A Literature Review*, University of New South Wales, Sydney, 2011, p 16, <www.adfvc.unsw.edu.au/documents/ImpactofDVonChildren.pdf>; Abigail Gewirtz and Jeffrey Edleson, 'Young Children's Exposure to Intimate Partner Violence: Towards a Development Risk and Resilience Framework for Research and Intervention' (2007) 22 *Journal of Family Violence* 151; Laura Hickman, Lisa Jaycox, Claude Setodji, Aaron Kofner, Dana Schultz, Dionne Barnes-Proby and Racine Harris, 'How Much Does "How Much" Matter? Assessing the Relationship Between Children's Lifetime Exposure to Violence and Trauma Symptoms, Behaviour Problems and Parenting Stress' (2013) 28 *Journal of Interpersonal Violence* 1338.

144 See, e.g., the discussion in Gewirtz and Edleson, above n 143.

145 See, e.g., Judy Cashmore, Patrick Parkinson, Ruth Weston, Roger Patulny, Gerry Redmond, Lixia Qu, Jennifer Baxter, Marianne Rajkovic, Tomasz Sitek and Ilan Katz, *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, Sydney, 2010; Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells and Caroline Long, *Post-Separation Parenting Arrangements and Developmental Outcomes for Children: Collected Reports*, Family Transitions, Melbourne, 2010; Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) 14 *Journal of Family Studies* 37; Joan Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' (2000) 39 *Journal of the American Academy of Child and Adolescent Psychiatry* 963.

146 See, e.g., a study being undertaken by Bruce Smyth, available at <http://adsri.anu.edu.au/news/smyth14-11-11>, 29 April 2014.

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Even though significant proportions of children witness family violence, as noted earlier, the application of these provisions in a technical sense will be narrowed by the requirement to establish that the exposure 'caused psychological harm' (section 4). At the time writing, there was very little jurisprudence on this aspect of the reforms (as discussed further in Chapter 8). It remains to be seen how this recognition of the exposure of children to family violence will play out in practice. In the child protection context, recognition of family violence as a form of child abuse has led to concerns about non-perpetrator mothers, rather than fathers as perpetrators, being held responsible.[147]

5.7 *FAMILY LAW ACT* APPROACHES

A long-range consideration of family law policy changes and the reports and reviews underpinning them reveals that a consistent tension since the mid-1990s has been a concern to encourage both parents (in particular fathers) to remain involved in their children's lives after separation and to protect children from harm from exposure to abuse and family violence. This tension is evident very strongly in the *Every Picture Report* that lead to the Howard Government's 2006 amendments,[148] and in the reforms themselves, but has also been evident before and after that, as this part of the chapter explains.

Prior to the 2006 amendments, explicit reference to family violence in the *FLA* from 1996 required courts to consider the need to protect children from physical or psychological harm from abuse, ill-treatment, violence or other behaviour in considering the factors relevant to determining 'best interests'.[149] In early Family Court of Australia (FCoA) jurisprudence, the issue of violence was originally obscured by an emphasis on the 'no fault' philosophy of the *FLA*[150] and past conduct was largely considered irrelevant to decision making. On the basis of an analysis of decision making in matrimonial cases pre-dating the *FLA*, Rhoades and colleagues argue that the *FLA* 'silenced' a professional awareness of family violence and its implications for post-divorce decision making evident among lawyers, judges and counsellors in the pre-*FLA* era.[151] For the first decade and a half or so, FCoA case law under the *FLA*, both in property and children's matters, was permeated by a view that consideration of violence was irrelevant.[152] In the early 1990s, the FCoA

147 Cathy Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice*, Issues Paper 13, Sydney, Australian Domestic and Family Violence Clearinghouse.

148 *Every Picture Report*, above n 121, Recommendations 2 and 16.

149 Rae Kaspiew, 'Family Violence in Children's Cases Under the *Family Law Act 1975* (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279.

150 See, e.g., Juliet Behrens, 'Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse' (1993) 7 *Australian Journal of Family Law* 9; Regina Graycar, 'The Relevance of Violence in Family Law Decision Making' (1995) 9 *Australian Journal of Family Law* 58, 66.

151 Helen Rhoades, Charlotte Frew and Shurlee Swain, 'Recognition of Violence in the Australian Family Law System: A Long Journey' (2010) 3(24) *Australian Journal of Family Law* 296, 297.

152 Justice KA Murray, 'Domestic Violence and the Judicial Process' (1995) 9 *Australian Journal of Family Law* 26.

began to acknowledge in case law that violence was a factor to be taken into consideration in relation to both property and children's matters.[153] However, even as the case law on the relevance of family violence to children's and property matters was developing, it was clear that the Court was concerned to ensure that the floodgates would remain closed, with violence being relevant only in a narrow band of cases where high standards of severity and evidentiary support could be met.[154]

Despite the new emphasis on family violence in the *Family Law Reform Act 1995* (the 1996 amendments),[155] an increased focus on the child's right to contact[156] (see Chapter 6) in the same set of amendments had the effect that violence arguably became even less visible than before.[157]

The *Every Picture Report* of the Parliamentary Committee that lead to the 2006 amendments recommended measures intended to strengthen legislative support for fathers' involvement post-separation, at the same time as recognising that the system's capacity to deal with family violence and child abuse needed to be improved.[158] The legislative changes introduced in response to the report pursued both of these aims, although it was the support for shared parenting that received most attention in the press and from lobby groups, particularly fathers' rights groups. A change central to both aims was the introduction of a presumption of equal shared parental responsibility (*FLA* section 61DA) with a linked obligation on the courts to consider making orders for equal or substantial and significant time where orders for equal shared parental responsibility were made pursuant to the presumption (section 65DAA), and such arrangements were deemed to be in a child's best interests and reasonably practicable (sections 65DAA(2)). In legal terms, the presumption is highly qualified: it is not applicable where there are reasonable grounds (a low evidentiary threshold) to believe a parent has engaged in family violence or child abuse (section 61DA(2)) and it is rebuttable on the basis of evidence establishing that its application would not be in the child's best interests (requiring proof to the balance of probabilities) (*FLA* section 61DA(4)).

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153 Graycar, above n 150.

154 See, e.g., *Cassandra Kathleen Kennon (Appellant/Wife) and Ian William Kennon (Cross-Appellant/Husband) Appeal* [1997] FamCA 27; 22 Fam LR 1, where the court was concerned to articulate limits on the way violence could be relevant in property matters to prevent it from becoming 'common coinage' (at 24); see also the discussion of evidentiary issues in *In the Marriage of JG and BG* (1994) 18 Fam LR 255, 261–3. For an analysis of violence in children's matters under the *Reform Act 1996* see Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112.

155 For example by inserting into the FLA s 68F(2)(g) and s 68J.

156 John Dewar and Stephen Parker, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975*, Family Law Research Unit Working Paper No. 3, Griffith University, 1999 ('*Parenting Planning and Partnership*'), p 83. A shorter version of this report has been published as 'The Impact of the New Part VII *Family Law Act 1975*' (1999) 13 *Australian Journal of Family Law* 96. See also Helen Rhoades, Regina Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (the '*First Three Years Report*'), University of Sydney and Family Court of Australia, 2000, p 6, [1.21].

157 John Dewar and Stephen Parker, ibid. See also Helen Rhoades, Regina Graycar and Margaret Harrison, Kaye et al., above n 103; Kaspiew (2005), above n**; Amanda Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *Australian Journal of Family Law* 170.

158 *Every Picture Report*, above n 121.

The 2006 amendments also involved the adoption of a tighter definition of family violence in the *FLA* (a requirement for fear or apprehension to be experienced 'reasonably' in the subject's circumstances), a narrower approach to the kinds of civil protection orders that were specifically considered under the *FLA* when parenting orders are made (excluding those obtained on an interim basis in the absence of the other party)[159] and the introduction of measures subsequently considered to contribute to concerns about family violence and child safety not being raised in court proceedings.[160]

5.7.1 THE 2012 FAMILY VIOLENCE AMENDMENTS

In addition to introducing the wider definition of family violence relevant to all proceedings under the Act, the 2012 amendments made changes to Part VII of the *FLA* that were intended to produce two main shifts in the way matters involving family violence and child abuse are dealt with: first, to ensure that concerns about family violence and child safety are brought to the attention of decision makers and, second, to ensure that the aim of protecting children from harm is given priority over maintaining a meaningful relationship with both parents after separation, where these aims are in conflict.[161]

The rationale for these aims is grounded in empirical evidence about the operation of the 2006 amendments[162] and the analyses by Richard Chisholm and the Family Law Council,[163] referred to earlier, that highlighted the need for reform across the system to support better handling of family violence and child safety. One of the core relevant empirical findings to come from the 2009 AIFS Evaluation of the 2006 family amendments was that families where there had been a history of family violence and/or the presence of ongoing concerns about safety were marginally more likely than families without these concerns to have shared time parenting arrangements.[164] Such families were also more likely to have used family law system services than other families, suggesting that the 'system, to some extent is instrumental in producing, or at least not preventing' such arrangements.[165] As the description of the presumption set out about above clearly indicates, such an outcome is not consistent with the intent behind the 2006 amendments although it was a likely effect of the tension between shared parenting and safety-focused policy goals. Released on the same day as the AIFS Evaluation was the *Family Courts Violence Review*, in which the Honourable Richard Chisholm identified a need for family violence to be 'disclosed, understood, and acted upon'.[166] To support this aim, his report made a number of recommendations for change, including legislative amendments to support disclosure

159 *FLA* s 60CC(3)(k).

160 The provisions were s 117AB—costs order for 'knowingly' made false statements and s 60CC(3) requiring courts to consider the extent to which one parent had facilitated the other parents relationship with the child. Chisholm, above n 3, recommended the repeal of s 11, AB and the amendment of s 60CC(3)7 and the Commonwealth Parliament repealed both.

161 Both these goals were identified as important in the *Family Courts Violence Review*: Chisholm, above n 3.

162 Kaspiew et al., above n 2, Bagshaw et al., above n 71.

163 Chisholm, above n 3.

164 Kaspiew et al., above n 2, pp 232–3.

165 R Kaspiew, M Gray, L Qu and R Weston, 'Legislative Aspirations and Social Realities: Empirical Reflections on Australia's 2006 Family Law Reforms' (2011) 33(4) *Journal of Social Welfare and Family Law* 397, 402.

166 Chisholm, above n 3, p 6.

(repealing provisions considered to discourage disclosure and imposing obligations on various actors to ask about family violence), and increasing the level of family violence expertise among professionals across the system.

The 2012 amendments responded to the *Family Courts Violence Review* and the other empirical evidence, including the AIFS Evaluation of the 2006 family law amendments, by:

- introducing a wider definition of family violence (see 5.3) (section 4AB);
- providing that where the principle of protecting children from harm stands in conflict with the principle of ensuring they maintain a meaningful relationship with each parent after separation, protection from harm is to be given greater weight (section 60CC2A);
- imposing an obligation on advisors (professionals who provide advice to separated parents, including support service professionals, family dispute resolution practitioners and lawyers) to inform parents that parenting arrangements should prioritise the right to be protected from harm over maintaining meaningful relationships where this is a concern (section 60D(1)(iii));
- imposing an obligation on parties to inform courts about any attention from a child protection department that has been directed to a child in a matter or a member of that child's family (section 60CI(2));
- imposing an obligation on courts to actively inquire about the existence of risk of child abuse and family violence (section 69ZQ(aa));
- repealing provisions that may discourage concerns about family violence and child safety from being raised, including what became known as the 'friendly parent provision' and a provision obligating courts to make costs orders against a party found to have 'knowingly made a false statement' in court proceedings;[167]
- recognising the exposure of children to family violence as a form of abuse (section 4, section 4AB, see 5.6).

Subsequently, the findings of the AIFS SRSP 2012 have provided insight into the experiences of parents prior to the 2012 reforms and further evidence that they were needed. These findings have indicated an 'uneven set of behaviours and practices' in relation to parents disclosing concerns about family violence and child safety and professionals eliciting such concerns.[168] A substantial minority of parents who held such concerns indicated they did not disclose them to family law system professionals. Parents were also more likely to say they had disclosed concerns about child safety (69.5 per cent) than family violence (40.5 per cent) where they reported holding such concerns, but were more likely to report that 'nothing happened' in relation to disclosures about child safety concerns (41 per cent) than about family violence (35 per cent).[169] Moreover, of the parents who nominated a formal pathway (counselling, mediation, Family Dispute Resolution, lawyers, courts) as the 'main pathway' for sorting out parenting arrangements 41.0 per cent of fathers and 30.3 per cent

167 *Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011* (Cth), Items 18 and 43.
168 De Maio et al., above n 4, p 119.
169 ibid., Figure 5.2 and Figure 5.4.

of mothers indicated they had not been asked about these issues by professionals.[170] Not surprisingly in light of these findings, parents who reported concerns about family violence and safety were much less positive about the efficacy of the family law system than parents without these concerns.[171]

This and other recent evidence is consistent with earlier studies and analyses that have raised concerns about the family law system's ability to deal with family violence effectively for a range of reasons.[172] These include a lack of understanding among family law system practitioners of family violence,[173] the complexity of the legislation,[174] and a lack of infrastructure to support family violence identification and assessment.[175] Despite the measures described earlier—including the availability of the DOORS risk assessment tool—it is unlikely that the dynamics giving rise to these concerns will change quickly, particularly in an environment where there are concerns about insufficient resources in the system, including the availability of Legal Aid.[176]

These themes have been highlighted clearly again recently in research examining the practices of independent children's lawyers (ICLs), who are appointed in about a third of parenting matters, funded by legal aid, and whose caseload is dominated by matters involving family violence and child abuse.[177] This research has highlighted a need for an increased focus on family violence and child safety in training and professional development of these practitioners. The findings are discussed more fully in Chapter 7 but some findings are particularly pertinent to this discussion of violence and abuse. Of particular relevance is the lack of confidence expressed by participants in the capacity of ICLs to handle tasks associated with risk assessment and risk management with parents, and to a lesser extent children, which emerged as a significant theme in the research. This is evidenced by lower ratings of ICL ability in these areas by all professionals involved in the research, compared with other ICL tasks, and particularly by non-ICL lawyers.[178] Of this group, just 30 per cent rated ICL ability to respond adequately to risks to parents positively. ICLs themselves returned lower ratings of their own ability in this regard as well.[179] The data derived from interviews with parents and children for the project further reinforce concerns in this area, suggesting that the practices of some ICLs fall short of providing an effective response.[180] However, the data also suggest that, in some instances, ICLs are critical to ensuring that

170 ibid., Table 5.5.
171 ibid., Table 6.2 and Table 6.3.
172 See, e.g., Kaye, Stubbs and Tolmie, above n 103; Dewar and Parker, above n 156; Kaspiew et al., above n 2; Bagshaw et al., above n 71; Chisholm, above n 3; Family Law Council, above n 3.
173 For example, Bagshaw et al., above n 71.
174 Chisholm, above n 3.
175 *Every Picture Report*, above n 121; Chisholm, above n 3.
176 In February 2014, the Chief Justice of the Family Court of Australia, the Honorable Diana Bryant, took the unusual step of discussing her concerns in the media about a lack of resources (including Legal Aid) impairing the courts' ability to deal with family violence risk: <www.abc.net.au/worldtoday/content/2014/s3964685.htm>. See also the Hon Justice Steven Strickland and Kristen Murray, 'A Judicial Perspective on the Australian Family Violence Reforms 12 Months On' (2014) 28 *Australian Journal of Family* Law 1.
177 R Kaspiew, R Carson, S Moore, J De Maio, J Deblaquiere, B Horsfall, *Independent Children's Lawyer Study: Final Report*, Australian Institute of Family Studies, Melbourne, 2013.
178 ibid., Table 7.3.
179 ibid., Table 7.3.
180 ibid., part 8.4.3.

protective concerns are brought before the court.[181] The overall picture that emerges from the research is that a range of issues impinges on the question of whether ICL practice is effective in cases involving family violence and child abuse, including those that are individual (the competence of some practitioners was called into question by a significant number of professional and parent participants in the research) and systemic (concerns about funding, accreditation and training also play a part).[182]

Other research has highlighted the role professional attitudes play in determining whether legal responses to family violence are effective. A study by Rosemary Hunter of attitudes to family violence manifested by system players across state and federal jurisdictions has shown that, despite pro-feminist law reforms in these areas, 'non-feminist' approaches to domestic violence were most prevalent among lawyers and legal decision makers.[183] Hunter's research found that such beliefs:

> predominated in many lawyers', magistrates' and judges' minds and were highly influential in the way they went about their representative and adjudicative roles. The non-feminist narratives were that violence is manifested in isolated incidents of physical assault and occurs exceptionally; that women tend to lie or exaggerate about abuse; that violence is caused by provocation, relationship conflict, alcohol, and cultural norms among 'ethnic' communities; that there is no relationship between a man's violence towards his partner and his parental capacity; and that victims of violence suffer from a psychological disorder.[184]

Hunter concludes that the outcomes produced as a result were questionable with respect to the extent to which they achieved safety for women in both state and FCoA arenas. Specifically, 'many of the consent orders ... clearly perpetuated rather than prevented the father's future control and abuse of the mother'.[185] Underlining the impact that the attitudes of system players have on overall effectiveness and accessibility of the system, Hunter's study reinforces the point that these may well be more influential than the legal frameworks themselves and that professional development in relation to family violence and child safety needs to be thorough and ongoing.

The theme of lawyers, courts and police being inadequately equipped to deal with family violence is a common one in the literature in this area.[186] Carolyn Johnson's research on familicide—that is, situations in which a parent, typically a father, has killed his child or children and then committed or attempted to commit suicide—exposes the most serious potential implications of these system failures. This study showed that the history of

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181 ibid., part 8.4.3 and 4.2.

182 ibid., Chapter 9.

183 Rosemary Hunter, *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, Unpublished PhD thesis, Stanford University, 2005, p 305.

184 ibid., p 305. See also Hunter, above n 62.

185 Hunter, above n 62, p 773.

186 For example Hunter, above n 62; *Parenting Planning and Partnership*, above n 156, p 38; Hayley Katzen, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14(2) *Australian Journal of Family Law* 119; Rendell et al., above n 77. However, highlighting the power of institutional responses, Edwards' research, above n 74, showed that police action in removing a violent offender from the family home, followed by the granting of court orders excluding the perpetrator from the home, could be decisive in allowing women and children to stay in their homes on a long-term basis: p 29.

violence that preceded fatal incidents was underreported by victims and underrecognised by professionals. In examining the history behind seven Western Australian cases of familicide (resulting in 23 deaths, including 15 of children) that occurred mainly between 1989 and 1999, Johnson reported:

> Women commented on the general inability of the court to fully understand emotional disturbance resulting from separation, and the associated risks this posed to families, as well as its impotence in restricting the behaviour of disturbed individuals. Restraining orders were seen as virtually useless and family court orders when breached rarely incurred penalties. There were criticisms of lawyers, the family court, and of the family court counselling services.[187]

The challenges in predicting lethal violence are significant: so too are the implications of failing to predict such risk.

In summary, the discussion in this section has detailed successive legislative shifts in the *FLA* in the past 20 years and the ways in which they have attempted to address family violence and child abuse in family law parenting matters. The most recent changes introduced in 2012 are intended to encourage disclosure of such concerns and ensure that protection from harm is prioritised over the child's right to meaningful involvement with each parent in family law matters. The backdrop to this position is a coordinated national commitment to reducing family violence through the implementation of the National Plan to Reduce Violence against Women and Their Children. A further issue is longstanding recognition of the roles that professional skill and understanding play in determining whether systemic responses to family violence are effective or ineffective. Recent developments, such the DOORS and AVERT training packages, address this point, but it is also clear from research evidence that substantial change is needed in professional approaches. Similar issues and themes arise in the next section, which provides an overview of state-based civil protection orders systems, including recent developments in Victoria.

5.8 CIVIL PROTECTION ORDERS

This section is an introduction to the state- and territory-based legal frameworks that attempt to provide protection from family violence and abuse. It begins with a discussion of the purpose of civil protection orders, and also canvasses some of the complex policy questions to which these legal frameworks give rise.[188] These include the issue of how these frameworks fit in with the criminal justice system and the definitional issues surrounding the conduct to which they respond. Our aim is to provide a general overview of how state-based civil protection frameworks operate, and to introduce some of the conceptual issues

187 Carolyn Harris Johnson, 'Familicide and Family Law: A Study of Filicide–Suicide Following Separation' (2006) 44(3) *Family Court Review* 448, 463.

188 For an overview of the different frameworks, see, e.g., The National Council to Reduce Violence against Women and Their Children, *Domestic Violence Laws in Australia*, Department of Families, Housing, Community Services and Indigenous Affairs, Canberra, 2009. Some jurisdictions have changed their laws since this report was completed: see Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence against Women and Their Children: Progress Report 2010–2012*, Commonwealth of Australia, Canberra, 2013.

they raise, rather than to provide a detailed state-by-state analysis. In order to illustrate the approaches that may be taken, the Victorian legislation is used as an example.

Overall, empirical evidence indicates that men and women who experience family violence do not commonly report the violence to police. The ABS Personal Safety Survey 2012 shows that one-fifth of women who experienced violence by a current partner had reported the violence to police. Around two-fifths of women who reported violence by their most recent previous partner had contacted police. Of these, half had a restraining order issued and nearly three-fifths of these women reported experiencing further violence.[189] The vast majority of men who had experienced violence at the hands of a current or previous partner had not reported the experience to police (95 per cent and 80 per cent respectively).[190]

Frameworks for civil protection orders—known variously as restraining orders, apprehended violence orders (AVOs), family violence orders or domestic violence orders[191]—were the main legislative response to growing recognition that existing legal mechanisms failed to protect women from family violence and abuse. Feminist critiques through the 1970s and 1980s highlighted systematic institutional failure to address family violence and abuse[192] and the inability of the criminal justice system to protect women from future violence.[193] New laws providing for civil protection orders were enacted in most states in the 1980s and 1990s and operate by placing restrictions on the perpetrator of the violence. They are a civil remedy in nature—meaning that a complainant, or increasingly the police, must apply for the order. The case must be proven on the civil standard of proof, the balance of probabilities. These applications are made in a court of summary jurisdiction. When a civil protection order has been made by a court, breaches of the terms become a criminal offence, opening up the possibilities of a police response and criminal proceedings. Similar orders may also be made by the Family Court of Australia and the Federal Circuit Court of Australia exercising *FLA* jurisdiction,[194] although these orders are sought less often than orders under state legislation.

The conditions and prohibitions in civil protection orders can be tailored to reflect the particular circumstances of the case and can include restraining the respondent from approaching the applicant and prohibiting the respondent from entering the premises on which he and the applicant have resided. The substantive law is also backed by various special processes, including processes for making interim ex parte (in the absence of the respondent) orders, access to legal aid and support services, and a system for registration and enforcement of orders across state boundaries. In Victoria, an innovative feature of legislation enacted in 2008 allows for police to issue a personal safety notice, which is

189 ABS above n 52, Table 23.

190 ibid.

191 Different statutes adopt different names for these orders. In Victoria, for example, they are 'family violence intervention orders' under the Family Violence Protection Act 2008 (vic), in NSW they are 'apprehended domestic violence orders' (s19, Crime (Domestic and Personal Violence) Act 2007 (NSW).

192 For example Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence*, Viking, New York, 1988.

193 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*, 2nd edn, Federation Press, Sydney, 2002, p 317.

194 *FLA* ss 114 and 68B. The jurisdictional restrictions discussed in Chapter 3 apply to these injunctions.

effective until an application for a family violence intervention order is considered by a court (section 30). Police in Western Australia, South Australia, Tasmania and the Northern Territory have similar powers.[195]

In the past few years, most jurisdictions have embarked on reforms of the original frameworks.[196] These second-generation reforms have focused on widening the definitions of violence, broadening the scope of relationships covered, resolving conflicts between state orders and federal parenting law orders, and ensuring that children who witness or experience family violence and abuse are also protected.[197] More broadly, some jurisdictions have also introduced specialist domestic violence courts or lists within existing courts,[198] in recognition of the need to address difficulties that go beyond the wording of the statute and extend into the arena of legal profession practices and attitudes, including those of the judiciary and magistracy. Queensland researchers Heather Douglas and Robyn Fitzgerald observe that:

> the legislative responses to DV [domestic violence] have become increasingly complex, multi-layered and contingent ... more than statute reform is required to perfect the legal response to DV as the impact of legal change is dependent on wider social and cultural contexts.[199]

There is some research that suggests that some family law practitioners believe that personal protection orders are obtained for tactical reasons in circumstances where they are not really warranted when family law proceedings are pending. For example, a study by Patrick Parkinson and Judy Cashmore has suggested that some family law practitioners NSW view personal protection orders with some suspicion, holding the belief that where family law proceedings are, or may be, on foot, they may have been obtained for tactical rather than protective purposes.[200] The implications of this claim are that women are applying for intervention orders to establish a history of family violence in subsequent

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195 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 368.

196 National Council to Reduce Violence against Women and Their Children, above n 7. See also FaHSCIA, *Progress Report*, above n 188. Analyses of the effectiveness of these frameworks include Auditor-General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders*, Report No. 5, October 2002, p 6; Suzanne Hatty, *Male Violence and the Police: An Australian Experience*, School of Social Work, University of New South Wales, Kensington, 1990; Katzen, above n 186; Lily Trimboli and Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, New South Wales Bureau of Crime Statistics and Research, 1997, p vii; Julie Stubbs and Diane Powell, *Domestic Violence: Impact of Legal Reform in NSW*, New South Wales Bureau of Crime Statistics and Research, 1989; Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987*, La Trobe University, Melbourne, 1992; Margrette Young, Julie Byles and Annette Dobson, 'The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women', *Trends and Issues in Crime and Criminal Justice*, No. 148, Australian Institute of Criminology, Canberra, 2000.

197 Karen Wilcox, 'Recent Innovations in Australian Protection Order Law—A Comparative Discussion' Topic Paper No. 19, Domestic and Family Violence Clearing house, Sydney, 2010.

198 See *Progress Report on the National Plan 2010–2012*, above n 188. Julie Stewart, *Specialist Domestic/Family Violence Courts within the Australian Context*, Issues Paper 10, Australian Domestic and Family Violence Clearinghouse, Sydney, 2005.

199 Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36 *University of NSW Law Journal* 56, 86.

200 Patrick Parkinson, Judy Cashmore and Atlanta Webster, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 25 *Australian Journal of Family Law* 313; such views, and contrary views, were also reported in Kaspiew et al., above n 2, at part 10.4.4.

family law court proceedings, rather than actually needing them for protection. Such concerns have been reflected in a series of amendments to the provisions regarding the best interests checklist in the *FLA* (section 60CC). In 2006, these provisions were amended to provide that the court was to have regard only to final orders made after a contested hearing. They were changed in 2012 to provide that the court should take into account in any family violence order the circumstances in which it was made, reflecting a revision of the 2006 approach (*FLA* section 60CC(3)(k)).

In contrast to the reported views of some family lawyers, the overall evidence about the use and operation of civil protection orders establishes that use of these systems can be difficult and even traumatic for women and, as reported earlier, family violence is significantly underreported to police. Recently, a parliamentary committee in NSW concluded that 'the court system can be so traumatic for some victims of domestic violence that they are deterred from ever returning to court again'.[201]

Over a long period, research has consistently highlighted the difficulties women encounter when using these processes.[202] Most recently, Lesley Laing's study of 40 women's experiences of the NSW protection order system found a mixture of positive and negative experiences with different parts of the process.[203] The research uncovered:

> a continuum of responses, [at one end] there were some women who were primarily positive about their experience of the process and the outcomes, and at the other, women who regretted having ever becoming involved in the legal system. However, for the majority of the women, their experiences were more nuanced. A devastating legal outcome, for example, might be balanced by empathic support offered by someone in the system: a woman may be well supported through a protracted process and referred to essential resources outside the system.[204]

More than half of the women in the sample had experience of both family law processes and personal protection order processes. A common experience of these women was a sense that their situation was treated in each legal forum with scepticism, even though they had experienced very severe violence. Consistent with findings of an earlier study by Laing,[205] one woman was advised by police to confine her attempts to seek protection to the family court:

> [H]owever, she found that her ex-partner continually breached Family Court interim orders and to deal with this she faced great expense in going back to the Family Court ... She has found the process between the two systems confusing and had received contradictory advice from service providers.[206]

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201 New South Wales Parliament, Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW*, NSW Parliament, Sydney, 2012.

202 See, e.g., Hunter above n 62.

203 Lesley Laing, *It's like This Maze That You Have to Make Your Way Through: Women's Experiences of Seeking a Domestic Violence Protection Order in NSW*, University of Sydney, Sydney, 2013.

204 ibid., p 70.

205 Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence,* The University of Sydney, Sydney, 2010.

206 Laing, above n 203, p 52.

Other studies have shown that, despite experiencing violence, threats and fear, women have chosen not to obtain intervention orders and that, in cases where they have obtained them, they have been ineffective.[207]

Overall, there is little direct empirical evidence that supports the view that protection orders are obtained for tactical purposes to any significant extent: what is reported are perceptions along these lines, rather than any hard data. In light of evidence of the prevalence of family violence among separated couples, such views are concerning as they may contribute to a tendency for concerns about family violence to be dismissed too readily. The data on the rates at which family violence is reported to police and the proportion of cases in which civil protection orders are subsequently obtained suggest the significant issue in this context is underuse of these systems rather than spurious use of them. The empirical evidence that does exist shows that some victims of family violence can find personal protection order systems difficult to use, with varying attitudes and approaches among the personnel in the system, as well as fragmentation among intersecting frameworks in family law, child protection and family violence, impairing their capacity to achieve a coherent response to their needs.

5.8.1 PRACTICAL AND CONCEPTUAL TENSIONS

A number of tensions exist in debates concerning attempts to respond to family violence via civil protection order legislation; these are also relevant more generally to our discussion in this chapter. These tensions revolve around three themes. The first is the way that legal responses (and the operational mechanisms behind them) allow for agency (power of choice) to be exercised by those for whom protection is sought—the agency dilemma. This dilemma can be seen most clearly in whether the protected person has control over whether proceedings are instituted under protective frameworks and are subsequently maintained or discontinued. The second is the way that implementation of legal responses is consistent with the intent to provide protection for victims and avoids being used in ways not envisaged—the 'unintended consequences' phenomenon. An example of unintended consequences is the recent emergence of an apparently growing tendency for so-called 'mutual' orders to be issued so that each party in a matter is subject to, and protected by, a personal protection order. The third is whether the frameworks are configured in a way that is inconsistent with a policy-based intention to recognise the criminality of family violence—the decriminalisation concern.

These three themes, which are now examined in more depth, illustrate the complexity, and shifting ground, in the ways in which family violence is defined and responded to in a social and organisational context where understandings of family violence may not be based on common values, attitudes and understandings. The literature on personal protection order frameworks highlights the role that attitudes and understandings—underpinned

207 Angela Melville and Rosemary Hunter, '"As Everybody Knows": Countering Myths of Gender Bias in Family Law' (2001) 10 *Griffith Law Review* 124, 127–8.

by personal values—can play in influencing whether they are implemented effectively and result in a positive experience for victims.[208]

5.8.1.1 AGENCY DILEMMA

A significant issue in relation to family violence and abuse is the extent to which women should be permitted to exercise decision-making power as to whether applications for civil protection orders or criminal prosecutions for violence can proceed. This issue becomes particularly relevant where police are exercising their power to apply for civil protection orders and in jurisdictions where no-drop and pro-prosecution policies have been implemented. The question that arises in such contexts is what input the woman who has experienced the violence should have in relation to police and prosecutor decisions as to whether proceedings should be continued. A central theme in considerations of this issue is the need for processes that facilitate empowerment for targets of violence, because this is exactly what victims have been denied through the violence: the capacity to freely make their own life choices. '[B]ecause family violence involves the systematic disempowerment of people who experience it, legal processes must have the opposite effect.'[209] Empowerment is jeopardised if victims' lives continue to be controlled by the perpetrator and a further context in which this may happen is through actual or threatened abusive use of the legal system in relation to children. Conversely, there are significant debates in the pro-feminist literature on controlling violence about the extent to which laws and policies should defer to the autonomy and choice of victims.[210]

There are many strands to these debates, and there is a good deal of common ground underlying them, including the recognition that controlling violence is used as a way of disempowering victims, and that violence needs to be taken seriously as an offence not just against the victim, but also against the state. From this generally shared ground, however, very different positions can be reached. Those who place a high importance on women's autonomy and choice argue that it is only by prioritising those values that women can be protected from further abuse by the legal system; women's and children's agency (or capability to make effective choices) must not be denied. Victims will make choices that best promote their own perceptions of their own and their children's needs. If the system tries to second-guess these choices it disempowers victims and even endangers them. On the other hand, the notion that victims have free choice is fairly easily criticised, particularly where a victim is under continuing pressure from the perpetrator. It is argued that, by taking the choice away from a victim, the state in effect empowers her in relation to the perpetrator (by making it more difficult for the perpetrator to blame her for the decision), but also recognises the state's important interest in having controlling violence dealt with seriously. So, for example, it has been argued that prosecutions of controlling violence should proceed even if the victim does not want them to, that police officers should apply for protection

208 For example, Laing 2010, above n 205.

209 Victorian Law Reform Commission, above n 61, [1.24], p 7.

210 For an overview of these debates see Elizabeth Schneider, *Battered Women and Feminist Lawmaking*, Yale University Press, New Haven, Connecticut, 2000, pp 74–86.

orders even against the objection of the victim, and that victims should be compellable and compelled to give evidence in criminal trials based on controlling violence.[211]

5.8.1.2 MUTUALISATION AS AN EXAMPLE OF UNINTENDED CONSEQUENCES

An emerging concern is the phenomenon of orders being obtained by each party in a dispute. 'Cross application' describes circumstances where 'an application for a protection order made by the respondent to the current application against the person seeking the original protection order'.[212] The term 'mutual orders' is applied to situations where each party consents to the making of an order against them. As the ALRC notes, in some circumstances cross applications and mutual orders might be legitimate, but in others they may indicate that the protection order system is being manipulated or misused, potentially to perpetuate abuse and control of the victim.[213] Cross applications may be brought in order to pressure the person seeking the original order to agree to withdraw the application or consent to mutual orders to escape the consequences of having a non-consent-based personal protection order taken out against them. These consequences may potentially be significant from a family law perspective, since courts are required to have regard to the circumstances in which any personal protection order was issued (*FLA* section 60CC(k)). The existence of mutual orders might therefore suggest that each party was equally responsible for the violence, in circumstances where this is not the case. Broader concerns about the implications of mutual orders and cross applications include that the violence of the main aggressor is being minimised and the system's capacity to provide protection for the victim undermined. Further, submissions to the ALRC indicated that people who consent to mutual orders may not understand that they could subsequently be vulnerable to criminal prosecution arising from breaches of the order.[214]

There is limited empirical research on cross applications and mutual orders. Queensland researchers Heather Douglas and Robyn Fitzgerald examined personal protection order applications and determinations, including cross applications, from 2004–05 to 2010–11.[215] From a relatively stable level of 12–13 per cent, the proportion of cross applications increased from 2007–08 and reached close to or in excess of 16 per cent each subsequent year. Douglas and Fitzgerald note that this increase coincided with the implementation of the 2006 family law amendments, which, as explained earlier, required courts to consider family violence protection orders made after contested proceedings (implying no such regard was to be had to orders made by consent). They observe that the increase 'may also coincide with the emergence of typology like thinking that may have

211 For a discussion of this debate from a US perspective see ibid., pp 182–98, and the work of Susan Schechter, to which Schneider refers: *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement*, South End Press, Cambridge, Massachusetts, 1982; in Australia, see Graycar and Morgan, above n 193, pp 322–6, and the literature to which they refer there. For a more focused discussion of compellability and the tensions involved, see Community Law Reform Committee of the Australian Capital Territory, *Domestic Violence*, Discussion Paper No. 2, ALRC, Canberra, 1992.

212 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 877.

213 ibid.

214 ibid., p 876.

215 Douglas and Fitzgerald, above n 199.

begun to influence responses to DV' (domestic violence).[216] The inference arising from these observations is that the 2006 family law amendments had flow-through implications for personal protection order systems, with the Queensland data suggesting cross-order applications increased because of the potential implications of the existence of a personal protection order for family law proceedings.

Jane Wangmann's NSW-based research has a particular focus on cross applications.[217] Her research was based on interviews with women involved in cross applications, professionals, including judges, lawyers, police and family violence workers, court observations and 78 cross-application court files. Wangmann found that matters involving cross-order applications were much more likely than sole-order applications to result in the withdrawal of the application (62.3 per cent vs 49.3 per cent).[218] In the context of a systemic emphasis on settlement with processes conducted under significant time and resource pressures, Wangmann's research shows that cross applications are 'a bargaining tool' used to counter or undermine the primary applicant's case for protection.[219] Although the professionals interviewed tended to place a more benign interpretation on the implications of settlement in these circumstances, emphasising efficiency, the women interviewed experienced this as an extension of the abuse they were seeking protection from. Noting that the processes for obtaining personal protection orders precluded narratives relating to power and control from being raised and examined, Wangmann also observed evidence of values among some professionals suggesting a construction of family violence as 'mutual'. Wangmann suggested her findings had negative implications for the utility of approaches such as Michael Johnson's, described earlier, because 'differentiation may be seen as a way for the court to manage its excessive workload drawing on already dominant notions of mutuality, triviality and provocation, rather than a method to assist the court in developing appropriate responses to different forms of violence within intimate relationships'.[220]

Wangmann's research adds to the body of work that examines the role that the attitudes of professionals play in effectuating policies and frameworks relating to family violence. As noted earlier, there has been longstanding recognition of the fact that legal and policy change will be undermined unless it is accompanied by cultural change in the values of attitudes of those professionals operating within the frameworks.

5.8.1.3 CIVIL PROTECTION ORDERS AND THE CRIMINAL LAW

A significant issue that arises in this area is the relationship between criminal law and the law governing civil protection orders. Civil protection orders are sought as a result of behaviour that often may constitute a criminal offence (past behaviour) to provide future protection against the repetition of such behaviour. The violence founding the concerns to which the civil protection order responds may warrant criminal prosecution, independent

216 ibid., p 80.
217 Jane Wangmann, *'She Said ...' 'He Said ...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings* (March 2009), unpublished thesis, University of Sydney, Sydney eScholarship Repository, <http://ses.library.usyd.edu.au/handle/2123/5819>.
218 ibid., p 230.
219 ibid., p 269.
220 ibid., p 276.

of the civil protection order proceedings. Historically, however, criminal prosecution as a result of incidents of family violence has been uncommon, although in recent years many jurisdictions have tried to redress this.[221]

An ongoing concern therefore has been whether or not civil protection orders may become a substitute for criminal processes. The ALRC family violence inquiry examined this question and received submissions suggesting conflicting views as to whether protection orders displace criminal law responses in practice.[222] Several important points arise from submissions about this issue. First, several submissions raised the question of choice for those who experience family violence, recognising that they may need protection but may not want to see the perpetrator experience the consequences of criminal prosecution.[223] The question of the agency of victim/survivors in this context is a significant one, with ongoing arguments on either side of the debate over time, consistent with our earlier discussion regarding agency (5.8.1.1). Some commentators argue that the victim/survivor's view of whether criminal action should be taken should feed into prosecutorial decisions for a range of reasons, the most powerful among them being that removal of agency on this question compounds the disempowerment of the experience of family violence. On the other side of the debate, some commentators argue that choice displaces the responsibility of the state to administer justice, potentially re-privatising questions that have been de-privatised through the criminalisation of family violence. In submissions to the ALRC family violence inquiry, concerns were also expressed that choices made by victims-survivors may not be informed by the exercise of their own free will but might reflect pressure being brought to bear by perpetrators or others, including family members.

Apart from the question of choice, submissions to the ALRC raised other important points about the interface between the civil protection orders and criminal justice responses. Some responses indicated that, for police, expedience may inform decisions to pursue intervention orders rather than, instead of as well as, laying criminal charges. Depending on the approach involved in the particular jurisdiction, it was suggested that intervention order proceedings were administratively and legally less cumbersome than laying criminal charges, though in one jurisdiction the opposite was said to be true. Concerns about whether cooperation from the victim would be sustained throughout a criminal process were also raised. In this context, particular concerns were raised about situations involving Aboriginal and Torres Strait Islander peoples with some submissions suggesting that stereotypical views among police officers about the unreliability of Aboriginal women underpinned some decisions not to pursue criminal action.[224] On the basis of the evidence before it, the ALRC concluded that:

> in practice, the reasons police do not prosecute crimes committed in a family context seem to be inappropriate, and sometimes do not clearly relate to the safety or wishes

221 In 2008, Heather Douglas' study of criminal proceedings where civil protection orders were breached indicated that the harm to women from family violence was minimised and trivialised: 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 20 *Sydney Law Review* 439.

222 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, Chapters 8 and 11.

223 ibid., part 8.45 and following.

224 ibid., part 8.55.

> of victims. Not prosecuting because the task is difficult, or takes too much time, or because an officer thinks violence against a family member is less serious than other crimes are poor reasons not to prosecute a crime.[225]

5.8.2 THE VICTORIAN SYSTEM

The preceding discussion in this chapter has highlighted the dynamic nature of legislative responses to family violence, which continue to develop as policy keeps pace with developing research and practice understandings of family violence. In this section, we focus on one of the newer civil protection order frameworks, which came into effect in Victoria in 2008. The Victorian example provides a case study illustrating several of the key themes throughout this chapter.

The implementation of the *Family Violence Protection Act 2008* (Vic) (*FVPA*) came after a Victorian Law Reform Commission inquiry concluded that the preceding Victorian scheme—embodied in the *Crimes (Family Violence) Act 1987* (Vic)—lacked a coherent underlying philosophy and required significant reform to improve its efficacy (VLRC).[226] The 2008 legislation was part of a 'whole of government' approach aimed at developing a comprehensive response to family violence across different parts of governments and different agencies.[227] Key elements of this strategy included a Code of Practice for the Investigation of Family Violence 2004 (updated in 2010) for police, specialist family violence officers and teams within Victoria Police, specialist family violence court divisions and lists, and a common risk assessment framework for services responding to family violence.[228] An Indigenous Family Violence Taskforce was also established.[229]

Research examining the implementation of this approach demonstrates that an intensive amount of effort—in terms of resources and strategies to build commitment and understanding at agency and individual levels—was required to address the fragmentation of responses across different agencies and departments, as well as to establish a 'common set of philosophical and bureaucratic values'.[230] A core challenge was to generate a common understanding of what constitutes family violence in a context involving 'a great deal of philosophical and organisational cultural variation in the way that family violence is understood, and the way that responses to it are framed in organisational cultures'.[231]

The impact of the new approach in Victoria has been significant. An 82 per cent increase in the number of personal protection orders made in the Magistrates' Court has occurred between 2004–05 and 2011–12, accompanied by a 72.8 per cent increase in reported

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225 ibid., part 8.63.

226 Victorian Law Reform Commission, above n 61, pp xxii–xxiii.

227 S Ross, M Frere, Lucy Healey, Cathy Humphreys, 'A Whole of Government Strategy for Family Violence Reform' (2011) 70 *The Australian Journal of Public Administration* 131.

228 SAFER Team and Sentencing Advisory Council, Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework and Practice Guides 1–3*, 2nd edn, 2012.

229 Karen Crinall and Jenny Hurley, 'Safe at Home Programs in the Context of the Victorian Integrated Family Violence Service System Reforms: A Review of the Literature'.

230 Ross et al., above n 227, p 139.

231 ibid., p 137.

family violence incidents.[232] This increase is not purely attributable to population growth, since the rate of personal protection orders issued per 100,000 persons in the Victorian population increased by 35.6 per cent between 2008–09 and 2011–12.[233] Increasingly, police have become the main initiators of protection order applications, reversing a converse trend evident before the reforms: in 2004–05, 41 per cent of personal protection order applications were initiated by police, in contrast to 67 per cent in 2011–12.[234] Increases in the number of criminal charges laid by police in response to family violence incidents have also occurred: in 2011–12, charges were laid in 34.7 per cent of cases where family violence incidents were reported to police, compared with 18.7 per cent in 2004–05.[235] There has been an extraordinarily substantial rise in the number of minors protected under personal protection orders: an increase of 295.4 per cent between 2004–05 and 2011–12.[236] Patterns in sentencing responses to personal protection order contravention offences have also shifted, 'away from financial penalties to sentences with greater potential for some form of intervention in the lives of offenders'.[237] On the basis of consultations undertaken to support the consideration of the data presented in the report, the Sentencing Advisory Council noted in 2013 that 'stakeholders consistently remarked on cultural shift in the response to family violence among key criminal justice institutions, particularly the courts and police ... there is now a deeper understanding of the nature of family violence on the part of magistrates and police ...'.[238]

The reforms to the Victorian system, and the increased level of reporting family violence to police, have also stimulated public scrutiny of and debate about the extent to which the police and criminal justice systems are adequately resourced to deal with family violence. In April 2014, following a period in which three family violence murders had occurred in Victoria over a four-day period, *The Age* newspaper published an editorial questioning whether an adequate response to the 'epidemic' exposed by the changes could occur within existing resourcing parameters. The editorial asserted that 'for as long as family violence continues unabated, it remains a stigma on our society. It must be fixed, whatever it takes, whatever it costs'.[239]

The wider policy and operational context surrounding the enactment of the *FVPA* underpins a number of its innovative features. Specifically, some of these features were designed to contribute to the development of common understandings mentioned earlier (5.3).[240] For example, the Act includes a Preamble that sets out a number of normative 'principles' that embody the values the Parliament intended to uphold by enacting the legislation. These include recognition of 'non-violence' as a fundamental social value

232 Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention, Monitoring Report*, Sentencing Advisory Council, Melbourne 2013, p 11.
233 ibid., p 12.
234 ibid., p 16.
235 ibid., p 17.
236 ibid., p 19.
237 ibid., p 31.
238 ibid., p 14.
239 'Family Violence: A Concern beyond Price', editorial, *The Age*, 24 April 2014.
240 Victorian Law Reform Commission, above n 61.

(subsection (a)) and that family violence is a violation of human rights (subsection (b)). The Preamble also recognises the adverse impact exposure to family violence has on children, the non-physical dimensions of family violence and that it 'may involve overt or subtle exploitation of power imbalances'.

Remedying a deficiency identified by the VLRC report in the preceding framework, namely the lack of a definition of family violence, the *FVPA* 2008 introduced a comprehensive definition that was influential in the development of the *FLA* definition introduced in 2012 and discussed earlier (5.7.1). The *FVPA* definition (section 5(1)) provides a core statement that:

> family violence is—
>
> (a) behaviour by a person towards a family member of that person if that behaviour—
>
> (i) is physically or sexually abusive; or
>
> (ii) is emotionally or psychologically abusive; or
>
> (iii) is economically abusive; or
>
> (iv) is threatening; or
>
> (v) is coercive; or
>
> (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or well-being of that family member or another person; or
>
> (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

The core definition, however, includes examples and, further, more detailed provisions explaining the types of behaviour included in the definition, which is more extensive than under the *FLA*. For example, further provisions explain the concepts of 'economic abuse' (section 6) and 'emotional or psychological abuse' (section 7), providing illustrative examples. Who comes within the term 'family member' is to be determined in two main ways. The first way revolves around past and present relationships, including past and present 'domestic partners', past and present partners in intimate relationships (including the partner's child), past or present 'relatives' (implying the status of relative may have changed when the relationship ceased), and a child with whom the person seeking the personal protection order resides or resided with on a 'normal or regular basis' (section 8(1)). The second way involves establishing that the person seeking the personal protection order 'reasonably' regarded the other person as a family member, having regard to social and emotional ties between them, whether engagement between them occurs in 'a home environment', the way the individuals' wider community regard the relationship, whether there is cultural recognition of the relationship as being like family, the duration of the relationship and the frequency of contact, financial arrangements, other forms of dependence and interdependence, care responsibilities (on a paid or unpaid basis) and the provision of sustenance and support. This definition responds to recommendations by the VLRC that the definition of family member be made inclusive enough to capture a range of relationships, reflecting kinship norms within Indigenous communities and some other culturally and linguistically diverse communities, relationships between peoples

with disabilities and their carers and situations where protection is required from a person connected with a former partner (for example, a new partner, associate or child).[241]

Other key aspects of the *FVPA* include:

- **Family Violence Safety Notices:** a police officer may apply to a more senior officer for a Family Violence Safety Notice outside of normal court hours where they believe on 'reasonable grounds' that such a notice is necessary to ensure the safety of the affected family member, preserve their property or to maintain the safety of a child (section 24). These notices are deemed to be applications for a personal protection order (section 31) and are effective until such time as a court considers the application (section 30) on first mention, required to be within 72 hours (section 31).
- **Interim family violence intervention orders:** may be made where a court if satisfied on the balance of probabilities that an interim order is necessary to ensure the safety or protect the property of the affected family member or to protect a child (section 53).
- **Final orders:** the court may make a final order if it satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or to do so again (section 74)(1). Final orders may be made for multiple family members if section 74(2) is satisfied in relation to each of them.
- **Consent of the affected family member:** is not necessary for a court to make final orders on application by the police.
- **Orders to protect children:** the court may make orders to protect children in the family of the affected family member on its own initiative where it is satisfied on the balance of probabilities that the child has been 'subjected to family violence' committed by the respondent and this is likely to occur again (section 77).
- **Consent orders:** where both parties consent, the court may make final orders, or vary, extend or revoke final orders. Lack of opposition from the respondent is also sufficient to ground the exercise of these powers. Consent orders may be made without admission—that is, an admission of the matters of fact in section 74.
- **Conditions that may be included in intervention orders:** the court has a wide power to include 'any conditions that appear to the court necessary or desirable in the circumstances' (section 81). In addition to provisions preventing the respondent's access to weapons, among the conditions that may be included are prohibitions on:
  - the respondent from committing family violence against the protected person:
  - prohibitions on the respondent from contacting the protected person
  - the respondent from being with a specified distance of the protected person, included in relation to specified places (e.g. where they live).
  - the respondent causing another person to engage in conduct prohibited by the order.

241 Victorian Law Reform Commission, above n 61, pp 109–12.

- **Exclusion conditions:** intervention orders may include provisions excluding the respondent from the protected person's residence (section 81(b)), provided that it 'has regard to all circumstances of the case including' (section 82) the desirability of minimising disruption to the protected person (subsection (2)(a)) and any child living with them, the desirability of continuity and stability in the care of any child living with the protected person (subsection (2)(b)). Exclusion orders may be made regardless of who owns or leases the relevant property (section 82(3)).
- **Intervention orders and family law orders:** the following powers and obligations apply where there is an order under the *FLA*, which gives magistrates the power to vary, suspend, discharge or revive *FLA* orders (*FLA* section 68R):
  - where a court makes an intervention order in relation to a child, it must enquire as to whether there are any *FLA* orders in force in relation to the child (section 89);
  - if the inquiries made under section 89 lead the court to understand that the *FLA* orders and the family violence intervention order are inconsistent, the court must exercise its power under *FLA* section 68R to alter the *FLA* order to make it consistent;
- **Intervention orders and contact with children:** where the respondent or the protected person are the parents of a child, the court must decide whether or not the safety of the protected person or the child would be jeopardised if the child lives, spends time or communicates with the respondent (section 91(2)). An absence of violence previously directed at the child is not sufficient reason for a court to conclude that a child's safety will not be jeopardised if they live, spend time or communicate with the respondent (section 91(2)). Where a court concludes that living, spending time or communicating with the respondent will not jeopardise the child's safety, then the intervention order must include conditions specifying that arrangements for the child to spend time, live with, or communicate with, the respondent, if agreed to by the protected person, must be in specified in writing and be consistent with the conditions of the intervention order (section 92). The intervention order must include a condition about how the arrangements for engagement between the child and the respondent are to be negotiated (section 92(1)(b)). Where a court concludes that engagement between the child and protected person would jeopardise the safety of the child, then the intervention order must include a prohibition on the respondent living, spending time or communicating with the child (section 94).
- **Duration:** an intervention order lasts either for the period specified in the order or until it is revoked by the court of set aside on appeal (section 99).
- **Contraventions:** of an intervention order attract a jail term of up to two years, a monetary penalty (up to 240 penalty units (a penalty unit is $1,100), or both (section 123).

In summary, this section has examined civil protection order systems from an empirical, conceptual and practical perspective. The ABS evidence shows that family violence remains an underreported crime and that civil protection orders are taken out in about half the cases

in which family violence is reported to police. Some women find the systems for obtaining civil protection orders difficult to use and encounter uneven responses to their needs in the different agencies they interact with in this context. There is continuing concern about civil protection orders systems operating as a substitute for criminal action.

The Victorian experience offers some important insights. The discussion highlights the importance of establishing a coherent philosophy supported by a framework that encourages the development of a common understanding and a shared set of goals in generating cultural change to address family violence across different agencies. The Sentencing Council analysis highlights significant shifts in the extent to which family violence is reported to police and responded to by police and the justice system. However, the changes in Victoria have revealed to a greater extent than ever before the incidence of family violence and increased reporting has created concern about the level of resources needed to support an effective response.

5.9 CONCLUSION

In comparison with the terrain described in this chapter in the first edition of this text, the discussion in this edition details significant shifts in key areas. These shifts are encouraging, suggesting a commitment on the part of federal, state and territory governments to address family violence, evidenced by the endorsement of the National Plan to Reduce Violence against Women and Their Children. Significantly, commitment to this plan has been maintained at federal level, despite a change in government in September 2013 from Labor to the Coalition. Sustained commitment over time is recognised as essential in bringing about change in areas where complex problems are entrenched and multiple systems intersect in addressing them. There is evidence that suggests recognition of the value of fragmentation across jurisdictions in promoting reform, but also of the need to address the fragmentation across systems, frameworks and agencies that create such significant challenges in meeting the needs of women and children affected by family violence. The empirical evidence presented in this chapter of the extent and impact of family violence among separated families and the extent to which children are affected underlines the necessity for this continued commitment to reducing incidence and finding better ways to meet the needs of women and children affected by family violence across a range of levels, including federal and state justice systems. The impact of the 2012 family violence amendments at a federal level has yet to unfold, but concerns about the level of resources available in the system to respond to matters involving risk suggest significant challenges ahead.

Some important messages emerge from the discussion of the changes implemented in Victoria and their impact on system responses. A crucial ingredient in the Victorian reforms has been the adoption of a coordinated approach across agencies, which has meant that cultural change has been supported across the elements of the system affected by the changes. Previous research has highlighted the inherent limitations of legislative change in the absence of cultural change.[242] Significant aspects of the Victorian approach

242 For example, Hunter, above n 62.

include the adoption of a statewide family violence screening tool, the development of a Family Violence Code of Practice for Police and the development of specialised responses in the court system. Through measures such as these, the responses that victims/survivors of family violence experience in dealing with different agencies are mutually supportive.

Significant changes have also been implemented at federal level in the family law system, and the need for these changes has been amply evidenced in this chapter and the wide body of work upon which it draws. In addition to legislative change, measures aimed at supporting cultural change have also been adopted, including the AVERT Family Violence training package and the DOORS screening protocols.

In the current environment, two of the ALRCs statements about the direction in which change should occur to produce a coherent response to the experiences of victims/survivors of family violence are worth reiterating. These statements refer to a need for:

- 'corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the Australian Constitution';[243] and
- 'specialisation—bringing together, as far as possible, a wide set of jurisdictions to deal with most issues relating to family violence in one place, by specialised magistrates supported by a range of specialised legal and other services'.[244]

The challenges in realising these goals are significant but so too are the challenges faced by families affected by violence. As the discussion in at 3.7 indicates, innovations to overcome jurisdictional constraints have significant community benefits.

243 Australian Law Reform Commission and NSW Law Reform Commission, above n 5, p 54.
244 ibid.

CHAPTER

6

INTRODUCTION TO PARENTING DISPUTES

6.1 INTRODUCTION

> [F]amilies come in many shapes and sizes—they always have and they always will. Not only does the nature of families change over historical time, any person's family changes over their life course ... Families are embedded in the broader society. Inevitably, as social and economic structures change, so too will families.[1]

> [T]he goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care. However, the committee does not support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent.[2]

1 David de Vaus, *Diversity and Change in Australian Families: Statistical Profiles*, Australian Institute of Family Studies, Melbourne, 2004, p xv.

2 House Standing Committee on Family and Community Affairs, Parliament of Australia, House of Representatives, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements on the Event of Family Separation* (*Every Picture Report*), 2003, part [2.35], available at <www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fca/childcustody/report.htm> at 28 April 2014.

In this chapter we provide an overview of the law that governs decision making about the parenting of children under the *Family Law Act 1975* (Cth) (*FLA*). Our discussion here addresses the broader parenting law, policy and research context relevant to our more detailed analysis of parenting disputes in Chapters 8 and 9.

Disputes to be resolved under the *FLA* arise most often in the aftermath of parental separation, but they do not always involve parents who have lived together, and do not always involve one or both parents. They are to be distinguished from disputes about whether children should be the subject of state intervention because of concerns about their safety: we have touched briefly on that law in Chapter 3 exploring its interaction with what we might call the 'private' family law system in our case study at 3.7. This chapter also describes the social context in which the law operates by outlining contemporary evidence on gender roles, parenting patterns in intact families and parenting patterns in separated families.

Since the introduction of the *FLA* four decades ago, four significant (and more less significant[3]) sets of amendments have been made to Part VII, the Division that sets out the law that applies to disputes about the care of children. The first set of amendments attempted to provide legislative guidance in relation to the interpretation of the paramountcy principle (then known as welfare, now known as best interests).[4] Two further sets of amendments—made in 1996 and 2006—changed the way post-separation parenting is conceptualised in law, reflecting a policy intent on both occasions to provide stronger legislative support for shared parenting after separation. The fourth set of amendments—that became effective in 2012—left the substantial legal framework intact but aimed to increase the emphasis on family violence and child abuse as factors relevant to decision making (as discussed in Chapter 5).

These changes reflect a series of shifts in the way that intact and separated families are conceptualised, which in turn respond to a combination of social, economic, and policy developments. Moloney and colleagues identify four of the main drivers of the changes that have led to the contemporary framework as women's workforce participation; an increasing emphasis on the role of fathers as nurturers, not just as breadwinners; an increased awareness of family violence and child abuse and their impact; and an emphasis on the rights of the child that is gaining momentum.[5] From a political perspective, further significant

3 An important change in this category was the explicit recognition of family violence as of relevance to parenting matters in 1991.

4 *Family Law Amendment Act 1983* (Cth) s 29; for an overview of the development of post-separation parenting legislation in Australia and the United Kingdom see Belinda Fehlberg, Bruce Smyth and Liz Trinder, 'Parenting Issues after Separation: Developments in Common Law Countries' in John Eekelaar and Rob George (eds), *Routledge Handbook of Family Law and Policy*, Routledge, Oxford, 2014, part 3.3. Helen Rhoades has also described the background to the development of Part VII and the *FLA* more widely in 'Children's Needs and "Gender Wars"; The Paradox of Parenting Law Reform' (2010) 24 *Australian Journal of Family Law* 160. See also Helen Rhoades, Charlotte Frew and Shurlee Swain, 'Recognition of Violence in the Australian Law System: A Long Journey' (2010) 24(3) *Australian Journal of Family Law* 296; Helen Rhoades, Grania Sheehan and John Dewar, 'Developing a Consistent Message about Children's Care Needs across the Family Law System' (2013) 27 *Australian Journal of Family Law* 191; John Dewar, 'Can the Centre Hold?': Reflections on Two Decades of Family Law Reform in Australia, (2010) 24 *Australian Journal of Family Law* 139.

5 Lawrie Moloney, Ruth Weston and Alan Hayes, 'Key Social Issues in the Development of Australian Family Law: Research and its Impact on Policy and Practice' (2103) 19 *Journal of Family Studies* 110.

influences have been the issues and arguments raised by groups concerned primarily with the interests of either men or women.[6] The shifts referred to by Moloney and colleagues have been developing over decades, together with other areas of policy that impact upon the way families function, economically and affectively. These include policies in relation to labour market structure, the cost and availability of childcare, whether taxation structures favour families based on a dual or single earner model, the availability and extent of paid parental leave, the level and conditions of government support for sole parent families and the way child support obligations are configured. All of these policy areas potentially have an influence on the way that families balance work and care,[7] which in turn influences the way that financial and emotional ties develop between adults and between parents and children in intact families and may be strained, sustained or dissolved if separation occurs. Further significant forces play out at a social and individual level and include the influences that affect the way adults function (including family violence, mental ill-health and substance abuse) and the values they espouse, including the extent to which religious and ethical values shape the way that relationship obligations are viewed.

An important conceptual issue to be acknowledged at the outset of this discussion is that parenthood is a complex construction with many different, but interlinked, aspects. As the discussion in Chapter 4 acknowledges, in law it mostly but not inevitably arises through biology. It also has significant affective dimensions arising from the way day-to-day caregiving responsibilities are carried out and, less concretely, from the way values and beliefs about raising children and family obligations are enacted in private life. Parenthood also involves significant economic responsibilities and responsibility for making decisions about children. In intact families, these aspects of parenthood may (or may not) be fulfilled seamlessly and with little thought or negotiation as part of the fabric of everyday life. In the context of separation, these issues are more likely to become the subject of active thought, discussion and negotiation because of the necessity to work through the short- and long-term practicalities that arise in each of these areas.

While parenthood is an organic concept, the mechanisms for working through how it is fulfilled after separation are spread across different legal frameworks and agencies. Financial support obligations are determined by the Child Support Scheme (CSS) (Chapter 11). Other financial issues—such as the way the property of the relationship is divided and ongoing care obligations that are reflected in this division—are dealt with under the *FLA* (Chapters 10 and 12–15). Parenting issues are dealt with in Part VII of the *FLA* and, as noted earlier, are introduced in this chapter and examined further in Chapters 7, 8 and 9. Because this chapter is intended to provide the basis for understanding the operation and application of Part VII, the way it discusses parenthood is shaped to a significant extent by the legal concepts that underpin parenthood as it is configured in Part VII, reflected in a focus on time (that is, the way the child's time is allocated across parental (or possibly non-parental) households), and parental responsibility. Also significant to this discussion is the

6 See, e.g., Rhoades, above n 4; Michael Flood, 'Separated Fathers and the "Fathers' Rights" Movement' (2012) 18 *Journal of Family Studies* 235.

7 Lyn Craig, Killian Mullan, Megan Blaxland, 'Parenthood, Policy and Work–Family Time in Australia 1992–2006' (2010) 24 *Work, Employment and Society* 27.

range of dynamics, including family violence to varying extents, relevant across separated families set out in Chapter 5 and the ways in which the legal framework permits these to be acknowledged and considered in making parenting arrangements.

The first section of this chapter sets out the social context for the application of the *FLA* through a discussion of contemporary gender roles, how parenting is carried out in intact families and the evidence regarding parenting patterns after separation. The second section provides a brief overview of the history of changes in the way parenting has been conceptualised in Part VII. The third section describes the current decision-making framework. The fourth section introduces some key elements of the United Nations Convention on the Rights of the Child. A discussion of key concerns about the current decision making framework occupies section five. As already highlighted in Chapter 5, a significant feature of the empirical landscape is the extent to which family violence—at varying levels of intensity—is evident among the separated population: this has significant implications for the application of the Part VII framework.

6.2 GENDER ROLES AND PARENTING IN SEPARATED AND INTACT FAMILIES: EMPIRICAL EVIDENCE

6.2.1 GENDER ROLES AND PARENTING

In light of the significance placed on gender roles in relation to work and family responsibilities in debates about family law policy, this section outlines some key features of the evidence about these issues in relation to intact and separated families. The discussion begins with a consideration of some broad indicators in relation to gendered work and parenting patterns, with an underlying recognition that these broad indicators overlay significant diversity, based on a range of issues including socio-economic status, gender and ethnicity, in these areas.

In the past four decades, significant shifts have occurred in the way that gender roles in families are configured. Until as recently as the early 1970s, workforce participation levels among women were low and gender roles in families were generally relatively rigidly structured into 'breadwinner' (employed men) and 'homemaker' (women engaged in family work—that is, running the home and raising children).[8] The past three decades have seen women's participation in the workforce increase significantly, although for many women employment patterns differ substantially from those of men: women remain clustered in lower-paid positions and are more likely to work on a part-time or casual basis for longer periods than men, particularly when they have children.[9] Figures from the Organisation for Economic Co-operation and Development (OECD) show that 67 per cent of women

8 See, e.g., Alan Hayes, Ruth Weston, Lixia Qu and Matthew Gray, *Families Then and Now: 1980–2010*, Australian Institute of Family Studies, Melbourne, 2010.

9 See, e.g, Hayes et al., ibid., Mary Leahy, *Women and Work in Australia: Topic Guide*, Australian Policy Online, 28 November 2011, <http://apo.org.au/research/women-and-work-australia>.

aged between 15 and 65 are employed, compared to 78 per cent of men, and reveal a gender wage gap of 14 per cent.[10]

Concomitant with a rise in workforce participation among women, incremental changes have occurred in the way domestic responsibilities are carried out: men have assumed some responsibility for domestic tasks and child rearing, but women essentially retain most responsibility in these areas. Some work–family theorists refer to this as the 'second-shift',[11] meaning that women are engaged in financially rewarded employment in a workplace and non-financially rewarded family work. The most recent available research based on time-use data demonstrates just how incremental shifts in responsibility for family work have been.[12] Lyn Craig and colleagues show that between 1992 and 2006 'the division of labour between mothers and fathers is more extreme than it is between non-mothers and non-fathers and became even more so over time'.[13] Taking into account paid work, domestic work and childcare, the analysis found that, on average, the weekly workload of women with children rose from 80.1 hours to 85.9 hours between 1992 and 2006. The weekly workload of men with children also rose, from 70.5 to 79.5 hours a week. The increase in mothers' workload was accounted for by more hours in paid employment (3.7 hours) and childcare (2.1 hours). Time spent in domestic labour was relatively consistent. For men, the increase in hours spent working was accounted for by 6.6 hours in paid work and 3.7 hours in childcare. Their hours spent in domestic work fell by 1.3 hours. In 1992, men spent 15.5 hours a week on childcare compared to 19 hours in 2006. Childcare hours for mothers also increased over this period, from 44.1 to 45.7 hours a week. In broad terms, these findings show that while involvement in childcare by men has increased, this increase has not occurred at the expense of women's involvement with childcare and the relative amounts of time spent by fathers and mothers caring for children remain unequal.

While these aggregate level data provide means of understanding broad social patterns, it is also critical to appreciate that patterns in employment and engagement in 'family work' differ significantly within the general population. Employment patterns for mothers are just one example of the way parenting patterns influence and are influenced by broader issues. Employment rates for mothers are strongly linked to the age of their children: in 2009, just over 50 per cent of partnered mothers with children in 0–4 year age group were employed, compared with nearly 80 per cent of mothers with children in 10–14 year age group.[14] Most women with children work part-time, with 2009 ABS data showing that 28 per cent of mothers with children in paid employment worked full-time, compared with 35 per cent working part-time.[15]

Similarly, analyses of the amount of time fathers spend with children based on data from the Longitudinal Study of Australian Children (LSAC) shows that the time both

10 OECD, *Better Life Index*, available at <www.oecdbetterlifeindex.org/countries/australia>, 8 May 2014; for wage gap, see OECD, 'Country Snapshot: Australia', *How's Life? 2013 Measuring Wellbeing*, <www.oecd.org/statistics/HsL-Country-Note-AUSTRALIA.pdf>, November 2013.

11 For example, Lyn Craig, 'Is There Really a Second Shift and if So, Who Does It? A Time-Diary Investigation' (2007) 86 *Feminist Review* 149.

12 Craig et al., above n 7.

13 ibid., 10, the parents' group had a youngest child 0–4 years old.

14 Hayes et al., above n 8, p 6.

15 ibid., p 5.

mothers and fathers spend with children varies according to a range of factors including the age of child and the employment status of the parents.[16] Analysis by Jennifer Baxter and Diana Smart indicates that the time mothers and fathers spend directly engaged with childcare tasks diminishes as children grow older, but that mothers are consistently involved with daily care routines to a greater extent than fathers across all age groups represented in LSAC. Focusing on one aspect of care for children—getting ready for bed—for example, 79.2 per cent of LSAC mothers of 2–3-year-olds reported daily involvement compared to 62.2 per cent for 6–7-year-olds. Father reports of involvement in this activity for these age groups varied significantly. In relation to 2–3-year-olds, most fathers (56 per cent) reported being involved a 'few times a week' with 27.6 per cent reporting daily engagement. In relation to 6–7-year-olds, 28.2 per cent of fathers reported daily engagement and 51 per cent reported engaging with this activity 'a few times a week'. In addition to showing differences according to gender, these patterns also illustrate the extent to which variations among families occur.

Consistent with other research on fathering and families,[17] Baxter and Smart observe that the amount of time fathers spend with children is not the main factor associated with overall relationship quality and child well-being. Other relevant factors include the quality of the relationship between the parents, the extent to which the father maintains work–life balance and the nature of the parenting practices and styles exercised by fathers. This latter dimension of parenting has been shown in this and other research to be particularly significant.[18] The measures of parenting style applied in LSAC include the extent to which the following issues are reported by parents in their interactions with children: warmth, hostility, anger, inductive reasoning, consistency and over-protection. Baxter and Smart found that 'over all aspects of parenting, fathers differed significantly from mothers, exhibiting, on average, less warmth, less inductive reasoning, less consistency and less over-protection'. They further note that 'greater warmth in parenting styles on the part of mothers and fathers was associated with more positive learning and socio-emotional outcomes'.

From an empirical perspective then, the pertinent observations to draw from this discussion about gender roles, work and family and parenting is that the evidence shows that the contributions that men and women make in these areas remain gendered, despite significant shifts in workforce participation for women and incremental increases in active involvement in fathering (in the sense of engaging in caring activities) on the part of men. It is also important to note, however, that significant variations are evident in the ways that

16 J Baxter and D Smart, 'Fathering in Australia among Couple Families with Young Children: Research Highlights' (2011) 88 *Family Matters* 15, Table 2, 17. This article is a summary of Jennifer Baxter and Diana Smart, *Fathering in Australia among Couple Families with Young Children*, Occasional Paper No. 37, FaHCSIA, Canberra, 2010, <www.dss.gov.au/sites/default/files/documents/05_2012/op37.pdf>, 8 May 2014. See also Killian mullan and Daryl Higgins, *A Safe and Supportive Family Environment for Children: Key Components and Links to Child Outcomes* Occasional Paper No. 52, Australian Government, Department of Social Services, Commonwealth of Australia, Canberra, 2014, <www.dss.gov.au/sites/default/files/documents/07_2014/op52_safe_families_0.pdf> 4 August 2014.

17 Paul Amato and J Gilbreth, 'Non-Resident Fathers and Children's Well-Being: A Meta-Analysis' (1999) 61 *Journal of Marriage and the Family* 557; Jennifer Renda, 'Is It Just a Matter of Time? How Relationships between Children and Their Separated Parents Differ by Care-Time Arrangements' in Australian Institute of Family Studies, *The Longitudinal Study of Australian Children: Annual Statistical Report 2012*, Commonwealth of Australia, Canberra, 2012.

18 Baxter and Smart (2010) above n 16, pp viii–xii.

different families carry out work and family responsibilities, and the evidence of this in the research reinforces the wisdom in avoiding generalisation.

6.2.2 POST-SEPARATION PARENTING IN AUSTRALIAN FAMILIES

In the past five years, the evidence base on parenting patterns among separated families has grown exponentially and we now have a significant amount of quantitative research on the arrangements made to care for children after separation. Like earlier research by Bruce Smyth and colleagues,[19] recent evidence establishes considerable variation in the ways that children's time is divided between households,[20] although it is also clear that arrangements involving most nights being spent with the mother remain most common.

The discussion in this section will outline the empirical evidence on parenting arrangements evident among different groups of separated parents. The first part of the discussion focuses on the evidence from two studies of recently separated parents, which have already been referred to in Chapter 5—the Australian Institute of Family Studies Survey of Recently Separated Parents (AIFS SRSP) 2012 and the AIFS Longitudinal Study of Separated Families (LSSF) Wave 1.[21] Importantly, each of these studies describes the patterns evident among newly separated parents whose experiences reflect the post-2006 legal and policy environment and whose children are generally concentrated in the younger age groups.[22] The separations of AIFS LSSF parents occurred between July 2006 and September 2008[23] and those of AIFS SRSP parents between July 2010 and December 2011. The main focus of this discussion is the way children's time is allocated between parents. The second part of the discussion outlines the findings of research based on Australian Bureau of Statistics Family Characteristics Survey data,[24] which is representative of the general population of separated parents, rather than those who are newly separated. The definitions used in this discussion are those applied in the source studies: the definitions in AIFS SRSP and AIFS LSSF cover 11 different time arrangements. These are based on the DHS-CSP classifications applied in determining child support liability. They focus on the number

19 Bruce Smyth (ed.), *Parent–Child Contact and Post-Separation Parenting Arrangements*, Australian Institute of Family Studies, Melbourne, 2004.

20 In addition to Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009, other recent Australian research that demonstrates this includes Judy Cashmore, Patrick Parkinson, Ruth Weston, Roger Patulny, Gerry Redmond, Lixia Qu, Jennifer Baxter, Marianne Rajkovic, Tomasz Sitek and Ilan Katz, *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, Sydney, 2010; Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells, Caroline Long, *Post-Separation Parenting Arrangements and Developmental Outcomes for Children: Collected Reports*, Family Transitions, Melbourne, 2010.

21 Wave 1 findings are used in this discussion because they are most comparable with SRSP findings, based on the recency of separation for each sample.

22 Kaspiew et al., above n 20, Chapter 2; John De Maio, Rae Kaspiew, Diana Smart, Jessie Dunstan and Sharnee Moore, *Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011*, Australian Institute of Family Studies, Melbourne, 2013, pp 11–12.

23 Kaspiew et al., above n 20, pp 20–1.

24 Australian Institute of Family Studies, *Family Facts and Figures: Parent–Child Contact after Separation*, available at <www.aifs.org.au/institute/info/charts/contact/index.html#f2f> 9 May 2014.

of nights allocated to each parent. The third part of the discussion outlines what patterns in the allocation of parenting time are evident in court orders and through arrangements made in other parts of the system. The final section focuses on parental responsibility as it is exercised by parents and allocated in court orders. The discussion in this section is primarily concerned with providing an overview of the time arrangements applicable to children in separated families and the way parental responsibility is exercised.

6.2.2.1 METHODOLOGICAL ISSUES

Before outlining the findings of AIFS SRSP and AIFS LSSF, some methodological issues need to be acknowledged. Although the methodologies for these studies are substantively the same, a subtle difference in the way the sample for each study was drawn has resulted in slightly different sample profiles: the SRSP sample did not include parents who had never lived together, while the LSSF sample included nine per cent of such parents.[25] This sub-group on average tended to have younger children, resulting in a slightly lower age profile of LSSF children compared with SRSP children. This factor may well account for some of the differences in key areas, including parenting arrangements, observed between these two studies.

A further issue concerns the way that, in a variety of areas, the reports of mothers and fathers differ.[26] This is a phenomenon widely observable across a range of studies.[27] In some areas, particularly those involving subjective issues such questions about their own well-being and that of their children, differences may be expected because views on these questions are inherently subjective. Evidence of subjectivity does not stop there, however. In relation to issues that are more factual—such as the allocation of children's time between parents, the exercise of parental responsibility (which is less tangible than time and therefore more subjective) and the payment of child support—differences between mothers' and fathers' reports are also evident to varying extents. The discussion of SRSP and LSSF in this book maintains a significant level of generality because it is concerned with describing the social and legal context in which family law operates and, for this reason, these differences are noted at this point, and may be highlighted where they are of substantive interest in the discussion. Otherwise, the discussion is based on data that reflect a mean based on mothers' and fathers' reports.

In both studies, the most common parenting arrangement was for children to live with their mother for between 66 and 86 per cent of the time and to spend between 14 and 34 per cent of their time with their father (SRSP 40 per cent and LSSF

25 See footnote in De Maio et al., above n 22, pp 11–12.

26 See, e.g., Kaspiew et al., 2009 above n 20, pp 123, 177, 259; De Maio et al., 2013, above n 22, pp 18, 104. Lixia Qu and Ruth Weston, *Parenting Dynamics after Separation: A Follow-Up Study of Parents Who Separated After the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2010, 5.3.

27 See, e.g., discussion in Irwin Sandler, Sharlene Wolchik, Emily Winslow, Nicole Maherer, John Moran and David Weinstock, 'Quality of Maternal and Paternal Parenting Following Separation and Divorce' in Kathryn Kuehnle and Leslie M Drozd, *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press: New York, 2012, pp 86–100; Patrick Parkinson and Bruce Smyth, 'When the Difference Is Night and Day: Some Empirical Insights into Patterns of Parent–Child Contact after Separation', paper presented at the 8th *Australian Institute of Family Studies Conference*, Melbourne 2003, <www.aifs.gov.au/conferences/aifs8/parkinson.pdf>, 9 May 2014.

Wave 1 31 per cent).[28] In each sample, around a fifth of children were spread across three different arrangements approximating shared care time. The nearest arrangement to 50–50 shared care, a 48–52 per cent split, was applicable to 9.2 per cent of children in the AIFS SRSP sample and seven per cent of children in the AIFS LSSF sample. The next most common shared care arrangement—where 53–65 per cent of time was spent with the mother and 35–47 per cent with the father—was evident for 10.7 per cent of the AIFS SRSP sample and 7.8 per cent of the AIFS LSSF sample. Much smaller groups of children were in a shared care arrangements involving spending a greater proportion of their time with fathers (35–47 per cent with mother and 53–65 per cent with father), with 2.2 per cent of AIFS SRSP and 1.3 per cent of AIFS LSSF children in these arrangements. Very small proportions of children were in arrangements involving minimal or no time with mothers in both studies.[29] In contrast, 6.9 per cent of AIFS SRSP children and 11.1 per cent of AIFS LSSF children never saw their fathers and a further 13.1 per cent of AIFS SRSP and 22.5 per cent of AIFS LSSF children had day-time only contact with their fathers. Time arrangements are also significantly associated with children's age: the largest groups of shared care (35–65 per cent of nights with each parent) children were in the 5–11 year age group, with just over a quarter of these children in such arrangements in both samples.[30] Children in the younger and older age groups were least likely to have shared care arrangements.[31]

Consistent with previous research[32] suggesting that a self-selecting group of high-functioning parents opt for shared care arrangements, the following characteristics were evident among most AIFS LSSF shared care parents: higher socio-economic status, children of primary school age, close proximity (within 10 km) to the other parent's home. Parents with shared care were more likely than parents with a minority or no care nights to report higher levels involvement with their children's care prior to separation. They were also more likely to report having used a service—such as counselling, mediation or family dispute resolution (FDR), a lawyer or court—to sort out their parenting arrangements.[33] However, AIFS LSSF findings also indicated difficult relationship dynamics between some shared care parents, suggesting 'a substantial minority may experience frequent episodes of high inter-parental conflict or an atmosphere generating fear in one parent'.[34] The emergence of shared care arrangements involving parents with difficult relationships dynamics has been described in other reports.[35]

6.2.2.2 SEPARATED FAMILIES GENERALLY

We turn now to a discussion of ABS data as analysed by AIFS, in order to consider the arrangements evident for children in separated families in a sample that reflects all separated parents rather than particular time-based cohorts of separated families, as the AIFS LSSF

28 De Maio et al., above n 22 Figure 2.2; Kaspiew et al., above n 20, Table 6.1.
29 Kaspiew et al., 2009, Table 6.1; De Maio et al., Table 3.2.
30 De Maio et al., above n 20, Figure 2.2 and Table A2.1 p 128; Kaspiew et al., above n 20, Table 6.1 and Figure 6.5.
31 Kaspiew et al. 2009, above n 20, Table 6.1; De Maio et al., above n 22, Table A2.1.
32 Bruce Smyth, Catherine Caruana and Anna Ferro, 'Fifty–Fifty Care' in Smyth 2004, above n 19.
33 Kaspiew et al., above n 20, pp 168–9.
34 ibid., pp 162–3.
35 Cashmore et al., (2010), above n 20, McIntosh et al., (2010) above n 20.

and AIFS SRSP do. These data also confirm that arrangements for children to spend most time with their mothers are the most common.

The AIFS *Family Facts and Figures: Parent–Child Contact after Separation*[36] publication is based on the ABS Family Characteristics Survey 2009–2010. This survey is representative of all separated families but it should be noted that data on contact arrangements and overnight stays are based on the reports of resident parents. The way that the number of nights is measured in the ABS survey differs from the method applied in the AIFS LSSF and AIFS SRSP studies. The ABS surveys uses the following categories in relation to arrangements for the child to spend nights with the non-resident parent annually: nil nights, 1–9 per cent of nights, 10–19 per cent of nights, 20–29 per cent of nights, 30–49 per cent and 50 per cent plus nights.

The most common arrangement reported by resident parents was that which involved no overnight stays: 49 per cent of the children were reported to be in this kind of arrangement. This does not equate, however, to arrangements where no face-to-face contact occurred at all, as this was only applicable to 26 per cent of children in the sample. The next most common arrangements involving overnight stays were those involving 1–9 per cent of nights (20 per cent) and 10–19 per cent of nights (16.5 per cent). Only three per cent of the children in the sample reportedly stayed with the other parent for 50 per cent or more of nights, and small proportions were in the other time brackets involving larger proportions of nights: seven per cent had 20–29 per cent of nights and four per cent had 30–49 per cent of nights.

6.2.2.3 TIME ALLOCATION IN COURT ORDERS

The final point to be covered in our discussion about time arrangements is the patterns evident in court orders and arrangements made through engagement with formal services.[37] Evidence from the AIFS Evaluation of the 2006 amendments shows that the proportion of orders for shared care (involving a 35–65 per cent division of nights between parents) made by courts as a result of adjudication, while remaining small overall, increased substantially after the reforms. Using a lower bound estimate (reflecting cases resolved by judicial determination where contact hours were specified in the order in the context of all cases in the sample, even where contact hours were not specified),[38] the findings by Kaspiew and colleagues show that, after the reforms, cases where shared care time was ordered increased from two per cent to 13 per cent.[39] In the sample of cases resolved by consent, again using the more conservative estimate, the proportion of orders involving shared care rose from

36 Australian Institute of Family Studies, *Family Facts and Figures: Parent–Child Contact after Separation*, available at <www.aifs.org.au/institute/info/charts/contact/index.html#f2f> 9 May 2014.

37 Data for the latter aspect of the discussion are drawn from Kaspiew et al., above n 20.

38 See Kaspiew et al., 2009, above n 20, parts 6.3 and 6.5.3.

39 ibid., Table 6.8. One study referring to data generated by the Family Court of Australia (FCoA) (which hears a small minority of parenting cases—see Chapter 2) suggests a reduction in the number of shared time orders after 2009: Bruce Smyth, Richard Chisholm, Bryan Rodgers, Vu Son, 'Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?' (2014) 77 *Law and Contemporary Problems* forthcoming. See further Chapter 8.

10 per cent to 15 per cent,[40] a much less dramatic increase than that reflected in the judicial determination sample (see also 9.2).

6.2.2.4 PARENTAL RESPONSIBILITY: SOCIAL PATTERNS AND COURT ORDERS

Thus far, the discussion in this section has focused on time arrangements. This section focuses on another domain of parenting—the exercise of parental responsibility. As explained in more depth in the next section, parental responsibility is a core aspect of the legal framework, reflected in the presumption of equal shared parental responsibility. This section first outlines how parents described the exercise of responsibility, based on the AIFS SRSP sample. The patterns of parental responsibility allocated in court orders are then described.

The AIFS LSSF and AIFS SRSP studies each asked parents to report on how decision making occurred (mainly mother, mainly father, both parents equally) in four different areas of a child's life: education, health care, religion or cultural ties and sporting or social activities. In keeping with the dynamic and varied nature of parenthood highlighted throughout this discussion, according to the detailed analysis presented in these reports, parental accounts varied between mothers and fathers[41] and according to the age of the child,[42] care-time arrangements,[43] the involvement of fathers in the child's life prior to separation[44] and the presence or absence of a history of family violence.[45]

Overall, in each of the areas examined, statistics derived from the (often discrepant) accounts of mothers and fathers in Kaspiew and colleagues' 2009 study indicate decisions are most often reported to be made by mothers, particularly in relation to sporting and social activities (60 per cent reporting mainly mother) and health care (65 per cent reporting mainly mother).[46] 'Equal' decision making was reported across these domains by an average of between a quarter and just over a third of parents. Reports of equal decision making were most frequent in relation to education (37.8 per cent) and religion and or cultural ties (37.8 per cent). More equal decision-making patterns were more likely to be reported by parents with shared care arrangements[47] and where there was no history of physical hurt or emotional abuse,[48] but the differences in the latter area were not large. Shared decision making was most likely to be reported where parents also reported significant involvement of fathers in the children's lives prior to separation.[49]

In contrast to the varied and contingent nature of decision making suggested by parents' reports, the patterns evident in court based orders are much more likely to reflect a legal expectation that parents will make decisions together. The evidence presented in

40 ibid., Table 6.9.
41 De Maio et al., above n 22, Table 2.5; Kaspiew et al., above n 20, Table 8.1.
42 De Maio et al., above n 22, Table 2.6.
43 Kaspiew et al., above n 20, part 8.1.1.
44 ibid., part 8.1.2
45 ibid., part 8.1.3.
46 ibid., Table 8.1.
47 ibid., p 178.
48 ibid., p 182.
49 ibid., p 181.

Kaspiew and colleagues' 2009 study shows that court orders (whether made by consent or judicial determination) for shared parental responsibility were more likely to be made after the 2006 amendments family law reforms than before (86.5 per cent cf. 76.3 per cent), although in each time period these kinds of orders (rather than sole responsibility to either parent) were the majority.[50] In the judicial determination sample, the proportion of shared parental responsibility orders rose by 12 percentage points between the two time frames (44 per cent and 56 per cent), with the proportion of orders made by consent having this outcome increasing by 11 percentage points (80 per cent and 91 per cent).[51] Notably, shared parental responsibility was the most likely outcome even in cases where allegations concerning family violence and child safety had been raised, with around three-quarters of such cases involving these outcomes, compared with 90 per cent where no such allegation had been raised.[52]

6.2.2.5 INFLUENCES ON OUTCOMES FOR CHILDREN POST-SEPARATION: INSIGHTS FROM THE SOCIAL SCIENCE LITERATURE

Our discussion now turns from a focus on patterns in parenting before and after separation, including the patterns reflected in court orders, to a brief consideration of the evidence on child well-being.

By way of introduction, it is necessary to acknowledge the complexity of the empirical canvas that is the basis of this discussion. There is an extensive body of international and to a more limited extent, Australian, research on the impact of separation on relationships in families and the adjustment of parents and children to the transitions that separation entails, together with evidence on outcomes for children whose parents separate. This body of research reinforces the salience of the point made in 6.2.1 about the differences in the ways families function generally in relation to separated families: a large variety of factors have been shown to influence post-separation trajectories and outcomes for parents and children, including socio-economic status, inter-parental relationships, the nature of the relationship between parents and children, the age of the children at separation, parenting efficacy, the stability of household in which the child lives, re-partnering, sibling relationships, the way the family functioned before separation and the exposure of the family to other stressful events and transitions.[53] The variability of post-separation family life and the sheer number of factors that may or may not be linked to parent and child outcomes makes this an area of research that characterised by significant methodological challenges. This complexity defeats generalisation.

In considering the existing knowledge base on what may or may not contribute to positive outcomes for children, it is important to appreciate that a variety of theoretical approaches may be adopted, such as family systems theory, child development theory and

50 ibid., Table 8.2.
51 ibid., Table 8.3.
52 ibid., Table 8.7.
53 See, e.g., Paul Amato, Jennifer Kane and Spencer James, 'Reconsidering the "Good Divorce"' (2011) 60 *Family Relations*, 511–24; Amato and Gilbreth, above n 17; Jan Pryor and Bryan Rodgers, *Children in Changing Families: Life after Parental Separation*, Blackwell, Oxford, 2001.

attachment theory. In some of these areas, the underlying theoretical basis of the research, and the evidence on which the theory is based, may be contentious.[54] Depending on the theoretical approach adopted, and the focus of the study, different measures may be used to assess outcomes: these may include measures designed to assess social, emotional and educational functioning, for example, or longer term outcomes, such as educational attainment, workforce engagement and involvement in antisocial and criminal behaviour. Many studies use measures that are based on parents' reports of child functioning, and recent evidence reinforces the point that parents' perceptions are inherently subjective as noted earlier: this is clearly illustrated in the recent AIFS studies[55] and other research[56] in which parents' reports on the workability of parenting arrangements and child well-being were influenced by the parents' own level of satisfaction with the parenting arrangements. There is limited research that taps the views of children and young people on various types of parenting arrangements, particularly of a nature that would facilitate understanding of the lived experience of these kinds of arrangements.[57]

Research in the post-separation field can be very contentious and this is at times manifested in debates about the validity of different research methods and the implications of this for the robustness of findings and the aptness of interpretations based on such findings.[58] These debates underline the fact that evidence in this area is ever-developing and that method and message are intimately linked and mutually limiting.

For the reasons just outlined, there is considerable variation in the empirical evidence base about the impact of separation and the factors that support healthy development in children post-separation. There are few areas where the research findings are clear and

54 The theory of attachment and its implications for overnight stays for young children is one such area. Debate is longstanding: see, e.g., Gwynneth Smith, Brianna Coffina, Patricia Van Horn and Alicia Lieberman, 'Attachment and Child Custody' in Kathryn Kuehnle and Leslie M Drozd, *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press, New York, 2012. And more recently Richard Warshak, 'Social Science and Parenting Plans for Young Children: A Consensus Report' (2014) 20 *Psychology, Public Policy and Law* 4667; Jennifer McIntosh, Marsha Kline Pruett, and Joan Kelly. 'Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice' (2014) 52 *Family Court Review* 240.

55 Kaspiew et al., 2009, above n 20, e.g., pp 156–59, p 259; Qu and Weston, above n 26, p 84.

56 For example, Cashmore et al., 4.6, 4.7, 6.7; McIntosh et al., 2010, above n 20, pp 49, 74.

57 The main Australian studies examine this quantitatively: Jodie Lodge and Michael Alexander, *Views of adolescents in separated families: A study of adolescents' experiences after the 2006 reforms to the family law system*, Australian Institute of Family Studies, Melbourne, 2011. Cashmore et al., McIntosh et al., 2010, above n 20. See also Jennifer Renda, 'Is It Just a Matter of Time? How Relationships between Children and Their Separated Parents Differ by Care-Time Arrangements' in Australian Institute of Family Studies, *The Longitudinal Study of Australian Children: Annual Statistical Report 2012*, Commonwealth of Australia, Canberra, 2012. Children's experiences have been examined qualitatively by Campo and colleagues in a study that involved interviews with 22 children including 12 who were in shared time arrangements: Monica Campo, Belinda Fehlberg, Christine Millward and Rachel Carson, 'Shared Parenting Time in Australia: Exploring Children's Views' (2012) 34 *Journal of Social Welfare and Family Law* 295.

58 Recent examples of such debates include the debates on attachment, above n 54. In a narrower context, that of judicial decision making, the use of social science evidence has also been contentious for many years. Most recently, the Full Court has emphasised the need for the use of such evidence to be supported by procedural fairness: *McGregor & McGregor* [2012] FamCAFC 69. See also Zoe Rathus, 'A Call for Clarity in the Use of Social Science Evidence in Family Law Decision-Making' (2012) 27 *Australian Journal of Family Law* 81. McGregor concerns the use of social science material of alienation. This is a controversial topic: see, e.g., Tom Altobelli, 'When a Child Rejects a Parent: Why Children Resist Contact' (2011) 25 *Australian Journal of Family Law* 185; Rae Kaspiew, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' (2007) 29 *Sydney Law Review* 131.

relatively uncontested. For the purpose of this discussion, there are five important points that emerge from the research. First, as discussed in 5.6, children are negatively affected by exposure to family violence and/or negative inter-parental relationship dynamics (referred to in some literature as 'high conflict' separation).[59] Second, there is a spectrum in the ways that parenting responsibilities are discharged after separation and the ways in which parents relate to each other and their children.[60] A range of typologies have attempted to capture these different ways of relating, focusing on the extent to which particular characteristics are present, including the ability to cooperate, the presence of conflict and the ways parents (particularly fathers) maintain engagement or disengage from their co-parental relationships and their relationships with their children.[61] Third, when children maintain regular contact with both parents and this contact sustains positive relationships, child outcomes are generally positive.[62] Fourth, parenting efficacy is salient to positive outcomes for children.[63] This means the exercise of parenting activities in ways that support healthy emotional, physical and intellectual development for children. As mentioned earlier (6.2.1), key characteristics include warmth, consistency and an authoritative (characterised by supportiveness and consistent discipline) rather than authoritarian parenting style. Fifth, substantial pre-separation involvement by fathers with parenting pre-separation is associated with substantial post-separation involvement of fathers with children,[64] which in turn supports positive outcomes for children.

Despite a plethora of recent research, the available empirical evidence has not established a link between well-being outcomes and shared care arrangements that suggests that such arrangements are any better for children than those involving regular contact with each parent in the context of positive inter-parental and parent–child relationships. On the basis of an analysis of the existing evidence, Fehlberg and colleagues have concluded that 'so far, there is no empirical evidence showing a clear linear relationship between shared time and better outcomes for children'.[65] Nor is there consistent evidence on detriment arising from these arrangements except in circumstances involving high conflict or family violence in

59 Kaspiew et al., 2009, above n 20, pp 267–73; De Maio et al., 2013, above n 22, part 7.1.4.

60 Kaspiew et al., 2009, above n 20; De Maio et al., 2013, above n 20; Smyth et al., above n 19; Cashmore et al., above n 20, e.g., p 34; E M Hetherington and Joan Kelly, *For Better or for Worse*, Norton, New York, 2002; E Maccoby and R Mnookin, *Dividing the Child*, Harvard University Press, Cambridge, MA, 1992.

61 See, e.g. Bruce Smyth, Bryan Rodgers, Liz Allen and Vu Son, 'Post-Separation Patterns of Children's Overnight Stays with Each Parent: A Detailed Snapshot' (2012) 18 *Journal of Family Studies* 202; Rae Kaspiew, Juliet Behrens, Bruce Smyth, 'Relocation Disputes in Separated Families Prior to the 2006 Reforms: An Empirical Study' (2011) 86 *Family Matters* 72; and internationally, see, e.g., Jacob E Cheadle, Paul Amato and Valarie King, 'Patterns of Nonresident Father Contact' (2010) 47 *Demography* 205.

62 Kaspiew et al., 2009, above n 20, chapter 11; ME Whiteside and BJ Becker, 'Parental and the Young Child's Post-Divorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements, (2002) 14 *Journal of Family Psychology* 2; see also Joan Kelly, 'Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications' in Kathryn Kuehnle and Leslie Drozd, *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press, Oxford 2010.

63 For example, Amato and Gilbreth, above n 17; Irwin Sandler, Sharlene Wolchik, Emily Winslow, Nicole Maherer, John Moran and David Weinstock, 'Quality of Maternal and Paternal Parenting Following Separation and Divorce' in Kuehnle and Drozd, above n 62, p 85.

64 Kaspiew et al., 2009, above n 20, p 168.

65 Belinda Fehlberg, Bruce Smyth, Mavis Maclean and Ceridwen Roberts, 'Legislating for Shared Time Parenting after Separation: A Research Review', (2011) 25 (3) *International Journal of Law, Policy and the Family*.

clinical samples.[66] An area of particular contention in the shared care debate is the question of whether overnight stays with a non-primary caregiver are appropriate for children in 0–3 year age bracket: the message that emerges from the substantial body of academic literature on this topic in recent years is, not surprisingly, that it depends on the circumstances of the family, the nature of child's relationship with each parent and the capacity of each parent to provide sensitive and appropriate care for the child.[67]

In summary, the discussion in this section has outlined the empirical evidence on post-separation parenting in Australia. The data from AIFS LSSF, AIFS SRSP and the ABS show that, after separation, most children live in arrangements involving most nights with their mothers. AIFS LSSF Wave 1 data show that shared care arrangements are most likely to be utilised for children in the 5–11 year age group and in families with features that support such arrangements working effectively, including a history of significant father involvement pre-separation. However, there are also children in shared care arrangements without these positive aspects and, as discussed in 5.7, AIFS LSSF Wave 1 data showed that mothers with safety concerns were slightly more likely to report shared care arrangements than parents without these concerns.

In relation to parental responsibility, even taking into account the differences in reports by mothers and fathers, shared decision making across a range of domains is reported by a minority of parents (between a quarter and a third). Again, the factors connected with shared decision making are varied and include the father's pre-separation parenting history and the interlinked question of post-separation parenting time, the age of the child and the extent to which family violence is present or has occurred. In contrast with these social patterns, court orders reflect a legal expectation of shared decision making in the majority of cases even when allegations of family violence or child abuse have been raised separately or together.

The empirical evidence base on how outcomes for children are influenced by various factors, including parenting arrangements, provides few certain answers. It demonstrates the complexity and variability of post-separation family life, establishes that children are negatively affected by conflict and family violence and shows that positive relationships between parents support healthy development. The main message from this research is consistent with the conclusion in the *Every Picture Report* that there is no 'one size fits all' solution in post-separation parenting.[68]

The discussion in this section sets the scene for the discussion at 6.3 (beginning with a brief historical discussion) of how parenthood is conceptualised in the legal framework.

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66 Kaspiew et al., 2009, above n 20, found little evidence of variation in child wellbeing according to time arrangements, chapter 11; an initial finding in this study that shared care arrangements where there were safety concerns lead to poorer outcomes for children according to mothers' reports p 270, was sustained to a less clear extent in wave of the research: Qu and Weston (2010), above n 26, p 149. McIntosh et al., 2010, above n 30, pp 13–14 found an association between poorer outcomes for children in shared care. Study 1 in this report was based on families who used two different types of community based mediation and were characterised as being involved in 'high conflict' separation; for a discussion of research evidence suggesting some risk from shared care arrangements in some circumstances, see Jennifer McIntosh and Bruce Smyth, 'Shared Time Parenting: An Evidence Based Matrix for Evaluating Risk' in Kuehnle and Drozd, above n 62, 155; see also sources at above n 54.

67 See sources above n 54.

68 *Every Picture Report*, above n 2, para 2.39, p 31.

6.3 LEGAL CONCEPTS RELATING TO PARENTHOOD IN PART VII: AN HISTORICAL OVERVIEW

In the 40 years since the implementation of the *FLA*, Part VII has expanded from 10 simple provisions to a complex series of provisions and sub-provisions occupying 137 pages of one of the main consolidated printed versions of the *FLA*.[69] At the outset, Part VII provided a very simple framework based on the paramountcy of the welfare principles and a few simple provisions dealing with types of orders a court may make and some more technical provisions in support of those powers. Over time, Part VII has become much more complex, arguably more prescriptive and, in the words of Richard Chisholm, it now presents as 'a daunting tangle of provisions that make it so tricky to work out what's best for children'.[70] The best interests principle remains paramount, but the courts' consideration of 'best interests' is informed by objects, principles, primary and additional considerations, a presumption of equal shared parental responsibility and a mandatory consideration of equal or substantial and significant time (with caveats) where orders are made pursuant to the presumption, and numerous other provisions dealing with a range of other issues.

As noted in 5.7, in considering the reforms implemented since 1995, two sets of concerns are evident: one is to encourage shared parenting after separation and the other is to ensure that children are protected from harm and that parenting arrangements appropriately respond to any historical or ongoing family violence. In the 1996 amendments the shared parenting concern was most strongly evident, particularly in the statements embodied in the objects provisions.[71] Each concern was clearly evident in the 2006 amendments, but for a constellation of reasons, the shared parenting messages had greater impact than the protection messages.[72] The 2012 amendments were oriented towards retaining support for shared parenting but tipping the balance in favour of protection where a tension existed between supporting ongoing parental involvement and protection from harm, as discussed in Chapter 5.

Until 1995, parenthood as described in Part VII rested on the concepts of 'guardianship', 'custody' and 'access'. The prima facie position was that, in the absence of a court order to the contrary, both parents had guardianship and custody was shared (section 61). Guardianship referred to responsibility for long-term decision making about the child and 'custody' was a concept that applied both to time and decision making. In litigated matters, the common pattern was for orders to be made that vested both parents with guardianship and the mother with 'custody', which brought with it the right to determine the father's 'access'.[73] 'Custody' denoted decision-making power for day-to-day decisions about the child and majority time with the child. The parent who did not have custody of the child

69 *Australian Family Law Act 1975 with Regulations and Rules*, 31st edn, CCH, Sydney, [year?].

70 Richard Chisholm, 'Legislating about Family Violence: The Family Law Amendment (Family Violence) Bill 2010' (2010) 3 *Australian Journal of Family Law* 283, 295.

71 See also Rae Kaspiew, 'Family Violence in Children's Cases under the *Family Law Act 1975* (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279.

72 See Rhoades, 2010, above n 4, Dewar, 2010, above n 4.

73 Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) *Journal of Family Studies* 37.

(usually the father) generally exercised 'access': in some discourses about post-separation parenting in this era, being an 'access' parent was seen to be problematic as it represented a status of less significance than that occupied by 'custodial' parents. These concepts were based on those applied in the legal regime that preceded the *FLA*, the *Matrimonial Causes Act 1959* (Cth) (2.3).[74] The first significant amendment to Part VII came in 1983 and introduced a set of factors that were to be considered in determining what orders were consistent with the paramount consideration, the child's 'welfare'. This became known as the 'welfare checklist' and was the precursor to the current section 60CC list of 'primary and additional' considerations.

The first set of amendments that introduced substantive changes to the fundamental concepts and other aspects of the legislation was made in 1995 (becoming effective in 1996), with a complete overhaul of Part VII. These changes abolished the concepts of guardianship, custody and access, reflecting a concern to reconfigure the way that post-separation parenthood—particularly the role of fathers—was thought about socially and dealt with legally. These changes introduced a new conceptual basis for post-separation parenthood in legal terms. Parenting orders could be 'residence' orders (specifying who the child was to live with), contact orders (specifying who the child was to have contact with) and 'specific issues' orders in relation to parental responsibility, which could allocate long-term or day-to-day responsibility for the child to either or both parents and make orders in relation to other aspects of responsibility—allocating health decisions for one parent, for example. Parental responsibility was automatically vested in each parent unless altered by a court order. This set of amendments also introduced a set of normative statements (objects and principles) that were to guide the interpretation of Part VII and changed the wording of the paramountcy provision from 'welfare' to 'best interests'. These latter changes reflect the influence of the United Nations Convention on the Rights of the Child (see further 6.5).[75]

6.4 THE CONTEMPORARY PART VII FRAMEWORK

In 2006, the legislative statements about shared parenting in Part VII became stronger still, as did provisions dealing with the need to protect children from harm from abuse or exposure to family violence. The 2012 amendments left the substantive framework intact but, as outlined in the preceding chapter, aimed to encourage disclosure of abuse and family violence and provide legislative guidance about the priority to be accorded the protection from harm principles as against the meaningful involvement principle.

The 2006 amendments saw the introduction of a presumption in favour of equal shared parental responsibility (with exceptions—see further below). Where orders are made pursuant to the presumption, courts are obligated to consider making orders for equal or substantial and significant time with each parent (section 65DAA(1) and (2)), where this is considered to be reasonably practicable and in the child's best interests. The previous terminology describing living arrangements was changed again (section 64B): from 2006

74 Rhoades, 2010, above n 4.

75 Replacement Explanatory Memorandum, Family Law (Family Violence and Others Measures) Bill (Cth) Commonwealth Parliament, House of Representatives, Canberra, 2011.

the legislation has specified that parenting orders may deal with 'the person or persons with whom a child is to live' (section 64B(2)(a))) and/or 'the time a child is to spend with another person or persons' (section 64B(2)(b)), as well as the allocation of parental responsibility (section 64B(2)(c))).

In addition, from 2006 the concepts of 'meaningful involvement' and 'meaningful relationship' were added to the objects and the principles, which were also amended and augmented in other ways. Provisions directing attention to family violence and child safety issues were also included throughout the framework, as indicated below. The following summary of how they now read has the 2006 changes in italics and the 2012 changes in bold:

- Objects (section 60B):
  - + *to ensure children have the benefit of both parents having meaningful involvement in their lives to the maximum extent consistent with their best interests (subsection 1(a))*;
  - + *protecting children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence (subsection 1(b))*;
  - + ensuring children adequate and proper parenting to help them achieve their full potential (subsection 1(c));
  - + ensuring that parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children (subsection 1(d)).
- Principles (to apply except when it is or would be contrary to the child's best interests):
  - + children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together (subsection 2(a)); and
  - + children have a right to spend time with and communicate on a regular basis with, both their parents and other people significant to their care welfare and development *(such as grandparents and other relatives) (subsection 2(b))*; and
  - + parents jointly share duties and responsibilities concerning the care, welfare and development of their children (subsection 2(c)); and
  - + parents should agree about the future parenting of their children (subsection 2(d)); and
  - + *children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture) (subsection 2(e)).*
  - + **An additional object of this Part is to give effect to the Convention on the Rights of the Child (subsection 4).**

A further significant aspect of the post-2006 framework in relation to the exercise of the 'best interests' discretion is the list of 'primary' and 'additional' considerations that draw attention to particular issues that may arise. This list of considerations has its origins in the 'welfare checklist' that was inserted in 1983, augmented in 1995 and further amended in 2006 and 2012. A significant, and problematic, feature of the 2006 amendments was the adoption of a two-tier system, which specified two 'primary' and a number of 'additional'

considerations.[76] Provisions introduced or amended in 2006 are in italics and those introduced or amended in 2012 are in bold in the following summary:

- *The primary considerations are:*
  - + *the benefit to the child of having a meaningful relationship with both of the child's parents (section 60CC(1)(a)); and*
  - + *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (section 60CC(1)(b)).*
- **In applying the [primary] considerations the court is to give greater weight to the consideration regarding protection from harm (section 60CC(2A)).**
- Additional considerations are:
  - + any views expressed by the child (the court is to attach weight as it considers appropriate having regard to the child's maturity or level of understanding) (section 60CC(3)(a));
  - + the nature of the child's relationship with each parent and other persons (*including grandparents and other relatives*) (section 60CC(b));
  - + *the extent to which each of the child's parents has taken or failed to take the opportunity:*
    - – *to participate in making decisions about major long term issues in relation to the child (section 60CC(c)(i)*
    - – *to spend time with the child (section 60CC(c) (ii)*
    - – *to communicate with the child (section 60CC(c) (iii); and*
  - + *the extent to which each of the child's parents has fulfilled or failed to fulfil the parents' obligations to maintain the child (section 60CC(3(ca))*;
  - + the likely effect of any changes in the child's circumstances (section 60CC(d)(i)), including the likely effect on the child of any separation from:
    - – either parent (section 60CC(d)(i)
    - – any other child or other person (*including grandparent or other relative*) with whom he or she has been living (section 60CC(d)(ii)); and
  - + *the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis (section 60CC(3)(e)); and*
  - + the capacity of:
    - – each of the child's parents (section 60CC(f)(i) and
    - – any other person (*including any grandparent or other relative of the child*) *(section 60CC(f)(ii))*

    to provide for the needs of the child, including emotional and intellectual needs; and

76 Richard Chisholm, *Family Courts Violence Review*, Attorney-General's Department, Canberra, 2009; Kaspiew et al., 2009, above n 20, section 15.3.

+ the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents and any other characteristics of the child that the court thinks are relevant section 60CC(g); and
+ *if the child is an Aboriginal child or a Torres Strait Islander child:*
  – *the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and*
  – *The likely impact of any proposed parenting order under this Part will have on that right (section 60CC(h)); and*
+ the attitude to the child and to the responsibilities of parenthood demonstrated by each of the child's parents (section 60CC(i));
+ **any family violence order involving the child or a member of the child's family (section 60CC(k)); and**
+ **if a family violence order applies, or has applied, to the child or a member of the child's family, any relevant inferences that can be drawn from that order, taking into account the following:**
  – **the nature of the order;**
  – **the circumstances in which the order was made; the evidence admitted in proceedings for the order;**
  – **any findings made by the court in, or in proceedings for, the order;**
  – **any other relevant matter; and**
+ whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child (section 60CC(l)); and
+ any other fact or circumstances that the court thinks is relevant (section 60CC(m)).

In relation to consent orders, having regard to the primary and additional considerations is discretionary (but best interests remains paramount) (section 60CC(5)).

One 'additional' consideration enacted in 2006 was repealed in 2012: it directed the court's attention to the extent to which one parent had facilitated the involvement of the other parent in the child's life. This was known as the 'friendly parent' provision and is considered by many commentators to have contributed to concerns about family violence and child safety not being raised when negotiating or litigating parenting arrangements.[77]

In relation to parental responsibility, there are three main sets of provisions. One provides that parental responsibility is vested in each parent (regardless of relationship status) unless varied by a court order (section 61C). Another is the presumption of equal shared parental responsibility (section 61DA). Courts are not obliged to apply this presumption where an exception can be established on reasonable grounds (this is not a difficult burden of proof to

77 See, e.g., Chisholm, *Family Courts Violence Review*, ibid.

establish—it is below balance of probability). The exceptions provided for in the legislation are circumstances where a parent of a child, or a person who lives with a parent of the child, has engaged in abuse of the child or another child in the family or family violence (section 61DA(2)). The presumption may also be rebutted on the basis of evidence (to the balance of probabilities) that satisfies a court that its application would not be in a child's best interests. Where orders are made for equal shared parental responsibility pursuant to the presumption, the court is obliged to consider whether orders for equal or substantial and significant time are in the child's best interests and reasonably practicable. The definitions of these terms are discussed in Chapter 8. The third set of provisions specifies how shared parental responsibility is to be discharged, including specifying an obligation to consult the other parent on major long-term issues (section 65DAC).

The expectations for post-separation parenting arrangements that are established in Part VII are thus that parental responsibility will be shared equally and that children will, to the extent practicable and consistent with their best interests, share their time between parents to the maximum extent possible. The framework also recognises, however, that this may not be feasible for some families, particularly those who are affected by family violence and child safety concerns. As discussed in Chapter 5, these concerns are relevant to varying extents to a significant proportion of separated families and those who are more significantly affected by these issues are the ones most likely to use the formal parts of the family law system. This analysis highlights the extent to which Part VII is normative, in that the 'bar' in relation to time and responsibility is set high, particularly given the nature of the families to whom the law is applied. This point about normativity assumes particular significance when the patterns in parenting arrangements, in relation to time and the exercise of parental responsibility, set out at 6.2, are considered. Among separated parents generally, shared time arrangements remain in the minority, as does the exercise of parental responsibility on a shared basis.

The conceptual concerns arising from this and other features of Part VII are considered in 6.6.

The application of this framework in case law is discussed in more depth in Chapters 8 and 9. An influence on the current form of Part VII, and approaches to children generally, the United Nations Convention on the Rights of the Child, is outlined next.

6.5 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The UN Convention on the Rights of the Child (CRC)[78] was finalised (after a 10-year gestation) in 1989[79] and ratified by Australia in December 1990.[80] It is the most widely

78 Opened for signature 20 November 1989, 1557 UNTS 3 (entered into force 2 September 1009).

79 John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 580, 584.

80 Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, October 2007, available at <www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un> 9 May 2014.

ratified human rights treaty around the world[81] and reflects 'remarkable consensus around the question of whether children should have rights'.[82] The influence of the CRC was evident in the 1995 family law amendments, particularly the objects relating to the child's right to know and be cared for by both parents regardless of their relationship status and the shift in the wording of the paramountcy principle from 'welfare' to 'best interests'.[83]

In the 2012 family violence amendments, the CRC was recognised more strongly still by the insertion of section 60B(4) stating that an object of Part VII is 'to give effect to the UN Convention on the Rights of the Child'. Unless they are specifically enacted in domestic law, international treaties do not impose legally enforceable rights and obligations. Authority indicates that the impact of ratification is essentially normative, with the High Court of Australia (HCoA) in *Teoh* holding that, by ratifying a treaty, the executive government was signalling its intention that the executive and its agencies would act in a manner consistent with the treaty.[84] In relation to the exercise of judicial power, treaties may, in the absence of countervailing considerations, provide a guide to the direction in which judicial discretion should be exercise or be applied in resolving legislative ambiguity.[85] At the time of writing, the implications of the insertion of section 60B(4) into Part VII of *FLA* has yet to receive significant attention at first instance let alone at appellate level. The potential impact of this provision has been the subject of some debate, but the weight of academic of opinion suggests it may be limited.[86] Practitioner opinion suggests a greater potential impact[87] and as yet judicial consideration of the question has not taken place.

The influence of the CRC on executive actions in Australia can be seen in a numbers of measures adopted in recent years, including the development of the Framework for Protecting Australia's Children and the establishment of Children's Commissioners in all state and territories, and federally in recent years. The actions of parties to the CRC are monitored through four-yearly reports that ratifying states are obliged to provide to United Nations Committee on the Rights of the Child (CRC/C), which provides a response to the report. These responses provide important insight into the extent to which parties to the Convention are complying with the international benchmarks that the act of ratification signifies they are committed to upholding. The CRC/C's response to Australia's most recent report will be discussed after the main aspects of CRC for family law are outlined.

CRC comprises 54 Articles covering a wide range of issues, including issues relating to procedures for administering the convention (for example, Part III) and, more substantively, social, economic, educational and cultural rights. As noted earlier, CRC is the source of the

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81 ibid.

82 John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia,* Lexis Nexis Butterworths, Chatswood, Australia, 2008, pp 23–52.

83 Explanatory Memorandum.

84 *Teoh* (1995) 183 CLR 273.

85 ibid.

86 Michelle Fernando, 'Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children's Participation?' (2013) 36 *UNSW Law Journal* 88; Patrick Parkinson, '*The Family Law Act* and the UN Convention on Children's Rights: A New Focus on Children?', *Human Rights Now*, <http://rightnow.org.au/topics/children-and-youth/the-family-law-act-and-the-un-convention-on-children%E2%80%99s-rights-a-new-focus-on-children>.

87 See the view of Patrick Fitzgerald of the Legal Aid Commission of Tasmania, quoted in Fernando, 2013, ibid., p 1.

'best interests' principle (Article 3) applicable to all 'actions concerning children' in executive and judicial contexts[88] and also to parents (Article 18). From a family law perspective, further significant Articles are those relating to the child's relationship rights, their rights to be safe and what have become known as their participation rights and cultural rights. Each of these is considered in turn. Under the CRC, a child is 'every human being' under the age of 18 years unless the law of majority is different in the country in which they live (Article 1).

Relationship rights and parental obligations are dealt with in a range of articles, which recognise that parties (or, when applicable, extended family members and community) have the fundamental responsibility for raising children (Article 5, see also Article 27.2) and that the care and protection responsibilities of governments 'take into account' the duties and responsibilities of parents (Article 3.2). Article 18 further promotes 'recognition of the principle that both parents have common responsibilities for the upbringing and development of the child' and that the primary responsibility in this area falls on parents (or legal guardians) rather than the state. Separation from parents against the child's will should only occur in contexts where competent authorities subject to judicial review determine such an action is in the 'best interests' of the child. Such contexts include situations where the child is subject to abuse or neglect in the care of a parent or where the parents are living separately and it is necessary to determine the child's place of residence (Article 9.1). Where such separation occurs, children have the right to maintain 'personal relations' and direct contact with parents unless it is contrary to best interests (Article 9.3).

Rights to safety are recognised in a number of ways. Fundamentally, Article 19.1 provides that 'States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care the child'. Article 19.2 establishes an expectation that programs to support the prevention of, and to provide responses to, abuse will be provided. Article 34 deals with the prevention of sexual abuse and exploitation, including prostitution and pornography. Obligations to take 'all appropriate measures' in supporting children to recover from abuse, neglect, exploitation, torture and cruel and inhuman treatment are set out in Article 39.

The participation principle rests on number of Articles, including Article 12, which provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

88 United Nations Committee on the Rights of Children, *General Comment No 14* (2013) on the right of a child to have their bests interests taken as a primary consideration (Art 3, para 1), adopted by the Committee at its sixty-second session (14 January – 1 February 2013), para 14(b)).

Article 9.2, which as explained earlier deals with separating children from parents, recognises that 'all interested parties shall be given an opportunity to participate in the proceedings [relating to the decision] and make their views known'. Article 13 further recognises a right of freedom of expression including 'freedom to seek, receive and impart information and ideas of all kinds'. The question of child participation in family law proceedings is examined in more depth in Chapter 7 with case law on the role of children's views discussed in Chapter 8.

The UN CRC sits alongside the UN Declaration on the Rights of Indigenous Peoples.[89] In the CRC, cultural rights are recognised in Article 2, dealing with freedom from discrimination, Article 5 (recognising child-rearing practices may take different forms) and most substantively in Article 30, which provides that:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Decision making in relation to parenting cases involving Aboriginal and Torres Strait Islander children is examined in Chapter 9.

In theory, the CRC provides a way of shifting discourses about children, away from conceptualising them as vulnerable, incompetent and essentially a work in progress whose needs are best judged by adults, towards applying an approach that accords them agency in their own lives.[90] However, John Tobin has observed that:

> [o]n balance ... there has been no deliberate or concerted effort to use the CRC and the notion of children as rights bearers as the benchmark against which to develop, implement and monitor laws and policies affecting children.[91]

Australia's record in meeting its obligations as a party to the CRC has attracted criticism from the CRC/C. In relation to Australia's most recent report, provided in 2012, the following comments of relevance to the matters discussed in this book were made:[92]

- The CRC/C endorsed the 2012 family violence amendments, the National Plan to Reduce Violence against Women and Their Children 2010–2022 and the National Framework for Protecting Australian Children 2009–2020.[93]
- The CRC/C expressed its concern at the lack of a 'comprehensive child rights Act at the national level ... due to [Australia's] federal system, the absence of such legislation has resulted in fragmentation and inconsistencies in the implementation of child

89 The declaration was adopted by the United Nations General Assembly in September 2007 and Australia adopted it on April 3, 2009.

90 Carol Smart, 'Children and the Transformation of Family Law' in John Dewar and Stephen Parker, *Family Law Processes, Practices and Pressures*, Hart Publishing, Oxford, 2003, p 223.

91 John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia*, Lexis Nexis Butterworths, Australia, 2008, pp 23, 24.

92 Committee on the Rights of the Child, sixtieth session 29 May – 15 June 2012, *Consideration of Reports submitted by States Parties under Article 44 of the Convention*, CRC/C?AUS/CO4, available at <www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf> 9 May 2014.

93 ibid., para 4.

rights across its territory, with children in similar situations being subject to variations in fulfilment of their rights depending on the state or territory in which they reside'.

- A further concern related to 'the federal system present[ing] practical challenges to the coordination of activities for the consistent implementation of the Convention, resulting in significant disparities in the implementation of the Convention across the State party's states and territories'.
- Continuing the theme of concern about the capacity for co-ordinated action, the CRC/C noted the 'absence of a comprehensive national plan of action for implementing the Convention as a whole and the lack of a clear mechanism to link the implementation of the National Plan, the National Framework and the National Early Childhood Development Strategy'.
- Although it welcomed the introduction of a National Children's Commissioner, CRC/C noted that the resources allocated to this role were not adequate to support its mandate and also commented on the lack of representation of the interests of Aboriginal and Torres Strait Islander children.
- The CRC/C expressed concern about racism, discrimination and the position of Aboriginal and Torres Strait Islander children.[94]
- There was insufficient knowledge of the best interests principles across all administrative and judicial domains concerned with children.[95]
- The CRC/C expressed concern about the large number of Aboriginal and Torres Strait Islander children being placed into care and not having access to support for the preservation of their cultural and linguistic identity.[96]
- The CRC/C expressed 'grave concern' about the 'high levels of violence against women and children' and noted that 'there is an inherent risk that the coexistence of domestic violence, lawful corporal punishment, bullying, and other forms of violence in society are interlinked, conducing to an escalation and exacerbation of the situation'.[97]
- It also noted that 'the training approaches adopted by [Australia] to recognize and address potential cases of abuse and neglect by professionals working with or for children, including doctors and other medical personnel, as well as teachers, remain inadequate'.[98]

The themes of fragmentation, lack of consistency and concern about family violence and child safety in the CRC/C's response to Australia's report are consistent with themes highlighted throughout this book. The discussion in the next section of this chapter draws these and other themes together to reflect on the form and content of Part VII.

94 ibid., para 29.
95 ibid., para 31.
96 ibid., para 37.
97 ibid., para 51.
98 ibid., para 55.

6.6 PART VII: CURRENT CONCERNS

In the years since the 2006 amendments, a range of concerns about the workability of the Part VII framework has been raised in case law, research and commentary. Many of these remain pertinent in the context of the 2012 family violence amendments.

An overarching concern arises from the complexity of the Part VII framework as it now stands. This complexity has a number of implications. Perhaps most significantly, the framework fails to provide parents and the community at large with an accessible means of understanding the law in relation to post-separation parenting, including the nature of the duties and responsibilities of separated parents. Rick O'Brien, the then deputy chair (now chair) of the Family Law Section of the Law Council of Australia, observed that 'a law that cannot be understood by the people affected by it—or worse still lends itself to being actively misunderstood—is a bad law. That is particularly so when we are talking about a law that affects families and children'.[99] Evidence from the evaluation of the 2006 reforms showed that professionals in the system, including judges, family lawyers and family dispute resolution practitioners, reported a common misunderstanding among parents that equal shared parental responsibility equated to equal care and that fathers had an entitlement to 'equal time'.[100] This study also showed that professionals found it difficult to work with the existing Part VII framework in a way that supported child-focused discussions with separated parents, instead finding that the new parental responsibility provisions became linked with expectations about parental rights.[101] O'Brien attributes the 'convoluted state' of Part VII to the fact that the 2006 amendments 'tried to address the perceived need of many in the community for recognition of their rights as parents, but tried to address that without appearing to do so overtly. As a result we have a piece of legislation that is hopelessly compromised'.[102]

A second related implication of the complexity of the framework is the extent to which professionals find it difficult to understand and work with.[103] Again, the evidence from the evaluation of the 2006 reforms demonstrated that judges and lawyers found the complexity of Part VII made giving client advice, litigating parenting disputes, and writing judgments in parenting cases 'more time-consuming and complicated'.[104] As noted at the beginning of this chapter, judges have regularly remarked upon the complexity of the legislation in their judgments. For example, Part VII was described by the Full Court in *Marvel v Marvel* as 'convoluted'[105] and by Warnick J in *Zabini & Zabini* as 'a dilemma of labyrinthine complexity'.[106] The evaluation also found that lawyers were not always explaining the law to their clients correctly, largely due to misconceptions about the distinction between equal shared parental responsibility and equal time. For example, a federal magistrate 'observed

99 Rick O'Brien, 'Simplifying the System: Family Law Challenges—Can the System Ever be Simple?' (2010) 16 *Journal of Family Studies* 264, 266.
100 Kaspiew et al. 2009, above n 20, pp 210–11.
101 ibid., p 206.
102 O'Brien, above n 99, p 268.
103 Rhoades et al., 2013, above n 4.
104 Kaspiew et al., 2009, above n 20, p 336, see also Rhoades et al., 2013, above n 4.
105 *Marvel & Marvel* [2010] FamCAFC 101, 87.
106 *Zabini & Zabini* [2010] FamCA 10.

that they had noticed some affidavits—in explaining why particular arrangements had previously been made—citing erroneous legal advice on a mythical 50–50 rule: '"They will say: 'My lawyer told me the law has changed and you get equal time now and the judge wouldn't allow something that wasn't equal time'".'[107]

Other concerns revolve around family violence and child safety. Although the 2012 amendments went some way towards resolving the tension between the two 'primary considerations' in the best interests test—the child's right to a meaningful relationship with both parents and the need to be protected from harm—concerns about the lack of guidance with regard to decision making remain. For example, in the *Family Courts Violence Review* report, Richard Chisholm identified a significant gap in the Part VII framework when findings about family violence or concerns about child safety have been made.[108] As Chisholm explains, when such findings are made, and the presumption of equal shared parental responsibility is either not applied or rebutted, the legislation does not specify what the subsequent steps in the decision-making process should be. This is in contrast to the way in which the Part VII framework specifies consideration of particular outcomes when the presumption is applied in section 65DAA. In his analysis of the problem in the *Family Courts Violence Review*, Chisholm recommended a consideration of these elements of Part VII to remove the link between parental responsibility and time and to avoid any legislative suggestion that one kind of arrangement was any better than any other kind.[109] He advocated a revision that would be 'more clearly based on promoting the child's interests rather than accommodating notions of parental rights'.[110]

As our earlier overview of the legal framework shows, this proposal was not adopted: instead the Australian Parliament enacted the 'tie-breaker'[111] provision in section 60CC(2A). In commenting on the Exposure Draft of the Family Law Legislation Amendment (Family Violence and Other measures) Bill 2011, Chisholm observed that the fundamental problem spelt out in his earlier report had not been rectified by this measure and the framework still fell short of 'provid[ing] legislative guidance [on the two fundamental principles] without giving people the wrong impression, and without tying people up in legal technicalities'.[112] Consistent with this, research by Helen Rhoades and colleagues on the application of the Part VII framework demonstrates that concerns about the lacunae in the decision-making pathway identified by Chisholm remain pertinent in the post-2012 amendment practice environment. Rhoades and her colleagues argue that this research indicates a continuing need for clearer principles in relation to such cases. On the basis of the consultations with

107 Kaspiew et al., 2009, above n 20, p 212.
108 Rhoades et al., 2013, above n 4.
109 Chisholm 2009, above n 76, p 133.
110 ibid.
111 Helen Rhoades, Nareeda Lewers, John Dewar and Elise Holland, 'Another Look at Simplifying Part VII' (2014) *Australian Journal of Family Law* 28 (forthcoming).
112 Richard Chisholm, 'Legislating about Family Violence: The Family Law Amendment (Family Violence) Bill 2010' (2010) 24 *Australian Journal of Family Law* 283. See also Steven Strickland and Kristen Murray, 'A Judicial Perspective on the Australian Family Violence Reforms 12 Months On' (2014) 28 *Australian Journal of Family Law* 1.

family law system professionals conducted for the research,[113] such principles should specify the need for consideration of the following factors:

- the nature and frequency of the family violence;
- how recently the family violence occurred;
- the likelihood of further family violence occurring;
- how the child was subjected to or exposed to family violence;
- the physical or emotional harm caused to the child;
- any views expressed by the child on the matter; and
- any steps taken by the violent party to prevent further violence from occurring.[114]

A further concern focuses on the question of whether the existing Part VII framework provides adequate support for arrangements that take into account children's needs at different developmental stages of their lives, notwithstanding the challenges and concerns already outlined.[115] A developmental perspective on parenting arrangements uses knowledge and theory of child development to inform thinking and practice in such a way that post-separation parenting arrangements support rather than impair optimum development. Family law practice has been influenced by theories of child development and the research upon which they are based, since the inception of the Family Court of Australia, often via the social scientists who play a role in various family law processes.[116] However, the provisions in support of shared parenting have been seen to create particular tensions between sound social science practice and the approaches that may be adopted on the basis of the legal framework.[117] As the earlier discussion indicates (6.2.2.5), some aspects of these approaches are contested but others are generally well accepted.

The research being conducted by Rhoades and colleagues also examined the extent to which practice approaches among family dispute resolution practitioners and lawyers are informed by social science or legal principles, and the way these approaches are or are not supported by the Part VII framework. In addition to the perspective on family violence already referred to, a further conclusion from this study is that there are significant inconsistencies in some critical areas between approaches based on social science and those based on law.[118] The first was the failure of the legal framework and lawyers to adequately address the harm created by exposure to parental conflict, despite empirical evidence and widespread acceptance among social scientists and family dispute resolution practitioners of its significance to children's well-being.[119] This suggests the need for a broad interpretation

113 The research was conducted in two stages. Stage One involved consultations with 39 family law system professionals. Stage Two involved a survey of 110 family law practitioners and consultations with 20 family law practitioners and 17 family law court judges: above n 111, p 6.
114 Rhoades et al., 2014, above n 111.
115 See discussion in Kaspiew et al., 2009, above n 20, section 9.4.1 and Rhoades et al., 2013, above n 4.
116 Rhoades, 2010, above n 4.
117 Rhoades et al., 2013, above n 4.
118 ibid., p 217.
119 ibid., p 217.

of the concept of harm, which is consistent with a General Comment by the CRC/C on the interpretation of the best interests standard:

> Children's well-being, in a broad sense includes their basic material, physical, educational and emotional needs, as well as needs for affection and safety ...
>
> Applying a best interests approach to decision making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child's safety.[120]

The second discrepancy between the legal framework and social science perspectives highlighted by Rhoades and colleagues was the particular emphasis placed on parenting capacity (including the capacity to act protectively in relation to children) in the assessments made by social scientists, but not by lawyers.[121] The aspect of parenting capacity that was critical to the considerations of social scientists was the extent to which a parent is responsive to a child's needs. Although some provisions in the 'additional considerations' in section 60CC direct attention to parenting capacity, Rhoades and colleagues argue that 'responsive parenting' is not adequately recognised in the existing framework and that the 'meaningful relationship' element creates a 'pull' in an inconsistent direction.[122]

In summary, this discussion highlights several concerns about the existing form of the Part VII framework. These include its complexity and the consequent tendency for misreading and misapplication of key principles to occur, both in professional practice and among separated parents. Further concerns relate to the extent to which the framework adequately addresses the needs of children in particular areas, namely by specifying the questions that should be considered where exposure to family violence has been established, recognising the relevance of exposure to inter-parental conflict to best interests reasoning and also acknowledging the importance of parenting efficacy to child well-being.

6.7 CONCLUSION

In this chapter we have introduced the legislative framework applicable to parenting arrangements and outlined the social backdrop to the development and operation of this legislation. Our discussion has shown that while gender roles have shifted to some extent in recent decades, day-to-day parenting responsibilities in intact families are still executed by mothers to a significantly greater extent than fathers. Research on parenting in separated and intact families has, however, shown that time is not the critical aspect of parenting—neither of mothering nor of fathering. Rather, the way parenting is carried out is important, with the evidence highlighting the benefit to children of warm and consistent parenting.

Although the way post-separation parenting is enacted varies considerably among families, arrangements where children spend most nights with their mothers remain the norm and parental responsibility is reportedly jointly exercised by between a quarter and a

120 United Nations Committee on the Rights of Children, *General Comment No 14: On the Right of a Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art 3, para 1), adopted by the Committee at its sixty- second session (14 January – 1 February 2013) pp 15–16, para 71 and 74.

121 Rhoades et al., 2013, above n 4, 213.

122 ibid., p 218.

third of separated parents. This is in contrast to the expectations established in the Part VII framework, which sets out a presumption in favour of equal shared parental responsibility linked to an obligation on courts to consider equal or substantial and significant time arrangements.

Even in the context of the encouragement of shared parental responsibility and shared time, the best interests of the child remain paramount in the Part VII framework. This is consistent with CRC, as is the emphasis on children being protected from harm from exposure to family violence and child abuse, and recognition of their right to a relationship with each parent regardless of the parents' relationship status. In practice, some features of the Australian environment have raised concerns from the standpoint of Australia's obligations as a signatory to CRC, including the fragmentation of responses to child safety across different jurisdictional frameworks and our high level of family violence.

These concerns resonate with some of the ongoing debates about the extent to which the Part VII framework provides support for child-focused decision making even after the 2012 family violence amendments. Analysis and research suggest the complexity of the legislation remains an issue. Research informed the 2012 amendments and has the ongoing potential to provide clearer guidance on the questions for consideration in matters involving family violence, as well as recognising exposure to conflict as a source of harm and the importance of parenting efficacy for child well-being.

CHAPTER

7

PROCESSES FOR RESOLVING PARENTING DISPUTES

7.1 INTRODUCTION

This chapter describes the way that parenting arrangements are made, in the context of evidence of varying dynamics reflecting agreeing, bargaining and disputing behaviours among separated parents. It provides an overview of how the main formal avenues for resolving parenting disputes—family dispute resolution and courts—operate, with a particular focus on how child participation is supported in each of these contexts. A further purpose of the chapter is to explain the development of the current configuration of the family law system for resolution of parenting disputes and to examine recent policy shifts and current practice challenges.

Empirical evidence (7.2) demonstrates that most separated couples resolve their parenting and financial arrangements with little assistance from formal services.[1] A significant minority seeks information, advice or assistance from services such as Family Resource Centres (FRCs) and lawyers (private or publicly funded) to support informal negotiations.[2] A smaller proportion still use mediation (family dispute resolution)[3] and even fewer use courts.[4] The families who do use family dispute resolution, lawyers and courts to resolve disputes usually have particularly complex needs, including those that result from family violence and child safety concerns.[5] A significant aspect of the policy philosophy behind the 2006 family law reforms was an intention to remove parenting disputes in particular from legal arenas and to provide greater support for mediation-based mechanisms building on the directions established in the 1995 changes.

The 2006 changes to the substantive parenting provisions in Part VII, described in Chapter 6, were accompanied by legislative changes to procedural requirements for parenting matters and significant reforms to the family law system. Underlying these changes was a recognition of the complexity and fragmentation of the family law system with an important 2001 report comparing the system to a 'maze' with a series of 'random' entry points that had a 'disproportionate influence on the path taken'.[6] In 2003, further calls for reform were made in the *Every Picture Report*, which identified a need for the system to become less complex,[7] more child focused and to support shared parenting at the same time as protecting children and caregivers from family violence and abuse.[8] A core element of the 2006 changes to the system was the creation of 65 FRCs, which have a threefold charter: to strengthen family relationships, help families stay together and assist families through separation.[9]

In light of the more comprehensive evidence base on the operation of the family law system and the needs of its users that has been developed in more recent times, shifts in the

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1 Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, and Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009; John de Maio, Rae Kaspiew, Diana Smart, Jessie Dunstan and Sharnee Moore, *Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Measures) Act 2011*, Australian Institute of Family Studies, Melbourne, 2013.

2 ibid.

3 ibid.

4 ibid.

5 ibid.

6 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation: Report of the Family Law Pathways Advisory Group* (*Pathways Report*), Commonwealth of Australia, Canberra, 2001, p 16.

7 For example, Recommendation 10 and 11. House Standing Committee on Family and Community Affairs, Parliament of Australia, House of Representatives, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* ('*Every Picture Report*'), 2003.

8 For example, Recommendation 1 and 2. ibid.

9 Family Relationships Online, *Family Relationship Centers—Helping Families Build Better Relationships*, <www.familyrelationships.gov.au/BrochuresandPublications/Pages/FRC_Brochure_May_2008.aspx> at 27 April 2014.

focus of policy and program development have occurred since 2006.[10] Three main themes are discernable in these shifts. The first is the need to develop service models that are geared to the level of complexity evident among the families who use the services.[11] Second is the need to develop more streamlined and coordinated services to provide different kinds of support—for example, legal and social welfare services—to families within one program, requiring significant levels of collaboration between professionals from legal and non-legal arenas.[12] Third is the need to provide access to the most suitable and low cost form of justice appropriate, recognising that different dispute resolution mechanisms are appropriate in different circumstances.[13] An additional theme in research and commentary identifies further scope to improve the family law system's capacity to support children and allow for their participation to the maximum extent possible.[14]

This chapter begins with an overview of the empirical evidence on service use by separated parents. A recent element of the system—FRCs—is then discussed, along with some other services and initiatives introduced in 2006. An introductory discussion of child participation precedes more specific discussions of how this occurs in the context of family dispute resolution and court processes in the sections describing each of these processes.

7.2 SORTING THINGS OUT: DYNAMICS AND ISSUES

A large majority of parents sort their parenting arrangements out fairly quickly after separation (within 12–18 months), with no or light use of services. The introduction of

10 Kaspiew et al., 2009, above n 1; De Maio et al., 2013, above n 1; Lixia Qu and Ruth Weston, *Parenting Dynamics after Separation: A Follow-Up Study of Parents who Separated after the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2010; Lixia Qu, Ruth Weston, Lawrie Moloney, Rae Kaspiew, and Jessie Dunstan, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies, Melbourne, 2014; Rae Kaspiew, John De Maio, Julie Deblaquiere, and Briony Horsfall, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases, Final Report*, Australian Institute of Family Studies, Melbourne, 2012; Rae Kaspiew, Rachel Carson, Sharnee Moore, John De Maio, Julie Deblaquiere, and Briony Horsfall. *Independent Children's Lawyer Study: Final Report*, Australian Institute of Family Studies, Melbourne, 2013; Australian Law Reform Commission (ALRC) and NSW Law Reform Commission, *Family Violence: A National Legal Response, Final Report*, Australian Law Reform Commission and NSW Law Reform Commission, Sydney, 2010; FaHCSIA, *Family Support Program Future Directions Discussion Paper*, 2012, <www.dss.gov.au/sites/default/files/documents/10_2012/fsp_discussion_paper.pdf>; Robert McClelland, 'Building Better Partnerships between Family Relationship Centres and Legal Assistance Services', Media Release, Attorney-General's Department, Canberra.

11 ALRC 2010, above n 10; Australian Government, Department of Social Services, *Family Support Program Future Directions*, at <www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-support-program-future-directions> Allen Consulting Group, *Research on Family Support Program Family Law Services*, Final Report 2013, Allen Consulting Group.

12 Lawrie Moloney, Rae Kaspiew, John De Maio, Julie Deblaquiere, Kelly Hand and Briony Horsfall, *Evaluation of the Family Relationship Centre Legal Assistance Partnerships Program Final Report*, Australian Institute of Family Studies, 2011. See also Lawrie Moloney, Lixia Qu, Ruth Weston, Kelly Hand, 'Evaluating the Work of Australian Family Relationship Centres: Evidence from the First Five Years' (2013) 51 *Family Court Review* 234; Kaspiew et al., 2013, above n 10.

13 Australian Government, Attorney-General's Department, Report by the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Attorney-General's Department, Canberra, September 2009.

14 See, e.g., Kaspiew et al., 2013, above n 10; Alasdair Roy, Gabrielle McKinnon, and Heidi Yates, *Talking with Children and Young People about Participation in Family Court Proceedings*, Office of the ACT Children and Young People Commissioner, Canberra, 2013.

family dispute resolution with exceptions in 2006 has produced about a one fifth reduction in the number of court filings in children's matters, meaning that an even smaller minority of parents actually end up litigating.[15] The empirical evidence indicates that while most parents are able to agree (for a discussion of the notion of agreement, see 7.5 and 7.5.1.6) on arrangements fairly expeditiously, and can maintain agreement or re-negotiate agreements over the medium term, there are some smaller sub-groups of parents for whom agreement comes significantly less easily or not all.[16] These sub-groups reflect a spectrum of complexity.

More than 70 per cent of the parents interviewed for the Australian Institute of Family Studies Longitudinal Study of Separated Families (AIFS LSSF) Wave 1 and Survey of Recently Separated Parents (SRSP) 2012 (these studies were introduced in Chapter 5) indicated at the time of interview some 18 months after separation that their parenting arrangements were sorted out (72 per cent and 73.6 per cent).[17] About a fifth in each survey (19–16 per cent AIFS LSSF Wave 1 and 19.2 per cent AIFS SRSP) indicated they were in the process of sorting out their arrangements and about a tenth said nothing was sorted (10 per cent AIFS LSSF Wave 1 and 7.2 per cent AIFS SRSP 2012). Most parents nominated 'discussions' with the other parent as the main pathway for sorting out their arrangements in each survey (65.8 per cent LSSF Wave 1 and 68.9 per cent SRSP 2012). Increasingly small proportions nominated main pathways consisting of counselling, mediation or family dispute resolution (FDR) (7.3 per cent LSSF W1 and 9.5 per cent SRSP 2012), lawyers (5.8 per cent LSSF Wave 1 and 6.5 per cent SRSP) and courts (2.8 per cent LSSF Wave 1 and 3.5 per cent SRSP 2012). Both surveys show that parents who reported a history of family violence or the presence of ongoing safety concerns were taking longer to sort out their arrangements and were more likely to be using one of the three formal pathways.[18] AIFS SRSP findings show they were significantly less likely to express satisfaction with their experience.[19] AIFS LSSF Wave 2 findings demonstrate very clearly that a sub-group of very complex parents—denoted by the presence of two or more of the indicators of complexity referred to above—repeatedly re-engage with services, including dispute resolution and courts, over the medium term.[20]

The view that people who can resolve issues and agree with little recourse to services or lawyers have higher levels of satisfaction with their arrangements is borne out by the empirical evidence. Data from AIFS SRSP 2012 and AIFS LSSF Wave 2 consistently show that satisfaction among parents with the pathway used to sort out parenting arrangements diminishes as greater intervention occurs.[21] AIFS SRSP findings, for example, show that 93.0 per cent of parents for whom 'discussions' were the main pathway indicated

15 Allen Consulting Group, notes there is little evidence of further reductions than the 22per cent recorded by Kaspiew et al. above n 1, pp 76 and 305.

16 See Fehlberg and colleagues for a discussion on the experiences of a qualitative sample of parents in the first 12 months after separation: (2009) above n**. For a discussion on the experiences of a qualitative sample of parents in the first 12 months after separation, see Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-separation Parenting in 2009: An Empirical Snapshot' (2009) 23 *Australian Journal of Family Law* 247.

17 Kaspiew et al., 2009, above n 1, p 65; De Maio et al., 2013, above n 1, p 47.

18 Kaspiew et al., 2009, above n 1, pp 65, 77–8; De Maio et al., 2013, above n 1, pp 47, 50.

19 De Maio et al., 2013, above n 1, p 73.

20 Qu et al. 2014, above n 10, p 39.

21 Qu and Weston, 2010, above n 10, p 44; De Maio 2013, above n 1, p 75.

that the 'needs of the child were adequately considered', compared with 85.7 per cent for 'mediation/ FDR', 73.2 per cent for lawyers and 64.0 per cent for courts (see 7.5).[22] These data raise two noteworthy points. First, notwithstanding the differences in responses for the different pathways, it is important to acknowledge that majorities, albeit of differing proportions, of parents have positive responses to each of the pathways. Second, it is also clear that the more formal pathways are used by families with issues of greater complexity. When disputes are resolved by courts and, courts to a lesser extent, through lawyers, this means that at least one party's position will not be validated in whole or part. The dynamics concerning making agreements about children and other post-separation issues, particularly property and child support, have only recently started to be the subject of empirical examination.[23] Smyth and Rodgers refer to 'strategic bargaining' over parenting and financial issues and observe that 'there is no doubt that some parents bargain over money and parenting time to make ends meet while others do so to maximise their own or their children's interests—financial and/or emotional—in the context of a highly acrimonious inter-parental relationship'.[24]

The limited amount of relevant empirical evidence available suggests a wide range of behaviour among parents, with some, as noted, resolving issues in the areas of parenting, property and child support relatively quickly and with a minimal amount of intervention or difficulty, suggesting an 'agreeing' rather than 'bargaining' dynamic subsists among many parents.[25] Other sub-groups, however, appear to have greater difficulty with parenting and financial arrangements and these sub-groups are more likely to experience issues such as family violence, safety concerns and negative inter-parental relationships, either together or separately.[26] The emerging evidence then suggests a spectrum of agreement-making and disputing behaviour among separated parents.

Research based on quantitative samples suggests that behaviour at the more negative end of this spectrum occurs among a minority proportion of parents, raising a concern that children's needs and interests may be marginalised in these contexts. For example, 16 per cent of mothers and 13 per cent of fathers out of the 72 per cent of parents in LSSF Wave 1 who had sorted out parenting arrangements indicated that their parenting arrangements affected their property negotiations.[27] However, this may or may not suggest the presence of a dynamic linked to 'strategic bargaining over' these two issues, since the roles that each party has assumed during a relationship—caregiving, breadwinning, or shared responsibility for these issues—will effect financial entitlement when the relationship ends

22 De Maio et al., 2013, above n 1, p 76.

23 See, e.g., Kaspiew et al., 2009, above n 1, p 222; Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-Separation Parenting Arrangements, Child Support and Property Settlement: Exploring the Connections' (2010) 24 *Australian Journal of Family Law* 176; Bruce Smyth and Bryan Rodgers, 'Strategic Bargaining over Child Support and Parenting Time: A Critical Review of the Literature' (2011) 25 *Australian Journal of Family Law* 210; Bruce Smyth, Bryan Rodgers, Vu Son, Liz Allen and Maria Vnuk, 'Separated Parents' Knowledge of How Changes in Parenting Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre-/Post-Reform Comparison' (2012) 26 *Australian Journal of Family Law* 181; Rae Kaspiew, Matthew Gray, Ruth Weston, Lixia Qu and John De Maio, 'Legislative Aspirations and Social Realities: Empirical Reflections on Australia's 2006 Family Law Reforms' (2011) 33*Journal of Social Welfare and Family Law* 397.

24 Smyth et al., 2012, above n 23, p 182.

25 Qu et al., 2014, above n 10, p 10.

26 Qu et al., 2014, above n 10, chapter 9.

27 Kaspiew et al., 2009, above n 1, p 222.

(see further Chapters 10 and 13) and there is a clear link between caregiving responsibilities and the relative proportions of financial settlements.[28] A connection between difficult relationship dynamics, including family violence, and difficult, protracted and unbalanced agreement-making behaviours are emerging from qualitative (Fehlberg and colleagues) and quantitative research (AIFS LSSF Wave 3, AIFS SRSP).[29] The views of lawyers, who as we have seen are more likely to have parents at the more difficult end of the spectrum in their client base, confirm the existence of 'strategic bargaining' behaviours among some parents. Kaspiew and colleagues report the concerns expressed by lawyers and registrars that the 2006 shared parenting reforms had prompted some fathers in particular to seek shared parenting arrangements to maximise their property and financial entitlements, and some mothers to trade away such entitlements to retain majority care of the children. In relation to views on the motivations of child support payees and payers in seeking shared parenting arrangements, Kaspiew and colleagues report that a majority of lawyers (68 per cent) indicated that they thought payers were seeking shared care to reduce child support and 49 per cent agreed that payees would oppose shared care to retain child support entitlement.[30] As explained further in Chapter 11, the child support formula applied to assess liability provides for a reduction in the amount payable for parents who have their children for at least 14 per cent of nights.[31] In Kaspiew and colleagues' study, family relationship sector professionals were less likely to indicate agreement that they saw these dynamics among their clients, but about half of those surveyed indicated these issues may be relevant for about a quarter or fewer of their clients, making little distinction between payees and payers.[32]

In the context of qualitative research on links between parenting and financial arrangements, Fehlberg and colleagues described a continuum of dynamics relating to 'agreement', including reported 'consensual' arrangements, 'consent arrangements', where one party had agreed to the proposal of the other, 'compromise' with each party giving ground on their optimum position and 'coerced' agreements.[33] They observed that a matrix of factors that influenced where on the spectrum each agreement of the parents in the sample fell: 'this appeared to depend on a complex mix of factors including the cost (both emotionally for parents and their children and financially) of not agreeing, the presence of violence or other controlling behaviour (which tended to negatively affect mothers), parental roles adopted during the relationship (which tended to negatively affect fathers) and feelings of guilt on the part of the parent who ended the relationship'.[34]

A further significant issue in the context of a consideration of agreement making and bargaining dynamics is the fact that post-separation parenting arrangements are inherently

28 Qu et al., 2014, above n 10, Table 6.14.
29 Fehlberg et al., 2009, above n 16; De Maio et al., 2013, above n 1; Qu et al., 2013, above n 10.
30 Kaspiew et al., 2009, above n 1, pp 222–7.
31 Australian Government, Department of Human Services, *Child Support Guide*, 'Basics of Care 2.2.1: Definitions Used to Describe Care for Child Support Assessments', <www.humanservices.gov.au/corporate/publications-and-resources/child-support-guide/part-2/2-2-1#definitions>, 13 April 2014.
32 Kaspiew et al., 2009, above n 1, pp 222–3.
33 Fehlberg et al., 2009, above n 16.
34 ibid., 269.

subject to change. Some of this change can be seen as child-centric—arising from the evolving needs of children as they grow and develop. Some is also parent-centric—arising from the social, economic and relationship status of parents over time. This point is well illustrated by the longitudinal findings of LSSF: the longitudinal data provided by LSSF show that parenting arrangements are dynamic, with significant proportions of parents reporting change and renegotiation over the three waves of data collected. At Wave 3, of the parents who had reported that their arrangements were sorted out in Wave 1, 60 per cent reported changes in arrangements. Close to a fifth of these parents reported a change resulting in increased time with the mother and 30 per cent reported increased time with the father.[35]

7.3 PARTICIPATION OF CHILDREN AND YOUNG PEOPLE

Historically, children were the property of their fathers, with no independent legal identity or capacity. This meant that paternal rights were absolute until children reached the age of majority and assumed an independent legal identity.[36] Challenges to the supremacy of paternal rights developed through the second half the 19th century and were grounded in a child protection philosophy concerned to protect children from parental abuse, neglect and excessive corporal punishment.[37] The basis for this movement was a concern for child 'welfare' and the justification for interference in the privacy of the family (initially by 'child-saving' organisations and then by state child protection authorities originally with an infrastructure based on church-auspiced organisations) was the need for some children to be protected from abuse and neglect occurring within their families.[38] Thus, until about the 1980s the framing principles in legal discourses concerning children were dominated by welfare and protection paradigms. These paradigms were influential in elements of the original *Family Law Act 1975* (Cth) (*FLA*) Part VII framework, which required courts to consider the 'welfare' of the child as the paramount consideration until 1995 when the terminology 'best interests' was adopted, as explained in Chapter 5. In the latter half of the 20th century, paradigms based on concepts of children as rights bearers, epitomised by the United Nations Convention on the Rights of the Child (CRC), have also become increasingly significant. In part, this is reflected in the 1995 legislative shift to the 'best interests' wording of the paramountcy principle. Another indication of this, at least at a symbolic level, was the addition in the 2012 amendments to the *FLA* of a provision specifying that an object of Part VII of the *FLA* was to give effect to CRC (section 60B(4)), discussed in Chapter 6.

Recent years have seen much concern emerge about the extent to which Australia's family law system centralises the interests of children rather than focusing on the concerns

35 Qu et al., 2014, above n 10, Table 5.8.

36 See, e.g., John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking', in Michael Freeman (ed.), *Law and Childhood Studies* (Current Legal Issues 14), Oxford University Press, Oxford, 2012, pp 55–74.

37 See, e.g., Michael Freeman, 'Towards a Sociology of Children's Rights', in Freeman (ed.), ibid., p 30. For a discussion on the question of age as a determinant of legal competence, see Hedi Viterbo, 'The Age of Conflict: Rethinking Childhood, Law, and Age through the Israeli-Palestinian Case', in Freeman (ed.), ibid., pp 133–55.

38 See, e.g., Judith Bessant and Rob Watts, 'Children and the Law: An Historical Overview' in Monahan and Young, 2008, above n 82.

of adults. A significant theme in the *Every Picture Report* was the need to increase scope for child focus in Australia's family law system. The report observed that:

> A real child focus is not yet a reality in the system or in the behaviour of separating families. Opportunities for children's voices to be heard in the context of decisions that affect them are limited, both in the community and family setting and the court context.[39]

It made a range of recommendations intended to support the aim of improving the focus on children's needs, including for better avenues to support child participation across the system.

The concept of participation was introduced in the discussion on CRC in the Chapter 6. Article 12.1 of the CRC asserts the importance of children having the right to make their views known in judicial and administrative proceedings relevant to their care. Article 9 reinforces this principle setting out children's right to participate in proceedings relevant to their care. Participation rights are relevant across a range of contexts, including in relation to decisions about education for example, in addition to the decisions that arise in the post-separation parenting context. Participation is defined in this way by UNICEF:

> Respecting children's views means that such views should not be ignored; it does not mean that children's opinions should be automatically endorsed. Expressing an opinion is not the same as taking a decision, but it implies the ability to influence decisions. A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and become active, tolerant and democratic. In such a process, adults must provide direction and guidance to children while considering their views in a manner consistent with the child's age and maturity. Through this process, the child will gain an understanding of why particular options are followed, or why decisions are taken that might differ from the one he or she favoured.[40]

How participation occurs is thus seen to be influenced by the age and maturity of the child or young person and involves providing them with access to information about the decision and the opportunity to be consulted rather than necessarily being involved in making the actual decision.

The dynamics of participation acquire particular significance when the issues involving parental separation are considered from the child's perspective. Although experiences of separation are individual and varied, it is clear that for most children and young people this parent-focused event brings about enormous change across many areas of their lives: the people who live in their household, the way they spend their time, the financial and other resources available to them, possibly where they live and go to school. As post-separation life develops, many children and young people are faced with having to negotiate

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39 House Standing Committee on Family and Community Affairs, Parliament of Australia, House of Representatives, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements on the Event of Family Separation* ('*Every Picture Report*'), 2003, pp 25–6, available at <www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fca/childcustody/report.htm>, 28 April 2014.

40 UNICEF, *The Right to Participation* (Fact Sheet), UNICEF, Paris, <www.unicef.org/crc/files/Right-to-Participation.pdf>, 28 April 2014, p [1].

relationships with parents' new partners,[41] step-siblings or half-siblings. Negotiating these relationships—possibly across two sets of households—can become very complex and this process of adjustment and negotiation may well be lifelong. The impact that separation can have is summed up concisely in this excerpt from a study of the perspectives of young adults who experienced parental separation in their youth or childhood by United Kingdom (UK) researchers Jane Fortin, Joan Hunt and Lesley Scanlan:

> Throughout their recollections was a constant reminder that for many respondents, the most shocking event in their lives was their parents' separation ... This produced a profound change in their lives and in their responses to the outside world, school life, wider family members and friends. The fact that many parents had not warned their children about their impending separation and failed to explain to them the reasons for this created the perception that they were only incidental to their parents' lives—that they were not important enough to warrant an explanation.[42]

A growing body of Australian and international research has examined the dynamics of participation in a range of family law contexts. The research establishes that children and young people mostly want to be consulted about decisions about their living arrangements and that such consultation can support their adjustment to the changes in their lives.[43] It also demonstrates that the interests and needs of children and young people should be recognised as distinct from those of their parents, at the same time acknowledging that a range of interests and needs in families overlap and are, at times, interconnected.[44] The participation needs of children and young people vary according to their individual characteristics, the nature of the decisions being made and the context in which they are being made. An important distinction that emerges from some studies focuses on the differences between consulting with children and young people—sometimes referred to as 'recognition'—and making the decision.[45] An aspect of this distinction revolves around the concept of influence as opposed to choice. The extent to which children and young people actually want to influence the decision being made depends on the nature of the decision itself and the circumstances of the child or young person.[46] Some evidence suggests that children and young people feel more comfortable with 'having a say' on issues such

41 See Monica Campo, Belinda Fehlberg, Christine Millward and Rachel Carson, 'Shared Parenting Time in Australia: Exploring Children's Views' (2012) 34 *Journal of Social Welfare and Family Law* 295 for recent Australian research that explores children's experiences of parents re-partnering.

42 Jane Fortin, Joan Hunt and Lesley Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults Who Experienced Parental Separation in Their Youth*, Sussex Law School, Brighton, 2012, p 315, <www.sussex.ac.uk/webteam/gateway/file.php?name=nuffield-foundation-final-report-16nov2012.pdf&site=28>, 28 April 2014.

43 Nicola Taylor, M Gallop and AB Smith, 'Children and Young People's Perspectives on Their Legal Representation', in AB Smith, N Taylor and M Gallop (eds), *Children's Voices: Research, Policy and Practice,* Pearson Education New Zealand, Auckland, 2000; Judy Cashmore, Patrick Parkinson, Ruth Weston, Roger Patulny, Gerry Redmond, Lixia Qu, Jenny Baster, Marianne Rajkovic, Tomasz Sitek, Ilan Katz, *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, Sydney, 2010; J. McIntosh, 2010, above n**, 4.3;. Campo et al., 2012, above n**.

44 C Smart, B Neale, and A Wade, *The Changing Experience of Childhood: Families and Divorce*, Polity Press, Cambridge, 2001.

45 P Parkinson and J. Cashmore, *The Voice of a Child in Family Law Disputes*, Oxford University Press, Sydney, 2008.

46 See, e.g., Rachel Birnbaum, Nicholas Bala and Francine Cyr, 'Children's Experiences with Family Justice Professionals in Ontario and Ohio' (2011) 25 *International Journal of Law, Policy and the Family* 398. For a discussion on the differences between children's 'wishes' and 'views', see Alan Campbell, 'I Wish the Views Were Clearer: Children's Wishes and Views in Australian Family Law' (2013) 38 *Children Australia* 184.

as when and how much contact to have with a non-resident parent, but are reticent to exercise choice in determining the parent they are to live with.[47] Other studies suggest that some children and young people may experience considerable ambivalence in 'having a say' and that processes and approaches to participation need to be capable of supporting this.[48] Therefore such literature points to participation needing to be flexible across contexts and over time and for sensitive, informed negotiations about participation choices with each child and young person.

In Australia, the picture that emerges from various studies is that opportunities for meaningful participation in the formal parts of the family law system are limited and that professional approaches to and discourses about participation lack a coherent underlying philosophy.[49] Some other research suggests that the processes in families, in contrast, are favourable towards supporting adolescents (this question has not been examined in relation to children) in 'having a say'. Australian research on the experiences of adolescents whose parents separated after the 2006 family law reforms found that most of the 623 participants (aged between 12 and 14) were in arrangements consistent with what they wanted.[50] The majority (70 per cent) said they had had a say in the decision about their living arrangements, but a slightly smaller proportion said they actually wanted a say (63 per cent). Having a say in the decision was associated with markedly more adolescents in the primary care of the father (86 per cent), compared with those who lived with their mother (65 per cent) and with both parents equally (68 per cent).[51] The majority of adolescents indicated that the way they had had a say in their living arrangements was informally through 'talking it over with Mum and/or Dad' (90 per cent). Just over a quarter indicated they had spoken to a counsellor or mediator about who they would live with (28 per cent).[52]

These data, particularly the finding that a substantial minority of adolescents did not affirm that they wanted a say, suggest that experiences in this context vary, and the conditions under which 'having a say' is construed positively by adolescents differ. The report's authors, Jodie Lodge and Michael Alexander, noted that some 'adolescents wished to avoid getting involved, perhaps to avoid having to choose between parents'.[53] This suggests that whether having a say is positive, negative or ambiguous is likely to depend on the quality of the relationships the adolescent has with each parent and that parent's capacity to understand and respect the views of the adolescent.[54] It's likely that all of these issues are particularly complex in matters involving family violence, child safety or poor

47 Fortin et al., 2012, above n 42.

48 Robyn Fitzgerald and Anne Graham, '"Something Amazing I Guess": Children's Views on Having a Say about Supervised Contact' (2011) 64 *Australian Social Work* 487, 496.

49 Kaspiew et al., 2013, above n 10; Fitzgerald and Graham, 2011, ibid; Anne Graham and Robyn Fitzgerald, 'Taking Account of the To and Fro' of Children's Experiences in Family Law' (2006) 31 *Children Australia*, 30; Anne Graham and Robyn Fitzgerald, 'Exploring the Promises and Possibilities for Children's Participation in Family Relationship Centres' (2010) 84 *Family Matters* 53; Nicola Ross, *The Hidden Child: How Lawyers See Children in Child Representation*, PhD Thesis, University of Sydney, 2012.

50 Jodie Lodge and Michael Alexander, *Views of Adolescents in Separated Families: A Study of Adolescents Experiences After the 2006 Reforms to the Family Law System*, Australian Institute of Family Studies Melbourne, 2010.

51 ibid. This is a significant finding, but it is unclear how the underlying dynamics should be interpreted.

52 ibid., p 26.

53 ibid., p 67.

54 Carol Smart, 'Children and the Transformation of Family Law', in J Dewar and S Parker (eds), *Family Law: Processes, Practices and Pressures*, Hart Publishing, Portland, 2003, p 237.

inter-parental relationships. These are the contexts in which formal engagement between services (FDR, lawyers and courts) and children and young people is most likely to occur. Some research suggests that in these contexts children's desire for participation is greater than in circumstances where family relationships are less complicated.[55] An emerging body of research indicates that in such contexts the imperatives for providing children and young people with opportunities to be consulted are significant, as the children and young people themselves are the most direct source of information about what is happening in their lives (see further 7.5.1.4 and 7.6.3). At the same time, in circumstances where a child or young person may be experiencing family violence or subjected to abuse, processes for consultation need to be geared to ensuring that the child is protected from any ramifications that may occur within their families when disclosures about these issues are made.

Two of the main discourses about post-separation family life have conceptualised children in particular ways: either as vulnerable and need of protection (the welfare discourse) or as 'bearers of rights' (the rights discourse). Increasingly, research and theory about children and young people are developing alternative ways of conceptualising children's agency, arguing that neither a rights-based nor a welfare-based approach adequately captures the ways in which children's engagement should be configured. Based on their interviews with children, and drawing on a wider body of literature, Carol Smart, Bren Neale and Amanda Wade have developed a more subtle vision of 'children's citizenship', by which is meant children's active participation in life, and particularly in family life.[56] They reject the idea that children's citizenship depends upon their recognition as 'autonomous legal subjects' and argue for recognition of interdependence between adults and children.[57] Critical is their finding that 'what children seem to want is social recognition, respect and inclusion rather than simply legal rights'.[58] Smart and colleagues do not argue 'against children's rights', but for 'rights based more on an ethic of care than simply on an ethic of justice'.[59] Thus they build the notion of 'citizenship-in-context', which is different from 'partial citizenship' but recognises that, while citizenship may have a different meaning for children, it must be recognised and practised.[60]

The body of research on child participation provides no easy answers, but reinforces the need for parents to listen to children, and for policy makers and service providers to help parents to do this. More specifically, it underlines the imperatives for the formal parts of the system to provide opportunities for children to express their views and needs. Processes for engaging children and young people in FDR and court proceedings are discussed in the forthcoming sections.

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55 For a discussion on participation in cases involving family violence see, Kaspiew et al., 2013, above n 10; Parkinson and Cashmore, 2008, above n 45; Graham and Fitzgerald, 2010, above n 49; Kay Tisdall and Fiona Morrison, 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', in Freeman (ed.), above n 37, pp 156–189; Smart et al., above n 44.

56 Smart et al., 2001, above n 44, p 121.

57 ibid., p 108.

58 ibid., p 109.

59 ibid., pp 108–9.

60 ibid., p 110.

7.4 FAMILY RELATIONSHIP CENTRES AND OTHER ELEMENTS OF THE SYSTEM

The establishment of 65 Federal Government-funded Family Relationship Centres (FRCs) around Australia was a core element of the 2006 family law reforms. The stated aim of introducing these centres was to provide 'a source of information for families at all stages, including people starting relationships, those wanting to make their relationships stronger, those having relationship difficulties and those affected when families separate'.[61] As this statement indicates, the charter of the centres encompasses assistance for intact and separated families, although their greater focus is the latter. For separated families, this assistance includes advice, referral, FDR and a range of services to help parents and children adjust to separation.

The proposal to develop these centres developed out of the thinking that occurred after the *Every Picture Report* was released and also took account of some of the measures recommended in the *Pathways Report*. Each of these reports concluded that family law clients felt confused about where to go, and recommended streamlining the system in order to provide an 'integrated family law system that is flexible and builds individual and community capacity'.[62] The *Pathways Report* did not recommend a single entry point, but rather that gatekeepers to the system 'commit to a systemwide approach to assessment to assist family members newly entering the family law system, and to review the assistance required by those re-entering the family law system'.[63] In contrast, the *Every Picture Report* did recommend a single entry point, which would be a new agency that would have 'close administrative and operational links' with a proposed new Families Tribunal with decision-making power exercised by a multidisciplinary panel.

As consideration of the report's recommendations developed, the Howard Coalition Federal Government moved away from the idea of a Families Tribunal, for a range of reasons, including concerns about whether the Constitution would support decision-making power being exercised by such a Tribunal.[64] The idea for the FRCs came out of the thinking and discussion spurred by the Families Tribunal idea, but the function of these centres is substantially different from those suggested for the Families Tribunal.[65] Sue Pidgeon describes FRCs in this way:

> FRCs were an entirely new sort of service. While components of their role were familiar—information, referral, advice, education and mediation—their intended role in the family law system as an alternative to the courts and as a doorway to the wider service system was much broader than any existing services.[66]

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61 Family Relationships Online, *Fact Sheet Five: Family Relationship Centres*, 2006, available at <www.familyrelationships.gov.au>, Information Kit, Fact Sheets, Family Relationship Centres, at 15 June 2007.

62 *Pathways Report*, above n 6, Terms of Reference, p v.

63 ibid., p 32.

64 Patrick Parkinson, 'The Idea of Family Relationship Centres in Australia' (2013) 51 *Family Court Review* 195.

65 ibid.

66 Sue Pidgeon, 'From Policy to Implementation—How Family Relationship Centres Became a Reality' (2013) 51 *Family Court Review* 224, 227.

Patrick Parkinson notes that the vision for the FRCs entailed branding them in a way that would mean they became a highly visible and accessible entry point to the system for families experiencing relationship difficulties and 'would become culturally accepted in the same way that other public services are accepted'.[67]

Alongside FRCs, two other significant services aimed at providing families with ready access to information and referrals were established. Family Relationships Advice Line is a free telephone-based service incorporating a free Legal Advice Service and the Telephone and Online Dispute Resolution Service.[68] Family Relationships Online provides internet-based information and referral. A further recent development has been the expansion of a measure intended to support collaboration among family law system agencies and other agencies with overlapping areas of operation, including human services agencies. In 2010–11, the Attorney-General's Department auspiced the expansion of Family Law Pathways Networks (FLPN), some of which had been operating on an unfunded basis for more than 10 years.[69] They are a measure intended to support the development of relationships between different kinds of services and professionals in the family law system.[70] An evaluation of the 36 FLPN in 2012 found they played an important role in providing cross-sectoral professional development, information exchange and networking opportunities. It also noted some gaps in the kinds of agencies involved in the networks, highlighting a need for increased engagement with Aboriginal and Torres Strait Islander services and drug and alcohol services.[71]

The 65 FRCs, located in urban and regional centres across Australia, were rolled out over a three-year period after a competitive tender process which saw a range of different community-based relationship support services selected to run the centres. Among the non-government organisations involved in running the centres are Unitingcare, Relationships Australia, Anglicare and Interelate Family Centres, which have a substantial history in providing a variety of family services. The evaluation of the 2006 family law reforms highlighted increasing client numbers as the FRCs capacity expanded in the period covered,[72] and largely positive reports of experiences with FRCs from clients though the findings also suggest limited satisfaction with the extent of the service provided.[73] The centres have significant flexibility in determining the mix of services they offer as they are encouraged to tailor their approaches to those needed to their local community. This has meant that the centres have scope for innovation and flexibility and this is evidenced by the development in some centres of programs that are focused on meeting the needs of Aboriginal and Torres Strait Islander clients and clients from culturally and linguistically

67 Parkinson, 2013, above n 64, p 200.

68 For an overview of these services see for example, Thea Brown, Becky Batagol, Tania Sourdin, *Family Support Program Literature Review*, Monash University, Melbourne, 2012; also Kaspiew et al. 2009, above n 1. For information about online dispute resolution see, e.g., M Thomson, 'Alternative Modes of Delivery for Family Dispute Resolution: The Telephone Dispute Resolution Service and the Online FDR Project' (2011) 17 *Journal of Family Studies* 253.

69 Encompass Family and Community Pty Ltd, *Independent Review of the Family Law Pathways Networks*, 2012, <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/IndependentReviewoftheFamilyLawPathwaysNetworks.PDF>, 28 April 2014.

70 ibid.

71 ibid.

72 Kaspiew et al., 2009, above n 1, section 3.1.2, p 38.

73 ibid., section 3.6.2, p 60.

diverse communities.[74] However, a report by the Australian National Audit Office (ANAO) suggested some disadvantages to this level of flexibility, observing an 'increased risk that individual centres may concentrate on specific components of the services rather than the achievement of the overall objectives of the initiative'.[75] In the eight years since the establishment of the centres, tighter performance-monitoring strategies have been implemented, for this and other reasons identified in the ANAO report.

There have been some shifts in the funding of services and also shifts in policy. Initially, the centres were funded to provide three free hours of dispute resolution to families but in July 2011 this was reduced to one free hour, with further services being provided on a subsidised basis depending on means testing.[76] A further significant shift has been in policy concerning how FRCs relate to the legal sector. Initially, a policy intent reflective of a desire to move away from legal mechanisms as a means of addressing parenting disputes saw the operating framework specify that lawyers were not permitted in FRCs with clients.[77] In 2009, a shift away from this position saw FRCs being funded to partner with publicly funded legal organisations (legal aid commissions and community legal centres) to provide legal information and advice to FRC clients and legal information to FRC staff. What has also become evident in the years since the inception of the FRCs is that complex families, including those affected by family violence and child abuse, make up a significant proportion of their clientele. This has seen an increased focus on ensuring FRC policies, processes and staff are equipped to deal with family violence and child safety issues, in light of the significant extent to which these are present in their caseload.[78] Screening and risk assessment are core elements of their work. The focus in FRCs is on children's issues, but they can assist with property matters in that context if their staff have the relevant expertise—although they 'should avoid undertaking long and complex work' and consider referring where this is more appropriate (see also Chapter 12).[79] Evidence of recognition of the need for low-cost information and assistance for property and financial matters is emerging but concern about the level of expertise in FRCs in this regard is also evident.[80]

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74 See, e.g., Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, Attorney-General's Department, Canberra, 2012; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, Attorney-General's Department, Canberra, 2012; Lola Akin Ojelabi, Thomas Fisher, Helen Cleak, Alikki Vernon and Nikola Balvin, 'A Cultural Assessment of Family Dispute Resolution: Findings about Access, Retention and Outcomes from the Evaluation of a Family Relationship Centre' (2011) 17 *Journal of Family Studies* 220; Susan Armstrong, 'Encouraging Conversations about Culture: Supporting Culturally Responsive Family Dispute Resolution' (2011) 17 *Journal of Family Studies* 233.

75 Australian National Audit Office (ANAO), *Implementation of the Family Relationship Centres Initiative Audit Report No 1, 2010–2011,* Australian National Audit Office, Canberra, 2010–11, section 4.25, p 72, <www.anao.gov.au/~/media/Uploads/Documents/2010%2011%20audit%20report%20no%201.pdf>, 28 April 2014.

76 ANAO, ibid., section 12, p 17.

77 Attorney-General's Department, *Operational Framework for Family Relationship Centres*, Attorney-General's Department, Canberra, 2007; McClelland 2009, above n 10.

78 ANAO, 2010–11, above n 70; Australian Law Reform Commission 2010, above n 10, section 21.44; Parkinson 2013, above n 64. In 2013, Allen Consulting Group above n 11 noted ongoing concerns about the efficacy of approaches in some FRSs, p 52.

79 Commonwealth of Australia, Attorney-General's Department and Department of Families, Community Services and Indigenous Affairs, Operational Framework for Family Relationship Centres, September 2006.

80 Moloney et.al., 2011, above n 12; Belinda Fehlberg, Bruce Smyth and Kim Fraser, 'Pre-Filing Family Dispute Resolution for Financial Disputes: Putting the Cart Before the Horse? (2010) 16 *Journal of Family Studies* 197; Georgina Dimopoulos, 'Gateways, Gatekeepers or Guiding Hands? The Relationship between Family Relationship Centres and Legal Practitioners in Case Management and the Court Process' (2010) 24 *Australian Journal of Family Law* 176.

A number of challenges surrounding the implementation of the FRCs have been documented. The report on FRCs by the ANAO (2010) noted that the rapidity of the establishment of the FRCs meant that some 'notable gaps' in the selection, implementation and ongoing administration and performance monitoring phases resulted in a 'limited ability' to 'assess the success, or otherwise of the FRC network in achieving its objectives and delivering a value-for-money-outcome'.[81] A new performance-monitoring framework has since been developed. Other logistic and operational issues surrounding the development of a workforce skilled to operate in relationship support services in the context of a rapid increase in demand for this kind of workforce due to the establishment of a substantial number of new services have been documented.[82] There were also questions surrounding the extent to which FRCs could be integrated into the existing service structure and how relationships between agencies and practitioners could be established to ensure families are directed into the services that best meet their needs, especially in light of the complex features of their client base.[83]

Recent examinations of programs involving collaborations between FRCs and other agencies indicate that progress has been made in this area, but there are ongoing challenges.[84] An evaluation of a pilot program in which the FRC in Geelong, Victoria, partnered with the Geelong Registry of the Federal Circuit Court of Australia (FCCoA) to facilitate the provision of information about FDR and other relationship support services to FCCoA personnel (including judges) and court clients highlighted 'the potential for FRCs to play a valuable role in case management by establishing a physical presence at court, consulting with legal practitioners and remaining engaged with both the court and clients throughout the FDR and court process'.[85] However, the evaluation also highlighted areas of tension between legal and court practice and FRC practice. These included concerns on the part of lawyers in relation to assessment made of the suitability of some matters for FDR, the adequacy of family violence screening approaches in FRCs and an ambiguity in inter-professional and client-based understandings of the role FRCs have in providing legal information as distinct from legal advice. The former is general in nature and within the scope of FRC operation but the latter is specific to the client's circumstances and is the preserve of lawyers. However, lawyers particularly expressed concern about blurred understandings among clients in this regard and the implications of this for their decision about settling or pursuing court determinations of post-separation parenting and financial matters.[86]

In light of these findings, concerns raised by the ANAO about the implications of FRCs providing services to high-risk clients rather than referring them to other services or courts remain pertinent. The risks identified included producing unworkable parenting

81 ANAO, above n 75, p 18.
82 Parkinson, 2013, above n 64; Pidgeon 2012, above n 66.
83 Kaspiew et al., 2009, above n 1, Chapters 3 and 5.
84 Moloney et al., 2011, above n 12; Dimopoulos, 2010, above n 80.
85 Dimopoulos, 2010, above n 80, p 213.
86 ibid., pp 204–6. For a discussion of inter-professional practice pre-dating the 2006 reforms, see Helen Rhoades, Ann Sanson and Hilary Astor with Rae Kaspiew, *Working on Their Relationships: A Study of Inter-Professional Practices in a Changing Family Law System,* University of Melbourne, 2006.

agreements, delaying access to court and exposing clients and staff to a risk of harm.[87] Reflecting on these statements, Moloney and colleagues note that '[s]uch statements highlight the difficult judgement calls that must be made on a daily basis by FRC staff, and the tensions that exist in how best to meet [FRC] objectives'.[88] These authors also articulate the view that 'there is a risk associated with placing too much emphasis on mediation and relationship-focussed processes in cases where families exhibit significant levels of dysfunctional behaviours. Even then, the "bottom line" in a percentage of cases must be that of enforceable judicial decisions'.[89]

7.5 ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW: DEVELOPMENT AND DEBATES

In the past 30 or so years, efforts to support non-court-based mechanisms for resolving disputes across a range of private and, more latterly, public law areas have gathered pace.[90] The term 'Alternative Dispute Resolution' (ADR) covers a broad range of approaches to resolving disputes without judicial determination but with the assistance of an independent practitioner.[91] Formally, it is distinguishable from negotiation, which is a party–party process (see further below),[92] because of the involvement of the independent practitioner. Multiple policy, fiscal and philosophical concerns have contributed to increasing policy support for these developments, including a need to find less costly ways of dealing with disputes from both the perspective of public funding for legal infrastructure and the desire to relieve cost burdens on disputants.[93] From a broader standpoint, a philosophy based on support for conflict resolution through problem solving and negotiation, rather than adversarial litigation, has also underpinned these developments.[94] Part of this philosophy asserts that where parties have had the opportunity to agree on outcomes—rather than having them imposed by a decision maker—these outcomes are fairer and more sustainable.[95]

A central concern in ADR processes is the need to create a 'level playing field' so that any 'bargain' or 'agreement' reached arises out of genuine agreement rather than coercion or other power imbalances.[96] In practice, ADR (and negotiation more generally) may be a process of compromise driven by the strengths and weaknesses of each party's claims in any

87 ANAO, above n 75, p 48.
88 Moloney et al., 2013, above n 12, p 245.
89 ibid.
90 ALRC 2010, above n 10; Michael King, Arie Freiberg, Backy Batagol and Ross Hyams, *Non-Adversarial Justice*, The Federation Press, Annadale, 2009; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, Butterworths, Sydney, 1992.
91 See, e.g., Australian Government, Productivity Commission, *Access to Justice Arrangements, Productivity Commission Draft Report*, Productivity Commission, Canberra, 2014, section 8.1, p 250.
92 A useful overview of negotiation in the family law context is contained in Ian Serisier and Tom Altobelli, *Practising Family Law,* 3rd edn, Lexis Nexis Butterworths, Australia, 2012, p 36.
93 Productivity Commission 2014, above n 91, section 8.2.
94 See, e.g., King et al., above n 90, pp 14–15.
95 ibid.
96 See, e.g., Rachael Field, 'Using the Feminist Critique of Mediation to Explore "The Good, the Bad and the Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45.

particular context. Such strengths and weaknesses may have diverse sources. From a legal perspective, they may arise from ambiguity or lack of ambiguity in legislation and case law in any given area or the evidentiary issues either party may encounter in establishing a claim in court. A core concept in this area is 'bargaining in the shadow of the law',[97] which expresses the potential relationship between negotiated outcomes and legal issues and frameworks. Other issues are also relevant to bargaining dynamics. For example, one party may have access to better legal advice, representation and advocacy than the other.[98] Either or both parties may have an interest in ensuring the matters relevant to the dispute, or moral or cultural issues that may be relevant to the dispute itself or the position or conduct of the parties, do not become public.

There is a considerable body of theory on the dynamics of bargaining, including from a feminist perspective, that examines the dynamics of power in various bargaining contexts.[99] The questions of gender, inequality and power are central to discussions about whether ADR can operate positively or negatively for the interests of women from a feminist perspective. Concern about the gendered dynamics of power and the capacity of women to negotiate equally from a position of inequality are persistent themes in the debates.[100] In this context, the notion of equality has legal, political, social, economic and personal dimensions. On these dimensions many, if not all, women have less power, influence or entitlement than men, leading some theorists to question whether this creates inherent barriers to fair outcomes in ADR. An additional significant element in mediation processes and outcomes is that these processes are private, in contrast to the transparent and public nature of court proceedings, raising the possibility that 'decisions about issues of importance to women could be made according to norms which are unarticulated and unable to be challenged'.[101]

Yet there is also a body of thought reflecting a strand of feminist thinking based on relational ethics and arising out of Carol Gilligan's theory of an 'ethic of care'[102] as a framework for understanding the needs and interests of women. This perspective suggests that ADR-based approaches to dispute resolution, particularly mediation, have greater capacity to support the interests of women than adversarial mechanisms because they 'support dialogue and emphasise relationships'.[103] In canvassing the positive aspects of

97 This foundational metaphor comes from R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. A large body of theory and research has engaged with the extent to which this metaphor is apt: see, e.g., John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *The Modern Law Review* 467.

98 See, e.g., Productivity Commission, above n 91, section 8.2.

99 See, e.g., Austin Sarat and William Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process*, Oxford University Press, New York, 1995; Katalien Bollen, Alain Laurent Verbeke and Martin Euwema, 'Money or Children'? Power Sources in Divorce Mediation' (2013) 19 *Journal of Family Studies* 159; Rachael Field, 'Using the Feminist Critique of Mediation to Explore "The Good, the Bad and the Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45; John Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 8 *Australian Journal of Family Law* 40.

100 Astor and Chinkin, 1992, above n 90, pp 92–5 and 109–11.

101 ibid, p 112.

102 Carol Gilligan, *In a Different Voice. Psychological Theory and Women's Development*, Harvard University Press, Cambridge Mass, 1982.

103 Astor and Chinkin, 1992, above n 90, p 22.

mediation from a feminist perspective, Rachael Field has noted that mediation has the potential to be empowering for women:

> mediation can be said to reject gendered notions of power which advantage and privilege men. This is partly a result of the fact that party self-determination in mediation is uniquely relational in nature. That is, party self-determination in mediation requires party connection, co-operation, collaboration and consensus. The rights and entitlements of individuals are not emphasised ... Rather in mediation the parties are supported in reaching an integrated solution to their dispute that responds to each party's concerns, needs and interests ...'[104]

Along with other analysts, Field has raised concerns about the application of FDR in family violence cases and these are considered further in 7.5.1.6.

In the family law area, the aim of settling matters and avoiding court proceedings has been part of the philosophy of the Family Court of Australia (FCoA) since inception, reflecting a view of the importance of preserving family relationships and reducing rather than exacerbating the harm children are exposed to as a result of ongoing conflict (Chapter 2).[105] As part of the vision for a 'helping court', social scientists—originally called 'court counsellors'—had an important role in providing what were then known as counselling and conciliation services to court users to assist and encourage them to settle their matters without proceedings to trial.[106] Moloney and McIntosh explain that mediation in family law disputes developed out of the 'conferences' conducted by Family Court counsellors, noting that from 'its beginnings in Australia in the early 1980s, family mediation was greeted with scepticism and was intensely scrutinised'.[107] FCoA counsellors also provided reports on the family dynamics of a matter to the court, when such 'welfare reports' were ordered by judges. The involvement of social scientists—who had a social work or psychology background—underscores the centrality both of agreement and social science knowledge to the functioning of the FCoA from the outset.

Over time, the legal and organisational dynamics surrounding mediation in family law have shifted (see also 3.3.2). From a legal perspective, explicit legislative statements about the centrality of mediated outcomes in family law matters have become stronger. In 1995, a range of amendments was introduced to support the expansion of community-based mediation services for parenting matters, to strengthen the normative legislative messages in favour of agreement rather than disputation and to introduce a legislative structure for parenting plans to enshrine agreement as an alternative to consent orders (see further 7.5.1.5).[108] Even stronger legislative statements in support of out of court settlement for parenting matters were enacted as part of the 2006 family law amendments and these are detailed in 7.5.1. From an organisational perspective, what were known as conciliation

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104 Rachel Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21 *Australasian Dispute Resolution Journal*, 185 (electronic version accessed).

105 Helen Rhoades, 'Children's Needs and Gender Wars: The Paradox of Parenting Law Reform' (2010) 24 *Australian Journal of Family Law* 296. Moloney, 2013, above n**.

106 See, e.g., Sarat and Felstiner, 1995, above n 99; Bollen et al., above n 99; Field, 2006, above n 99; Wade, above n 99.

107 Lawrie Moloney and Jennifer McIntosh, 'Child Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Journal of Family Studies* 71.

108 House of Representatives, *Explanatory Memorandum to the Family Law Reform Bill 1994,* Commonwealth Parliament, Canberra 1994, par 155.

or counselling functions—now described as 'family dispute resolution'—are no longer attached to the court. They are instead part of the family law infrastructure spread across a range of organisations, including community organisations, legal aid commissions and privately based mediation services that operate on a fee for service basis.[109]

The 2006 family law reforms accelerated a pre-existing policy direction, with the establishment of 65 FRCs whose services include free or subsidised FDR. Now, most family dispute resolution is provided in FRCs.[110] In the context of these shifts, the way that social scientists support the work of the family law courts has also shifted. Family consultants are attached to each of three courts, either as employees or on a sub-contracted basis, to provide what are now known as family reports, as well as having a role in making initial assessments of families (see further below 7.6). Although these reports are recognised to be influential in bringing about settlement in some circumstances, this is not considered to be their primary role:[111] they now have an essentially forensic function to inform the court about the circumstances of the family.

The legislative changes in 2006 raised conceptual debate about the extent to which parties could be compelled to use what is now known as family dispute resolution (FDR). For example, while generally supportive of the move towards 'compulsory' private dispute resolution, the National Alternative Dispute Resolution Advisory Council registered concerns about the effectiveness and acceptance of mediation if it became 'merely a procedural step which parties undertake', and suggested 'that there be flexibility in any requirement to use mediation, so that the appropriate intervention is used in the right case and at the right point in time'.[112] Other commentators have raised concerns about the extent to which a process based on the concept of voluntary agreement could be mandated, echoing longstanding reservations about the concept of mandatory mediation.[113] The way 'compulsory' FDR has unfolded is considered next.

7.5.1 FAMILY DISPUTE RESOLUTION

This section provides an overview of the legislative framework that governs family dispute resolution and how FDR operates in practice. After canvassing the legislative definition, the provisions concerning what matters may be dealt with in FDR and the obligations of family dispute resolution practitioners (FDRPs), empirical evidence and practice analysis concerning the application of FDR is considered. The discussion in this section establishes that the way the use and application of FDR has evolved in practice is somewhat complex in that many families affected by family violence and safety concerns use it. This poses significant challenges in applying safe processes consistent with the neutral underlying philosophy of mediation.[114]

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109 For example, Moloney et al., 2013, above n 12.

110 ibid., p 243.

111 See, e.g., Federal Circuit Court, Annual Report 2012–13, Federal Circuit Court of Australian, Canberra, 2013.

112 National Alternative Dispute Resolution Advisory Council, *Report on the Inquiry into Child Custody Arrangements*, 2005, p 2.

113 Family Law Council, *Mediation*, Australian Government Publishing Service, Canberra, 1992, [4.11].

114 For an analysis of this issue see Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an 'Independent Practitioner'' (2008) 8 *Queensland University of Technology Law and Justice Journal* 158.

As noted above, most FDR services are provided in FRCs. FDR is also provided by non-FRC family relationship support services funded by the Federal Government (some of which also auspice FRCs, for example Relationships Australia), community mediation centres and FDR practitioners who work in private practice and offer a fee-based service. A conferencing process allied to FDR is provided by legal aid commissions, which apply lawyer-assisted models when one party qualifies for legal aid assistance.[115] There are registration and accreditation requirements for FDR practitioners, who come from a variety of backgrounds, including social science (psychology or social work), law or education.[116] Training requirements for FRC staff are set out in the Family Relationship Services Program approval requirements. These provide that FRC staff have an appropriate degree, diploma or other qualification (for example, in behavioural or social sciences or education) and demonstrate an appropriate level of competence in an assessment by the organisation. The *FLA* requires FDR practitioners, family counsellors, and other family service providers to be accredited when performing services under the Act (section 10G). The process and requirements for accreditation as an FDR practitioner are set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. These regulations set out criteria for accreditation based on qualifications (including entitlement to a Vocational Graduate Diploma of Family Dispute Resolution) (Regulation 5) and suitability (including not being prohibited from working with children by law (Regulation 6(1)(a)) and not having criminal convictions for personal violence or sex offences (including against children) (Regulation 6(2)).

The 2006 reforms introduced new terminology for what had previously been known as primary dispute resolution[117] in the *FLA*, or mediation in common parlance, and new legislative imperatives for using FDR. 'Family dispute resolution', as defined in *FLA* section 10F, is a very broad, inclusive term:

> A process (other than a judicial process):
>
> (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
>
> (b) in which the practitioner is independent of all of the parties involved in the process.

This very wide definition is capable of encompassing a range of processes, from fairly 'light touch' assistance of a counselling nature to more formal processes including lawyer-assisted FDR. A critical aspect of the FDR process is the impartiality of the FDRP, who is neither an advisor nor decision maker[118] but rather an actor who supports the parties to make their own decisions in the process.[119] There are several steps in the lead up to FDR,

115 Linda Fisher and Mieke Brandon, *Mediating with Families*, 3rd edn, Lawbook Company, Sydney, 2012, p 43.
116 As at 1 January 2014, the numbers of registered practitioners stood at 1,699.
117 Previous s 14E. (CONFRIM SOURCE)
118 National Alternative Dispute Resolution Advisory Council (NADRAC) <www.nadrac.gov.au**>.
119 Fisher and Brandon, above n 115, p 24. There is a significant body of theory that engages with the mediator's role. See, e.g., Cooper and Field, above n 114.

including screening and intake sessions[120] (sometimes with an FDR practitioner or another appropriately qualified professional) and preparation sessions. These focus on providing information about the process, clarifying what issues are to be subject to mediation and establishing and moderating client expectations.

Prior to FDR starting, the FDRP makes an assessment of each party's capacity to engage with the process and considers whether there are factors, including, potentially, a history of family violence, which may mean that this capacity is not present. Broadly, 'capacity' refers to the person's ability to engage in the process as a rational actor on an equal footing with the other party. Apart from one of the most common issues—power imbalance and fear—that can be the consequence of family violence, other issues relevant to capacity include the ability to make compromises, to see the other persons' viewpoint and to consider the interests of those affected by the agreements made in FDR. The presence of some kinds of mental ill-health may compromise capacity. The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Regulation 25) require FDRPs to consider whether the ability of 'any party to negotiate freely' is affected by '(a) a history of family violence (if any) among the parties; (b) the likely safety of the parties; (c) the equality of bargaining power among the parties; (d) the risk that a child may suffer abuse; (e) the emotional, psychological and physical health of the parties; (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution'. The process of assessing parties' capacity to engage productively in the FDR process does not end with intake: it is an ongoing responsibility as mediation is a dynamic process in which emotional states, power balances and the way that issues are understood may shift.[121]

There are a variety of FDR models, reflecting varying underlying philosophies and approaches. In some instances, clients may be advised or supported to obtain legal advice prior to FDR and, in some models, legal advice is an essential part of the process. FDR (and mediation more generally) is seen in some approaches as a quasi-legal process. In an alternative approach, it is seen more as a counselling process in which legal concepts and notions are unhelpful and have the potential to impede the clients' capacity to focus on the interests of their children. Fisher and Brandon identify a number of different mediation philosophies, including an approach based on problem solving, a transformative approach, which is intended to change the way parties interact, and a therapeutic approach, again intended to improve relationships. In practice, many mediators 'prefer an eclectic approach' that allows them to tailor the process to the clients' needs.[122] As described in more depth later, FDR processes may be adapted to meet particular circumstances. Where family violence has occurred, for example, a 'shuttle' approach, where the parties are not in the same room but the FDRP moves between them, may be applied. There are also varied ways in which the process deals with children (see further below). As noted earlier, models geared

120 Australian Government, Attorney-General's Department, *Information for Family Dispute Resolution Providers, Screening and Assessment Framework* (14 August 2006), available at <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Pages/Foraccreditedfamilydisputeresolutionpractitioners.aspx>, 28 April 2014; *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*, Family Dispute Resolution Practitioners—Assessment of Family Dispute Resolution Suitability Part 25, s 1(a)(b).

121 Fisher and Brandon, above n 115, p 270.

122 ibid., p 35.

at meeting the needs of particular cultural groups, including Aboriginal and Torres Strait Islander peoples[123] and people from culturally and linguistically diverse backgrounds[124] have also been developed.

7.5.1.1 CONFIDENTIALITY, ADMISSIBILITY AND PRACTITIONER OBLIGATIONS

Like 'primary dispute resolution', as it was termed prior to July 2006, FDR is confidential (section 10H), and evidence of anything said by or in the company of a FDR practitioner in FDR is not admissible in any court or any proceedings (section 10J). Both of these elements are subject to exceptions (section 10H(4)–(7) and section 10J(2)–(3)). In relation to confidentiality, there are a number of exceptions where the FDR practitioner reasonably believes the disclosure is necessary, for purposes ranging from 'protecting a child from the risk of harm (whether physical or psychological)' to 'reporting the commission, or preventing the likely commission, of any offence involving intentional damage to property of a person or a threat of damage to property' (section 10H(4)). In relation to admissibility, the exceptions are much more limited and relate to admissions or disclosures of child abuse or risk of abuse (section 10J(2)). In light of the context in which FDR is applied in practice, and the extent to which different services and agencies, including courts, have common clients, the boundaries of the confidentiality and inadmissibility provisions are starting to be tested in case law.[125] More broadly, the question of information sharing is undergoing analysis and potentially reconsideration, as part of the ongoing program of improving the family law system capacity to respond to parents and children who may be at risk of family violence and child abuse and neglect.[126] In this context, the capacity to share information across services and with lawyers and courts, as well as between systems, namely the state- and territory- based child protection, family violence and criminal justice system and the federal family law system, is recognised to require significant improvement.[127]

FDRPs have two broad kinds of obligations. The first kind comprises professional obligations relevant to conduct and ethics and is set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (professional obligations). The second is a set of advisory obligations arising out of the *FLA* (the statutory obligations). The statutory obligations changed when the 2012 family violence amendments were introduced. Prior to the 2012 amendments, the statutory obligations of FDRPs (and advisors more widely) focused on informing parents about the possibility of entering into a parenting plan and about where they could get assistance for this purpose (section 63DA). Parenting plans are discussed further below (at 7.5.1.5). There is also an obligation to inform parents that they could consider the option of the child spending equal time or substantial and significant

123 Family Law Council, 2012, above n 74.

124 ibid.

125 See, e.g., Joe Harman 'Confidentiality in Family Dispute Resolution and Family Counseling: Recent Cases and Why They Matter' (2012) 17 *Journal of Family Studies* 204. Relevant cases include *Rastall and Ball* [2010] FMCA Fam 1290; *Unitingcare—Unifam Counselling and Mediation and Harkiss and Anor* [2011] FamCAFC 159.

126 Harman, 2012, ibid; Elizabeth Matthew, 'Concerns about the Limits of Confidentiality in FDR' (2012) 17 *Journal of Family Studies* 213.

127 Richard Chisolm, *Family Courts Violence Review*, Attorney General's Department, Canberra, 2009.

time with each of the parents (section 63DA(2)). These requirements were introduced as part of the 2006 reforms and reflected the Commonwealth Parliament's desire to encourage agreement and shared parenting.

The additional statutory obligations as set out in 2012 are consistent with the intent of the 2012 changes to enhance the family law system's ability to deal with family violence and child abuse. In addition to the obligations in section 63DA just described, the statutory obligation of advisors to inform parents that the best interests of the child are paramount has been given increased prominence by being moved from section 63DA(c) to a free-standing provision earlier in Part VII: section 60D(1)(a). Further, the provisions specifying the importance of 'protection from harm' over 'meaningful relationship' in section 60CC2A (see 6.4) are mirrored in section 60D(1), which also sets out the relevance of these issues to best interests in an advisory context.

When the 2006 statutory obligations were introduced, concerns were raised that they 'may conflict with accepted standards of mediation practice' in which 'the matters discussed at, and the outcomes arising from, a mediation process belong to the parties concerned, taking into account children's needs'.[128] Later, Richard Chisholm pointed out that, by staying silent on family violence and child abuse, the 2006 statutory section63DA obligation:

> effectively invites the professional to ignore issues of family violence and safety, and focus only on the benefits of parental involvement. By doing so it seems likely to have exposed people to increased risks of violence, by contributing to the impression that the family law system is more interested in encouraging parents to be involved than respecting the safety of adults and children.[129]

This analysis supported a recommendation intended to simplify Part VII significantly (see Chapter 6) and heighten the attention paid to protection from harm. However, the Federal Government chose instead to clarify advisors' statutory obligations (among other measures already described) and retain the pre-existing Part VII structure. The positioning of two sets of statutory obligations for FDRPs and 'advisors' more generally at different points in Part VII is yet another illustration of the complex and convoluted nature of *FLA* parenting provisions discussed in Chapter 6 and further analysed in Chapter 9.

7.5.1.2 WHEN IS FDR APPLIED AND HOW 'MANDATORY' IS IT?

A significant feature of the 2006 amendments was to provide stronger legislative support for FDR than had been enacted previously. Although the reforms were often spoken of as

128 See National Alternative Dispute Resolution Advisory Council, *Comments to the Attorney-General in relation to the Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation*, publisher, place 2005, p 1. Relationships Australia did not support the imposition of requirements that advisers inform parents that they could consider an option of the child spending equal time with both parents when developing parenting plans. They were of the view that the requirement 'firmly frames the discussion around parental rights rather than focussing on the child', and that it 'is at odds with allowing the adviser to be impartial': Relationships Australia, Submission No. 14 to the Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, 2006.

129 Chisholm, 2009, above n 127.

having introduced 'mandatory' FDR,[130] there are two avenues in the legislation that permit parents to lodge a court application without attempting (or completing) FDR. The first is through a set of exceptions that may be applied in certain circumstances (the exceptions avenue). The second arises where parents are assessed for FDR (or start an FDR process) and are assessed by the FDR practitioner as not suitable at the outset or during the process. In these circumstances, parents may lodge a court application accompanied by a certificate issued to the applicant by an FDR practitioner (section 60I(7)) (the 'certificate avenue').[131] As the following discussion indicates, practice decisions about which of these avenues is appropriate in any given case are complex, particularly since courts have the discretion to refer a case to FDR even when a court application is made pursuant to the exception avenue: *FLA* section 60I(10).

The legislation provides six grounds that may support the lodgement of a court application without attempting FDR or obtaining a certificate. These exceptions are:

- where there is an application for a consent order (*FLA* section 60I(9)(a));
- where there are 'reasonable grounds to believe' that 'there has been abuse of the child by one of the parties to the proceedings; or there would be a risk of abuse of the child if there were to be a delay in applying for the order; or there has been family violence by one of the parties to the proceedings; or there is a risk of family violence by one of the parties to the proceedings' (section 60I(9)(b));
- where the dispute has arisen as a result of a contravention of an order made in the previous 12 months (section 60I(9)(c));
- where the application is urgent (section 60I(9)(d));
- where there is incapacity (physical or otherwise) to participate in FDR (section 60I(9)(e)); or
- where there are other circumstances provided for in the regulations (section 60I(9)(f)).

In terms of the certificate avenue, three different sets of circumstances may give rise to a certificate being issued (section 60I(8)). The first concerns the engagement of the parties in the FDR process. A certificate may be issued where one party engages with the FDR service and the other party (or parties—FDR may involve more than two parties, such as new partners, grandparents or extended kin in the case of Aboriginal and Torres Strait Islander peoples) refuses to do so (section 60I(8)(a)) or engages and then subsequently withdraws. The second set of circumstances involves the FDR practitioner making an assessment that the matter is not suitable for FDR (section 60I(8)(aa)). Such assessments may be made following screening and preparation sessions or they may be made after FDR has commenced (section 60I(8)(d)). Such assessments are guided by the requirements of the *Family Law Family Dispute Resolution Practitioners Regulations 2008* (Regulation 25). These involve the FDRP considering whether the capacity of either or both of the parties to

130 For example, Pidgeon, 2013, above n 66.

131 In fact, the FCoA's pre-action procedures in the *Family Law Rules 2004*, sch 1, came close to imposing compulsory dispute resolution processes. The change may be more a strengthening of the message.

'negotiate freely' in the dispute is affected by a non-exhaustive range of matters (see earlier discussion), including family violence, concerns about the safety of the parties, equality of bargaining power, and concerns about child abuse and the emotional, psychological and physical health of the parties (Regulation 25(2)). The third set of circumstances arises when FDR is attempted but does not produce an outcome. In such cases, the FDRP is required to consider whether each party made a genuine effort to resolve the dispute and provide a certificate reflecting this assessment. Such certificates may indicate either that a 'genuine effort' to resolve the dispute was made by all or some parties (section 60I(8)(b)). The provisions allow for this certificate to indicate which party did not make a genuine effort (section 60I(8)(c)), but it seems that in practice this occurs rarely. This is understandable given that such certificates may, under the legislation, be considered by courts in deciding whether to order parties to have further engagement with FDR or in relation to making a costs order (section 60I, note) (see next paragraph).

In practice, this system of certificates and exceptions to FDR has raised some concerns, particularly about referrals being made to FDRPs for the purpose of obtaining a certificate rather than attempting FDR.[132] Dimopoulos documents concerns expressed by lawyers that FDR may be being applied in some unsuitable cases and that FDR is being undertaken as 'a mere step in a "strategic operation" towards the legal enforcement of their clients' rights'.[133] The Australian Law Reform Commission's (ALRC's) *Family Violence* report also highlighted concerns. These included suggestions that lawyers were referring clients to FDRPs for an assessment to 'out-source' the process of screening and assessment of family violence and child safety issues, rather than making an assessment themselves.[134] The reasons for this practice were said to be twofold. First, lawyers did not have confidence in their own ability to make an assessment due to a lack of training and expertise in family violence. Second, obtaining a certificate was seen to be less costly than establishing the grounds for an exception. Apart from placing strain on FRC resources, which is where most certificates are issued, the practice raises concerns since FDRPs do not perform a forensic role and must take parties' disclosures at face value.[135] The ALRC report describes varying views among legal and relationship support services about whether this is a legitimate practice and recommended that the capacity of lawyers to screen and assess family violence and make referrals be improved. Developments consistent with this recommendation are discussed in Chapter 5.

Fisher and Brandon raise a further issue in relation to the certificate system: they note that some FDRPs have experienced clients seeking second certificates on the basis that the first certificate reflected grounds adverse to their interests.[136] Since some of the grounds for issuing a certificate (for example, genuine effort: section 60I(8)(c)) may contribute to a costs order being made against a party if a matter proceeds to court, some FDRPs have voiced concerns about their ability to make an adequate judgment about 'genuine effort' and there are concerns about being sued over such judgments.[137] Hilary Astor has suggested

132 Kaspiew et al., 2009, above n 1, p 100.
133 Dimopoulos, 2010, above n 80, p 196.
134 ALRC, 2010, above n 10, p 1007.
135 ibid., p 1049, quoting AIFS submission and others.
136 Fisher and Brandon, above n 115, p 277.
137 ibid., p 289.

that FDRPs are reluctant to issue certificates on these grounds for a number of different reasons including that the complexity of some clients' lives meant that simply attending FDR reflected a 'genuine effort' and that assessing 'genuine effort' involved the 'impossible task' of scrutinising the 'intra-psychic processes of individuals'.[138]

Like the presumption in favour of shared parental responsibility discussed in Chapter 6 (see further Chapters 6 and 8), the provisions in relation to FDR suggest that the presence or absence of family violence is the guiding principle in their application. This reflects policy intent for FDR to be applied to cases that might be considered unproblematic in terms of concerns with family violence or child abuse. This intent also acknowledges longstanding concerns about the implications of applying a dispute resolution process where a history of family violence has most probably produced inherent imbalances in power. A further concern behind this intent was to ensure that matters involving questions of fact requiring forensic resolution, such as those involving family violence and child abuse, would be resolved by courts. This concern is also reflected in the framing of the presumption for shared parental responsibility, with the presumption being not applicable in matters where there are reasonable grounds to establish that concerns about family violence and child abuse are pertinent.

As with the application of the substantive parenting provisions, the empirical evidence demonstrates that the operation of the exceptions to FDR is not based on a distinction between families affected by family violence and child abuse concerns and those not affected by such concerns. Rather, such concerns are common among families who use FDR. This is exemplified by the findings of the AIFS SRSP 2012 that 15 per cent of the parents who had sorted out their parenting arrangements and reported physical abuse and/or unwanted sexual activity before or during separation had nominated FDR, counselling or mediation as the main pathway for reaching agreement.[139] Where emotional abuse without physical abuse or unwanted sexual activity before or during separation was reported by parents who had also sorted out their arrangements, 10.4 per cent used counselling, mediation or FDR. In contrast, six per cent of parents who reported no violence before or during separation and had settled their parenting arrangements reported using this pathway.

Although a history of family violence raises complexities in FDR-type processes (as discussed further below), it does not stand in the way of agreements being reached in a substantial minority of such cases in which it is applied. The AIFS SRSP 2012 findings show 29.9 per cent of parents who used FDR and reported physical hurt and unwanted sexual activity also reported reaching agreement in FDR, as did 35.7 per cent of parents who reported emotional abuse in the same time frame. This compares with 43.9 per cent of parents who did not report any family violence reporting an agreement being reached in FDR. Certificates were significantly more likely to be issued to parents affected by family violence before or during separation (32.6 per cent for those reporting physical hurt and emotional abuse and 24.8 per cent reporting emotional abuse) than to those where no violence was reported (13.0 per cent). Underlining the point made earlier that certificates are not issued as a matter of course, the proportions of parents reporting no certificate

138 Hilary Astor, 'Genuine Effort in Family Dispute Resolution' (2010) 84 *Family Matters* 61.
139 De Maio et al., 2013, above n 1, Table 4.10, p 51.

and no agreement in each of the sub-groups was 22.7 per cent for physical hurt and/or unwanted sexual activity, 24.3 per cent for emotional abuse and 26.7 per cent for no family violence.[140]

7.5.1.3 FDR, FAMILY VIOLENCE AND CHILD SAFETY CONCERNS

Although there is acceptance that FDR can be applied appropriately in some cases involving family violence, there are a number of concerns that arise in this context. The first point to note is that although in practice FDR often occurs where there is family violence (see 7.5.1.2) it is generally accepted that issues directly related to family violence should not be mediated,[141] but FDR processes may be applied in some circumstances to resolve issues other than family violence, such as parenting arrangements. The application of FDR in this context is recognised to pose particular challenges, not the least of which is ensuring the safety of the clients, the children and the professionals involved in the process.[142] More substantively, Rachael Field sums up the implications of a history of family violence for FDR dynamics in this way:

> In mediation, it is difficult, if not impossible, for a perpetrator to work in a genuinely co-operative and consensual way to resolve the dispute. Family violence involves the perpetrator exerting power and control over the victim. Perpetrators do not co-operate with their victims; rather they impose their interests on their victims, they coerce and intimidate them, and they monitor and threaten them.[143]

If FDR is applied where there is family violence, it is recognised that a high level of skill and a range of particular safeguards, including potentially the use of shuttle approaches, is required to apply FDR appropriately in the context.[144] While it is clear that some cases will never be amenable to resolution through FDR, including those in which the power imbalance is not susceptible to amelioration and the perpetrators are not capable of developing insight into the impact of their behaviour and the needs of their children, FDR may also be viewed as a cheap, accessible and expeditious avenue for overcoming 'jurisdictional divides to offer seamless and effective resolution of intersecting issues in disputes involving family violence'.[145]

The ALRC family violence inquiry documented the range of challenges that arise in this context and that have emerged since the 2006 family law reforms, which saw the rapid roll out of FDR services and necessitated the speedy development of FDR processes, frameworks and workforce. It concluded that:

> There appears to be some inconsistency in standards in the FDR sector with respect to identifying family violence, assessing suitability for FDR and other aspects of

140 ibid., Table 4.13, p 52.
141 ALRC 2010, above n 10, p 984.
142 The level of stress that professionals experience operating in this context is discussed in Danielle Lundberg and Lawrie Moloney, 'Being in the Room: Family Dispute Resolution Practitioners' Experience of High Conflict Family Dispute Resolution' (2010) 16 *Journal of Family Studies* 209.
143 Field, 2010, above n 104, electronic access.
144 ALRC, 2010, above n 10, p 993; Brisbane Women's Legal Service, *Towards a Coordinated Community Response in Family Dispute Resolution: A Model to Pilot FDR For Families Where Past or Current Family Violence Exists,* Women's Legal Service, Brisbane, 2010.
145 ALRC, 2010, above n 10, pp 984, 991.

> screening and referral and FDR practice ... Clearly some services and practitioners have high standards of practice in relation to family violence, but there appears to be room for improvement in the sector. The solutions to these problems appear to lie in extra-legal measures such as improved training and accreditation, and improved screening and assessment frameworks.'[146]

As noted in Chapter 5, considerable effort and resources have been devoted to improving screening and assessment in recent times, with the development of the DOORs framework and the AVERT family violence training package for use across the family law sector. As with the family law system more broadly, the challenge of dealing with matters involving family violence and child safety in the FDR context continues to be the subject of scrutiny and debate from the perspective of policy and practice. At a policy level, there is clear recognition of a need to develop program structures and funding approaches better geared to meeting the needs of complex families.

This need is reinforced particularly clearly by empirical evidence from AIFS LSSF Wave 3 about the longer-term experience of families with complex characteristics who used FDR to sort out parenting arrangements in the first 18 or so months after separation. The findings of this study show sustained negative experiences among families with multiple problems. These families are denoted in the analysis by the presence of two or more of these features in Wave 1—a history of family violence before, during or after separation, ongoing safety concerns and clearly negative inter-parental relationships ('lots of conflict' and 'fearful'). Such families were much more likely than families with one or none of these indicators to report changed or unsettled parenting arrangements between survey waves and experiences of family violence and ongoing safety concerns across survey waves. On the basis of these data, Qu and colleagues observe that these findings 'raise serious questions about whether existing (or indeed any) FDR models are geared to addressing the level of complexity this client group manifests'.[147]

The salience of this concern is supported by practice experience in one development designed to assist families affected by family violence. The pilot program of Co-ordinated Family Dispute Resolution (CFDR) demonstrates the challenges involved in developing and implementing such approaches.[148] The CFDR pilot (which was not subsequently funded by the Federal Government) was based on a 'co-ordinated community-based' approach to meeting the needs of families affected by family violence and child safety concerns. The model was developed by Brisbane Women's Legal Service and other consultants and attempted to provide FDR services geared to the level of complexity evident among many families who use the family law system services. The pilot involved the formation of multidisciplinary teams of professionals working across agencies in an attempt to find a contextual way of working with such families. The multiagency teams, coordinated by a professional at the lead partner agency, involved a coordinator, support workers for each parent (a men's worker and a family violence worker), lawyers for each parent, a FDRP and potentially a child-inclusive practitioner.

146 ibid., p 997.
147 Qu et al., 2014, above n 10.
148 Kaspiew et al., 2012, above n 10.

The evaluation of the pilot showed multiple challenges arose in implementing CFDR. These challenges included needing to overcome differences in practice philosophies and operating frameworks between the agencies, logistical coordination of appointments with different professionals at different agencies for clients (some of whom exhibited significant fragility), and developing collaborative relationships among the professionals in each partnership. These challenges were overcome to varying extents in each of the five locations in which the pilot program was implemented, with three of the five pilot sites experiencing ongoing difficulty in some or all of these areas. Underlining the complexities involved in providing FDR where there has been family violence, only 27 of the 126 cases accepted into the CFDR pilot across the five sites reached mediation. Reasons for the remainder not reaching FDR included being screened out, negative assessments of the capacity of one or both parties to participate effectively or one of the parties choosing to terminate the process. The level of service provided in the pilot was intensive, with pilot clients receiving multiple legal advice sessions and, where matters proceeded to FDR, most having multiple FDR sessions. The evaluation report notes that family violence support workers provided intensive risk assessment, risk management and support, with 'risks escalating and abating as clients moved through the process, for varying reasons and with different triggers'.[149]

The CFDR evaluation reinforces the evidence that FDR processes can be traumatic for women who have experienced family violence,[150] underlining the ongoing need for professionals to maintain sensitivity to these issues and ensure that their professional experience has not desensitised them. The report also described in some depth the clinical challenges involved in assessing and making decisions about how to proceed in FDR where there has been family violence. A team approach to these decisions, based on information from all professionals involved (except lawyers because of professional ethics concerns), was seen as a strength, since it supported information from each client feeding into the decision. Although most clients interviewed for the evaluation were positive about their experience, some reported feeling fearful in the FDR sessions. For some, but not all, these feelings were overcome with assistance and support from professionals. The evaluation report concluded that clinical decisions about and within FDR processes where there has been a history of family violence were complex and that the potential for victims to experience trauma in this context should not be underestimated. Interviews with women conducted as part of the evaluation illustrate this. For example, for the following woman, the support of professionals meant that, despite her history, the FDR session was difficult but positive in the end:

> Emotionally … I'm a bit messy when it comes to dealing with my ex—so that's probably—wouldn't have mattered where we were … Whilst we were in the same room, we were surrounded by other people, so I didn't feel threatened by him. But he's certainly an intimidating man and he's very forceful in how he speaks … which I obviously react to after all these years …[151]

149 ibid., p xi.
150 ibid., p 126.
151 ibid., p 114.

The experience of this woman illustrates how the dynamics of family violence can continue to play out years after the relationship has ended. However, for her, the FDR session while emotionally difficult was endurable due to the presence of others. In contrast, this next quote highlights an example where the dynamics were not dealt with adequately or appropriately by the professionals and the FDR session was emotionally unsafe from the woman's perspective:

> He pushed me at an emotional level ... to the point where I was in tears in the room ... They just let that roll to the point where I was in tears and had to leave.[152]

The CFDR pilot suggests the boundaries and conditions within which FDR processes may be appropriately applied in circumstances where there has been a history of family violence. It is clear that these kinds of cases required intensive support and careful clinical decision making. It is also clear that, even with these conditions, some cases will never be susceptible to resolution through FDR. Through the evidence provided by this and other studies, the limits of the extent to which some problems in some families are amenable to resolution through non-court-based mechanisms is becoming increasingly obvious. There is a core group of families for whom the ideal of non-judicial, quasi-therapeutic, rational dispute resolution will never be realisable, no matter what the law says or what the service infrastructure provides. From a psychological perspective, one of the key issues that arises in these 'hard-core' cases is the level of insight that either or both parties may have in relation to the viability of their position and the constellation of interests and needs that must be considered in making parenting arrangements, particularly those of children. This is not to suggest, however, that court processes are always an ideal alternative.

7.5.1.4 CHILDREN'S INTERESTS IN FDR

The idea that children's views should be of influence in mediation-style processes in Australia is comparatively new and approaches to implement this idea are even newer.[153] In the early 2000s, the Attorney-General's Department auspiced the development of approaches that could be applied in mediation to ensure the interests of children could be centralised in the process either directly or indirectly.[154] Building on this work, FDR models in current practice accommodate a focus on children's interests in varied ways, although there is no legislative articulation of the need to consider children's views in FDR.[155] There are two main approaches that have been developed to specifically provide for the consideration of children's needs and interests in agreement making. One is child-focused practice and the other is child-inclusive practice. Both child-inclusive and child-focused approaches are based within a therapeutic framework founded on psychological and behavioural research and theory, with a rationale extending well beyond that of supporting participation,[156]

152 ibid., p 114.
153 Moloney and McIntosh, 2004 above n 102.
154 ibid.
155 For an analysis of the implications of this long-standing omission, see Richard Chisholm, 'Children's Participation in Family Court Litigation' in Dewar and Parker, 2003, above n 54, 9–36.
156 J McIntosh, 'Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors' (2007) 1 *Australian Family Relationships Clearinghouse Issues*, Australian Institute of Family Studies, Melbourne, p 5, available at <www.aifs.gov.au/afrc/pubs/issues/issues1/issues1.pdf>, 28 April 2014.

although this is also an important foundation for the approach.[157] McIntosh and colleagues note the 'primary aim is to assist parents to re-establish or consolidate a secure emotional base for their child after separation'.[158] Other aims include facilitating the development of parenting arrangements that assist children to recover from the effects of parental acrimony and assisting parents to reduce ongoing acrimony.[159]

The difference between the two approaches of child-inclusive versus child-focused practice hinges on the extent to which children are involved in the process. In child-focused practice, the FDRP encourages the parties to focus on the needs of the child or children in the process through discussion about them, their interests and routines. Some FDRPs may use symbolic representations, such as a photo, of the children who are the subject of negotiation to encourage the parents to focus on the needs and interests of the particular child. According to McIntosh and colleagues, this approach requires the mediator to 'deliberately step away from a neutral posture towards a distinctive therapeutic approach to building sensitive, shared parental attunement, at the same time actively advocating for the interest of children'.[160] 'Parental attunement' 'refers to a parent's capacity to take their child's perspective'.[161]

In child-inclusive practice, a specialised children's practitioner interviews the child privately and then provides feedback to the parents on the child's needs. This process is undertaken carefully, to ensure that it does not open the child to criticism or retribution from a parent. In some cases, the children's practitioner may decide not to share some or all of what the child says with the parents if it is physically or psychologically unsafe to do so. In light of the complexities involved in child and parent relationships and the potential vulnerability of children in this context, child-inclusive practice needs to be undertaken by a highly skilled and experienced practitioner.[162] McIntosh and others have raised concern about the potential negative impact on children and families if this approach is applied by inexperienced practitioners and have stressed the need for children's practitioners to be adequately qualified and have sufficient expertise to equip them to work with complex families, as well as having supportive organisational infrastructure including access to expert supervision.[163] In recognition of the specialised nature of the child-inclusive process, it is only applied in cases that meet particular criteria.[164] The main criteria are for the parents to have adequate ego strength and reflective capacity and a genuine desire to improve their child's situation. The practitioner must also be able to form a judgment that the child-inclusive

157 ibid.
158 ibid.
159 ibid., p 5.
160 Jennifer E McIntosh, Yvonne D Wells and Caroline M Long, 'Child Focused and Child Inclusive Family Law Dispute Resolution' (2007) 13 *Journal of Family Studies* 8, 10. Reports on further waves of data from this study are reported in Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells and Caroline Long, *Post-Separation Parenting Arrangements and Developmental Outcomes for Infants and Children: Collected Reports*, Family Transitions, North Carlton, 2010.
161 McIntosh, 2007, above n 156, p 4.
162 McIntosh et al., 2007, above n 160, p 16.
163 ibid., pp 15–21.
164 ibid.

process has the potential to improve the child's current situation.[165] Lawrie Moloney and Jennifer McIntosh point to research showing the 'significant long-term impacts on children' of ongoing parental conflict.[166] It is argued that '[s]killed, respectful and sensitive feedback to parents through a child-inclusive model ... [has] both an informative and therapeutic intent'.[167]

Evidence from evaluations of these child-focused and child-inclusive processes that were conducted in their developmental phases shows that parents and children both reported less conflict between parents after each intervention.[168] The child-inclusive process had further benefits. One year after application, the child-inclusive process also resulted in fathers reporting lower acrimony towards former spouses, greater improvement in the parental alliance, children experiencing greater closeness with fathers and improved emotional availability from fathers, greater satisfaction with parenting arrangements from the perspective of parents and children, and improved or stable mother–child relationships.[169] Four years later, the evaluation research indicated a range of positive outcomes accrued for the families that had taken part in the child-inclusive process compared with the child-focused process: these included lower levels of recourse to the legal system and return to mediation, higher levels of stability and satisfaction with arrangements (by fathers and children), lower levels of inter-parental conflict and more positive well-being outcomes for children.[170]

Child-inclusive and child-focused practices are both applied in FRCs. The child-focused approach is the dominant one and the more resource intensive child-inclusive approach is applied less frequently.[171] Although there is a significant amount of practitioner led discussion about these approaches in the family practice literature,[172] there is limited empirical evidence about the impact of these approaches as they are applied in current practice. One study by Robyn Fitzgerald and Anne Graham examined child participation practices and experiences in one FRC based in NSW.[173] The study involved interviews with 12 children aged between seven and 18 who had been involved in a child consultation. The study also included interviews with 27 parents and some professionals and managers from the FRC. The research highlighted an ambiguity in 'the language and practice' of children's participation in the FRC and in views about the purpose of the child consultation process.

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165 Moloney and McIntosh, 2004, above n 102.

166 Diana Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 141, referring to Moloney and McIntosh, above n 102.

167 Bryant, ibid.

168 McIntosh et al., 2007, above n 160. A subsequent qualitative study found fewer parents who were involved in child-inclusive practice reported improved relationships compared with those involved in non-child-inclusive practice: Felicity Bell, Judy Cashmore, Patrick Parkinson and Judi Single, 'Outcomes of Child-Inclusive Mediation' (2013) 21 *International Journal of Law, Policy and the Family* 116.

169 McIntosh et al., 2007, above n 160, p 15.

170 Jennifer McIntosh, Caroline Long and Yvonne Wells, *Children Beyond Dispute: A Four Year Follow Up Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution*, Family Transitions, Carlton, 2009.

171 Jennifer Hannan, 'Child Protection in Family Relationship Centres: Innovations in Western Australia' (2013) 51 *Family Court Review*, 268; Kaspiew et al., 2012, above n 10; Allen Consulting Group above n11, p 47.

172 For example, Bill Hewlett, 'Accessing the Parental Mind through the Heart: A Case Study in Child-Inclusive Mediation' (2007) 13 *Journal of Family Studies* 94.

173 Graham and Fitzgerald, 2010, above n 49.

A wider debate that has emerged in recent years concerns the extent to which either child-focused or child-inclusive practice should be applied in circumstances where family violence and child safety concerns are pertinent.[174] On one view, child-inclusive or child-focused practice should not be applied in such circumstances.[175] Underlying this position is a range of concerns, including the possibility that making disclosures to a children's practitioner may make a child unsafe[176] and that FDR processes are not the appropriate place for dealing with matters involving child abuse and family violence. The other view is based on an acknowledgment that these kinds of matters are, in practice, often dealt with in community sector agencies such as FRCs rather than the legal sector, although many of the child protection concerns revealed in FRC processes may fall below the threshold for child protection intervention.[177] This second view therefore does not automatically preclude children's participation where there may be family violence or child safety concerns.

Reflecting developments in practice that are starting to see child-inclusive practice applied outside of FDR processes and in the context of families where there are concerns about the well-being of the children, one organisation that operates FRCs and other family support programs in Western Australia, Anglicare, has developed a model of child-inclusive practice that does not involve proceeding to FDR.[178] According to Jennifer Hannan, this model is routinely applied where 'any risk factor is identified in the course of intake processes with parents'.[179] The thinking behind the approach is based on a view that parents may not be in any position to assess risks to children for a range of reasons and that involving children in child-inclusive practice 'adds to the picture of the family, and identified needs, responses, plans and outcomes can be changed markedly by having information from all family members.[180] The model for this non-FDR child-inclusive process requires that one parent meets the criteria identified as necessary for the application for the FDR-based child-inclusive practice model, as described above. It entails a safety assessment, using a variety of tools developed to use with children to assess risk, and a discussion with the child that explores their experience of the parental separation. According to Hannan, the process unfolds in this way:

> The level of risk to the child are [sic] assessed by weighing family strengths, existing supports and protective factors; past harm to the child; potential future harm, and any complicating factors. Feedback is provided to parents when it is deemed safe to do so and is couched in such a way that actions such as appropriate referrals can be taken to ensure the child's safety and future well-being. The practitioner is always mindful of any possible consequences of disclosure for the child.[181]

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174 Kaspiew et al. 2012, above n 10; Jennifer Hannan, 'Child Protection in Family Law Services: How Much Do We Choose to Know?' (2012) 18(1) *Journal of Family Studies* 90; Tania Petridis and Jennifer Hannan, 'Innovations in Practice: A Safety Assessment Approach to Child Inclusive Family Dispute Resolution', (2013) 17(1) *Journal of Family Studies* 29; Hannan 2013, above n 171.

175 See, e.g., Graham and Fitzgerald, above n 49, noting concern among FRC personnel about proceedings with a child consultation where family violence and abuse are relevant: p 53.

176 Kaspiew et al., 2012, above n 10.

177 Hannan, 2013, above n 171, p 270.

178 ibid.

179 ibid.

180 ibid., p 270.

181 ibid., p 271.

Hannan argues that, given the complex nature of the client base of FRCs, a focus on identifying and assessing risks for children in FRC client families is essential. She suggests that FRCs will 'increasingly become part of the identification, assessment and referral of children at risk'.[182]

In summary, this section has explained how FDR operates. In addition to providing an overview of the system of certificates and exceptions and outlining FDRP obligations, the discussion has considered two areas where practice is developing. The first is in relation to the extent to which clients affected by family violence and client safety concerns can be safely appropriately supported to use FDR: this is a significant practice challenge requiring careful clinical decision making. The evidence suggests that in some cases FDR is being applied inappropriately in this context. The second issue concerns the application of child-focused and child-inclusive processes. Practice is developing in this area and initial evaluative evidence is promising. However, there is limited empirical evidence on the impact of more widespread and routine application of these processes. A further area where innovations in practice are emerging is the application of child-inclusive practice in situations where risks to safety and well-being are being assessed. Again, these are developments that warrant further research.

7.5.1.5 OTHER OUT OF COURT MECHANISMS FOR REACHING AGREEMENT

In addition to family dispute resolution, there are several other ways in which arrangements for children and financial matters together or separately can be made without recourse to court. These are described in the following sections.

7.5.1.5.1 Lawyer negotiation

As noted earlier, in circumstances where one party (or both) does not want, or is not able, to negotiate a property settlement or children's arrangements without assistance, those negotiations can take place between their lawyers. This form of dispute resolution is not formally regulated, except through the professional practice rules and legal ethics that apply more generally. It is also not visible, little researched, and, as a result, not well understood. For all of these reasons, we can speculate that the practice of lawyer-to-lawyer negotiation is probably strongly influenced by, and linked to, local legal cultures and to the particular style and approach of the individual lawyers involved.

Negotiations between lawyers most commonly start with the exchange of correspondence setting out the client's instructions, often expressing a view about the likely outcome if the matter proceeded to trial, and then making an offer on a 'without prejudice' basis. This can result in a quick resolution, but can also deteriorate into a lengthy (and so expensive) and unproductive exchange.

One form of more structured and focused lawyer negotiation (sometimes engaged in after an initial exchange of correspondence) is the 'four-way conference' in which both clients and their lawyers meet (often at one of the lawyer's offices) in an attempt to reach a resolution.

182 ibid., p 276.

Anecdotal evidence suggests that in such conferences lawyers often draw on mediation-related skills and practices, including the identification of each of the party's interests, and the exploration of outcomes that can promote those interests. However, many lawyers adopt quite positional approaches—either generally or in a particular case. To some extent, the lawyer's approach will reflect the client's instructions. Having said that, a good lawyer will explain to a client the benefits of taking a less positional approach in negotiations in an attempt to achieve agreement, while preserving or improving post-separation relationships. Whatever approach (or approaches) are taken, it will be important for clients to 'buy into' and understand their lawyer's approach to negotiation. A particular form of lawyer negotiation through conference is collaborative law (see below).

If agreement is reached through lawyer negotiation, that can then be formally documented, whether by application for consent orders, a binding financial agreement and/or a parenting plan.

7.5.1.5.2 Collaborative law

Collaborative law:

> is a method of dispute resolution whereby the parties and their lawyers contract to settle a matter without involving the court. Parties wishing to engage in the collaborative process must each retain a lawyer to represent their respective interests. The parties must also be prepared to participate actively in a process of open negotiations, aimed exclusively at settlement.[183]

Collaborative process involves lawyers assisting their clients in the dispute resolution process by providing advice during the negotiations between the parties with the goal being to identify a settlement that meets the need of the family as a whole and that both parties can live with. It 'proceeds by way of face-to-face discussions between the parties and their lawyers and, where appropriate, other professionals', with the focus being on 'the parties' respective interests rather than what a court might order if the matter proceeded to litigation'.[184] Parties are more involved in working through issues and developing solutions than in standard lawyer-based negotiations. It is a process aimed at assisting parties to have a better post-separation relationship. Sometimes experts, including accountants, financial planners, child psychologists and/or family dispute resolution practitioners, are jointly engaged by the parties and participate in the process. Both parties receive legal advice from their own lawyers but, in most forms of collaborative law, that advice is 'on the table' and available to both.

Collaborative law is resource-intensive and is limited to those families that can afford to pay the private fees of a family law practitioner accredited to practice collaborative law, as well as the fees of the other experts involved in the collaborative law process.

A further complexity of collaborative law is that the parties and their lawyers sign contracts to the effect that they will not threaten, during the collaborative law process, to

183 Family Law Council, *Collaborative Practice in Family Law, A report to the Attorney-General, December 2006,* Commonwealth of Australia, 2007, [2.1]. See also Caroline Counsel, 'What Is This Thing Called Collaborative Law?' (2010) 85 *Family Matters* 77; Catherine Caruana, 'Dispute Resolution Choices' (2010) 15 *Family Relationships Quarterly* 12.

184 Family Law Council, above n 183, [2.2].

commence court proceedings and that if the collaborative process is abandoned and court proceedings commenced, the parties will have to engage different lawyers to act for them (with all the additional expense and time this involves). This is designed to encourage settlement and an interests-based approach and it clearly creates significant incentives to settle. These incentives can, however, operate in the context of existing power imbalances (created, for example, by lack of equal access to money, violence, or differences in willingness to prioritise the interests of third parties like children) to produce unjust results.

7.5.1.5.3 Mechanisms for giving effect to private agreement

The mechanisms described in this section are ways in which, once agreement is reached (possibly as a result of the dispute resolution processes outlined in 12.3), that agreement can be given effect. There are three main ways in which separating spouses and de facto partners may reach agreement regarding their property disputes without commencing court proceedings, namely informal agreement, parenting plans, and consent orders. In each instance, there are particular potential benefits and pitfalls.

Informal agreement

There is no legal requirement that separating spouses or de facto partners enter a formal agreement regarding how their property will be divided or arrangements for children. There are, however, taxation and stamp duty implications that often create strong incentives to formalisation (12.4.2) in relation to property and financial matters.

When this is not the case, parties are more likely to agree informally between themselves on financial (and parenting) matters, either with or without legal or other professional assistance. Other reasons for informal agreement include a lack of free or affordable professional services to assist in relation to *FLA* financial disputes, low or negligible property pools not justifying the cost of professional services, and a desire to 'keep the peace' with an ex-partner—the concern being that involving lawyers will increase conflict (a concern that research on family lawyers does not support).[185] Preserving financial privacy (including the scrutiny of the ATO and Centrelink over one's financial affairs) are further matters that may be of concern.

In relation to parenting arrangements, in line with the findings reported earlier that most parents agree on parenting arrangements without intervention, most also report that agreements are not enshrined in any written document (AIFS SRSP). Of the parents who reported having had finalised arrangement (at the time of interview or previously had a

185 Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156. Rosemary Hunter, 'Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation' (2002) 16 *Australian Journal of Family Law* 7; and Rosemary Hunter et al., *Legal Services in Family Law* (which includes a review of the previous research at 35–9). More recent research suggests that family dispute resolution practitioners and lawyers do not view themselves as being in competition for work and that where cross-professional criticisms were evident, they were likely to be made by family dispute resolution practitioners. Lawyers 'generally described the work of family dispute resolution practitioners in extremely positive terms': Helen Rhoades, Ann Sanson and Hilary Astor with Rae Kaspiew, *Working on Their Relationships: A Study of Inter-Professional Practices in a Changing Family Law System,* University of Melbourne, 2006, ii–iii. Overseas research includes, in the UK, John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors,* Hart Publishing, Oxford, 2000, and Richard Ingleby, *Solicitors and Divorce,* Clarendon Press, Oxford, 1992.

parenting arrangement in place but no longer at the time of the interview) in the AIFS SRSP study, 57 per cent of fathers and 65 per cent of mothers indicated the agreements were not written down.[186] Where agreements had been written down, most parents indicated they had not been formalised by a court (58 per cent of fathers and 57 per cent of mothers).

Parenting plans

Prior to 2006, parenting plans were provided for in the *FLA* but were apparently not widely used.[187] The 2006 reform agenda sought to place greater emphasis on parenting plans through FRCs processes, which were seen as 'the primary source of help and encouragement in developing a parenting plan'.[188] Active promotion of this kind of agreement was one of the obligations placed on advisors as part of the 2006 family law reforms (*FLA* section 63DA). The legislation requires that parenting plans must be in writing and be signed and dated, but there are no other formal requirements. Although they are not legally enforceable, parenting plans do nonetheless have some reasonably significant legal effects. They will vary a previously made parenting order (section 64D), unless a court has, in exceptional circumstances, included in a parenting order a provision that it may only be varied by a subsequent order of the court (section 64D(2)). These exceptional circumstances include situations where risks of family violence or child abuse arise in relation to a child or where 'substantial evidence' suggests one person is likely to use coercion or duress against the parent to gain agreement.[189] When making a parenting order, a court is to have regard to the terms of the most recent parenting plan if doing so would be in the best interests of the child (section 65DAB).

Consent orders

The development of consent orders may occur in two main ways. In one avenue the parties make an agreement through discussion, FDR or other negotiation and present it to the court for endorsement through a special process available in the Family Court of Australia (this process is discussed in more depth at 12.4.2). In another process, consent orders reflect an agreement made between the parties after court proceedings have been initiated. The majority of court proceedings are settled in this way.[190] Consent orders made by either of these routes can be drafted to cover property and spousal maintenance issues as well as parenting arrangements.

There is little detailed empirical evidence about the dynamics at play when consent orders occur in either of these ways, but particularly when matters settle after proceedings

186 De Maio et al., 2013, above n 1, p 48.

187 Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials*, 3rd edn, Lawbook Company, Sydney, 2004, p 965.

188 Australian Government, *A New Family Law System: Government Response to Every Picture Tells a Story*, Canberra, 2005, p 3.

189 Section 64D(3) provides: 'Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following: (a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; (b) the existence of substantial evidence that one of the child's parents is likely to use coercion or duress to gain the agreement of the other parent to a parenting plan'.

190 Family Court of Australia, *Annual Report 2012–2013*, Family Court of Australia, Canberra, 2013, Figure 3.4; Federal Circuit Court of Australia, *Annual Report 2012–2013,* Federal Circuit Court of Australia, Canberra, 2013, Part 3.

have been initiated. What little evidence exists suggests that certain events in the course of litigation can stimulate decisions to settle, including the withdrawal of legal aid assistance from one or both parties, the production of a family report that may mean one party is in a stronger or weaker position than the other and the appointment of an Independent Children's Lawyer (ICL).[191] As discussed below, one of the functions of an ICL is to encourage the parties to settle the matter, on the basis that children's interests are best served by avoiding protracted litigation.

Where consent orders are being sought, the court may, but is not required to, have regard to the matters set out for consideration in determining what is in a child's best interests (section 60CC(5)).[192] There are some minimal particular requirements where the consent orders sought would result in a child living with someone who is not a parent, a grandparent, or other relative of the child, or would not result in the allocation of parental responsibility to a parent, grandparent or other relative (section 65G). In such cases, the court must not make the proposed order unless 'the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order' or 'the court is satisfied that there are circumstances that make it appropriate to make the proposed order' anyway (section 65G(2)). This involves a change from the previous provision, which imposed these requirements wherever there was to be an order in favour of someone (including a grandparent or other relative) who was not a parent of the child. This change can be seen as an example of the success of grandparents' lobby groups in recent times in mainstreaming their claims in relation to family law matters.

7.5.1.6 CONCERNS ABOUT PRIVATE SETTLEMENT

Some research and commentary has raised concerns about private settlement, particularly for women and children affected by family violence and child safety concerns and other disadvantaged groups.[193] Although the levels of satisfaction with various pathways reported above suggest that the system works well in the main, there are clearly some instances in which settlement occurs not as a result of free agreement but because of resource or other pressures. In recent years, such concerns in relation to matters involving children and financial matters (together and separately) have been raised in research by Carson and colleagues,[194] Kaspiew and colleagues[195] and others[196] and in law reforms submissions from agencies such as the Magistrates Court and the Children's Court of Victoria.[197]

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191 Kaspiew et al., 2013, above n 10, p 69.

192 Compare with *Harris v Caladine* (1991) 172 CLR 84, in which the High Court indicated what was required in making consent orders under s 79 (property adjustment: see 9.3.7.2): namely that those making consent orders must consider whether the order is proper, including at least a truncated consideration of the s 79(4) factors.

193 See, e.g., Rachael Field, (2010), above n 104; Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71, 83.

194 Rachel Carson, Belinda Fehlberg and Christine Millward, 'Parents' Experiences of Family Dispute Resolution and Family Law Services in Australia Following Shared Parenting Reform: Recent Qualitative Findings' (2013) 25 *Child and Family Law Quarterly*, 406; Christine Millward and Belinda Fehlberg, 'Family violence and financial settlements in family law matters' in *Children and Families in Australia: Selected Policy, Legal and Practice Issues* (eds A Hayes and D Higgins), 2013, Australian Institute of Family Studies, Chapter 24, pp 235–43.

195 Kaspiew et al,. 2009, above n 1; Kaspiew et al. 2013, above n 10.

196 ALRC, 2010, above n 10, section 21.41.

197 ibid.

A persistent theme in the recent research and earlier studies is the link between unfair outcomes, a history of family violence and a sense that victims of family violence have a compromised ability to stand up for a fair outcome in all of these contexts for a range of reasons, including encouragement and pressure to settle in various parts of the system. For example, Lesley Laing's study of 22 women who were making parenting arrangements against a background of family violence in 2008 found that the women reported experiencing pressure to consent to arrangements that they did not consider the best option for ensuring the safety of themselves and their children. This pressure came from their own legal representatives, those of their ex-partners and ICLs.[198] Like other analyses,[199] this research attributes such outcomes to a range of factors, including inadequate processes for assessing risks to women and children, a tendency among family law system professionals to emphasise the child's right to a meaningful relationship with fathers over protection from harm, poor integration between services and a lack of coordination between different elements of the systems that respond to family violence and child protection and deal with family law issues, and a lack of understanding about family violence among family law system professionals.

Laing's findings are consistent with earlier research. One of the findings of Rosemary Hunter's study of women's experiences in court in cases involving domestic violence was that 'a significant proportion of cases in which the files indicated quite a serious history of domestic violence resulted in settlement by consent orders prior to or during the final hearing'.[200] She found that most lawyers and judges failed 'to pay attention to power relations and safety considerations in negotiating and approving consent orders in the Family Court', and that 'consent orders often produced adverse material and symbolic consequences for survivors of violence'.[201] In addition, research by Julie Stubbs, Miranda Kaye and Julia Tolmie showed that women who were the victims of domestic violence were 'agreeing' to arrangements that they felt were unsafe, both for themselves and for their children.[202]

7.6 COURT PROCESSES

This section provides an overview of how courts work in relation to parenting matters (for financial disputes see Chapter 11 (child support), 12 (property) and 15 (spousal and de facto partner maintenance). As discussed in Chapter 3, three main courts in Australia exercise family law jurisdiction: the Family Court of Australia (FCoA), the Federal Circuit Court (FCC) and the Family Court of Western Australia (FCoWA).

198 Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence*, University of Sydney, Sydney, 2010.

199 ALRC, 2010, above n 10.

200 Rosemary Hunter, *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence*, unpublished PhD Thesis, Stanford University, 2005, p 202.

201 ibid., pp 304–5.

202 Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93.

In recent years, two significant developments have occurred in court processes. One development revolves around developing child-focused processes with an increasingly inquisitorial nature. This is reflected in legislative support for greater judicial control of court proceedings, stimulated by the FCoA's trialling in 2004 of the Children's Cases Program, which evolved into its Less Adversarial Trials process. The other development concerns initiatives aimed at finding effective ways to deal with matters involving child abuse allegations at the most serious end of the spectrum. This is evident in the FCoA's Magellan case-management process, piloted in 1998, to deal with matters involving child sexual abuse or serious physical abuse (see 7.6.2).

7.6.1 CHILD-FOCUSED COURT PROCESSES

One of the most significant legislative statements to be made in a procedural sense in recent years has been the enactment of Division 12A in Part VII of the *FLA*. These amendments were made in 2006, to support the program of increasing child focus in the family law system. In 2004 it was appropriate to describe 'the ultimate adjudication processes' of the FCoA as adversarial,[203] despite the original vision of the court as a 'helping court' 'that would place an emphasis on counselling and conferences as venues for resolving disputes over children and assisting families in transition'.[204] During 2004, however, the FCoA instituted the Children's Cases Program,[205] which was a clear and conscious move away from an adversarial approach in children's matters. It 'set about providing a highly supportive, consensual and less formal process for separating parents to follow, to maximise their chances of settling their dispute effectively, and without full adversarial armoury'.[206] It was clearly influenced by inquisitorial processes in Europe, although with a greater emphasis on mediation and conciliation than in some parts of Europe.[207] Former Chief Justice, Alastair Nicholson has said: 'Above all the scheme placed a duty on the judge to elicit the truth and arrive at an appropriate result in the best interests of the child, rather than simply relying upon what the parties tell him/her.'[208]

Division 12A sets out a series of principles, duties and powers to be applied in decision making in children's matters that were intended to militate against adversarialism in the way that children's matters are conducted in the family law courts. As Harrison explains, Division 12A reflects developments that were instigated in the FCoA in 2004 through the development of the Children's Cases Program, which was motivated by a 'growing concern that the traditional adversarial system of determining disputes (albeit modified in children's cases) had failed to provide the optimal method for determining children's best

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203 Parkinson and Behrens, above n 187, p 302, referring to the High Court's decision in *R v Watson: Ex parte Armstrong* (1976) 136 CLR 248 in which 'the High Court disagreed with Watson J when he described proceedings as not strictly adversarial'.

204 Jennifer McIntosh, *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being*, final report to the Family Court of Australia, March 2006, p 4.

205 Practice Direction 1.2, subsequently No. 2 of 2004, and No. 3 of 2005.

206 McIntosh 2006, above n 204, p 6.

207 Alastair Nicholson, 'Family Law Reform: How Much Real Reform Is Involved? Does It Take Us Forward or Backwards?', an address to the ACT Council of Social Service, Canberra, 17 August 2006, p 22.

208 ibid., p 23.

interests'.[209] Harrison identifies a number of important features of the Children's Cases Program approach (now reflected in Division 12A and Less Adversarial Trials), including the 'power given to the presiding judge to determine how the hearing will be conducted, which includes what evidence is to be provided and how it is to be treated', the way the process unfolds in steps (rather than a 'climactic trial as in common law'), a less formal approach to the physical environment of the courtroom and an expanded role for family consultants (this part of the process is known as the Child Responsive Program).[210]

Under Division 12A, the following principles are intended to guide procedural decisions about children's matters:

> s 69ZN:
>
> Principle 1: The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
>
> Principle 2: The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.
>
> Principle 3: The third principle is that the proceedings are to be conducted in a way that will safeguard:
>
> (a) the child concerned against family violence, child abuse and child neglect; and
>
> (b) the parties to the proceedings against family violence.
>
> Principle 4: The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
>
> Principle 5: The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Further, the legislation imposes a series of general duties on courts, consistent with the principle that the court is to be proactive in the management of children's matters. Thus, section 69ZQ(1) provides that a court must:

> (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
>
> (b) decide the order in which the issues are to be decided; and
>
> (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
>
> (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
>
> (e) make appropriate use of technology; and

209 Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Approach to the Conduct of Legal Proceedings*, Family Court of Australia, Canberra, 2007.

210 ibid., pp 50–4. Separate evaluations of the two phases of the CCP were conducted. The Child Responsive Program, which is the term applied to the phase involving family consultants, was evaluated by Jennifer McIntosh, *The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Well-Being*, final report to the Family Court of Australia, March 2006. The legal phase (LAT) was evaluated by Rosemary Hunter, 'Child-Related Proceedings under Pt VII Div 12 A of the *Family Law Act*: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227.

(f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and

(g) deal with as many aspects of the matter as it can on a single occasion; and

(h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

Powers accorded to judges include the power to make determinations, findings and orders at any stage of proceedings (section 69ZR) and to 'designate a family consultant as the family consultant in relation to the proceedings' (section 69ZS). Courts are also given duties and powers relating to evidence (section 69ZX). These are significant. Most of the provisions of the *Evidence Act 1995* (Cth) which would operate to exclude evidence do not apply (section 69ZT(1)), and a 'court may give such weight (if any) as it thinks fit to evidence admitted' as a consequence of this provision (section 69ZT(2)).

The *FLA* provisions setting out the role of family consultants (*FLA* Part III) also play a significant role in shaping how each court approaches case management and draws on social science expertise in the course of proceedings. A significant change to the way family consultants operate occurred in 2006, when provisions making all of their dealings with families reportable (not confidential) were introduced (section 11C). As noted earlier, this change underlines a shift in focus from what was initially conceptualised as a partly therapeutic role to an effectively forensic function post-2006. Under section 11F, courts have the power to order that parties (subsection (a)) and children (subsection (b)) attend an appointment (or a series of appointments) with a family consultant. Under these orders, family consultants meet with the parties, and potentially the children, and provide an initial assessment of the family to the court. Under section 62G, the court also has the power to order a family report 'on such matters relevant to the proceedings as the court thinks desirable' (subsection (2)). Since 2006, in preparing a section 62G report, family consultants are obliged to 'ascertain the views of the child in relation to the matter' (section 62G(3A)(a)) and 'include the views of the child on that matter' in the report (section 62G(3A)(b)). Children are not obliged to express views (section 60CE) and the family consultant has the discretion to not ascertain the view of the child (section 62G(3B)) if they form the view that to do so would be inappropriate because of the age or maturity of the child or because of some other 'special circumstance'. Family reports are admissible as evidence in court, as are all family consultant dealings with families, and family consultants may be called to give evidence and be cross-examined on their conclusions about the family. Family reports may be court funded, self-funded by the parties or funded by Legal Aid. Family reports are treated as one piece of evidence in any particular matter and given the weight the judicial officer considers appropriate in the context of all the evidence in any particular proceeding (*Hall and Hall* (1979) FLC 90-713).

Each of the courts has slightly different approaches to the way that family consultants are used; however, all of these approaches involve the capacity to request initial assessments from a family consultant supported by fuller reports as a matter progresses. Family consultants are involved in the FCoA's parenting matters process through the Child Responsive Program (CRP), which involves the application of an initial screening and assessment process, ahead of the legal process conducted under the Less Adversarial

Trials principles referred to earlier. The CRP is based on the same principles as the child-inclusive dispute resolution approach discussed at 7.5.1.4 and it also includes an explicitly educative component aimed at supporting parents to understand the impact of separation and conflict on children.[211] During the trial, the judge may draw on the expertise of the family consultant to 'provide evidence based on the and the parents' issues assessment and to provide a broader social science perspective on the issues raised by the parties and their lawyers'.[212]

In the FCCoA, matters are dealt with under a docket system (the FCoA also operates on a docket system), which is intended to support active and consistent case-management by the same judge during the course of a matter.[213] The FCCoA has access to a pool of in-house family consultants who may provide a brief report at the start of the proceedings and a fuller report (a family report) as proceedings progress. Family reports may also be provided (as can also occur in the FCoA) by so-called Regulation 7 family consultants,[214] who provide services as sub-contractors rather than employees and are engaged to do so under the *Family Law Regulations* (Regulation 7). Where orders are made for parties to see a family consultant under section 11F, the family consultant provides a brief report (a memorandum) to the court that sets out their views on the status of the matter and to provide recommendations for the way a matter should progress. The family consultant may also be able to 'assist the parties to reach a agreement' at this point or to make referrals to other services and programs.[215] After this initial contact, two further 'preliminary assessment' services may be offered.[216] These are (1) a Child Dispute Conference where each party is seen individually so that risk assessment may take place and a further step may involve a joint meeting with the consent of the parties, and (2) a Child Inclusive Conference which involves the child being interviewed in addition to and separately from the parents. Where a family report is ordered, the process is described in this way:

> The process involves the report writer interviewing each of the parties and the children, and any other people significant in the lives of the children. The report writer will also observe interactions between the children and each of the parties. The report writer will then prepare a written report for the Court on matters including the issues in dispute, the past and current parenting arrangements, the parenting capacities of each of the parties, and the children's wishes and views, and any other matters specifically included in the order. Based on their assessment, they will make recommendations to the Court as to the parenting arrangements that are likely to be in the best interests of the children.[217]

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211 Family Court of Australia, *Less Adversarial Trial Handbook*, Family Court of Australia, Canberra, 2009, <www.familycourt.gov.au/wps/wcm/resources/file/eb08eb04841dff4/LATReport_100609.pdf>, 28 April 2014.

212 ibid.

213 Federal Circuit Court, *Annual Report 2012–2013*, 3 Federal Circuit Court of Australia, Canberra.

214 These professionals are registered as family consultants under reg 7 of the *Family Law Regulations 1984*; *FLA* s 11B.

215 Federal Circuit Court, above n 213, p 9.

216 ibid.

217 ibid., p 19.

7.6.2 MAGELLAN

A significant development that pre-dated the development of the Children's Cases Program was the piloting (June 1998 – December 2000) and implementation of the Magellan case-management system that aims to provide a case-managed and coordinated approach to resolving matters involving allegations of sexual abuse or serious physical abuse. This initiative was intended to address the difficulties (referred to in Chapter 3) that arise in matters involving serious allegations of physical of sexual abuse—especially stemming from the potential for multiple agencies, including the family law courts, child protection departments and police to be involved with a family where these issues have been raised.

In light of concerns that such matters were not being resolved expeditiously, the FCoA introduced a pilot program, Project Magellan, to apply to 'a selected 100 residence and contact cases involving allegations of serious physical and or sexual abuse drawn from the Melbourne and Dandenong Registries of the Court in Victoria'.[218] The pilot program ran between June 1998 and the end of 2000, with a formative evaluation conducted by Thea Brown and colleagues. A national roll out of the program began in July 2003, and was completed during the 2004–05 financial year.[219] Magellan is supported by agreements between the FCoA, legal aid commissions and state and territory child protection departments. These agreements mean that each Magellan case has an independent children's lawyer (ICL) funded for the duration of the proceedings and that child protection departments provide a 'Magellan report' within a specified time-frame to inform the court about the department's involvement with the child.[220] A further evaluation of Magellan was conducted by Daryl Higgins in 2006–07 to assess whether Magellan was meeting its objectives. This evaluation highlights a number of positive outcomes of Magellan, including shorter resolution timeframes, fewer court events, fewer judicial officers involved in each case and a higher chance of a matter resolving prior to trial.[221] Higgins characterises Magellan as sitting:

> [A]mong a complex set of expectations, the intersection of a range of agencies and systems involved in responding to issues of child abuse allegations in family law matters ... it was this 'black spot' intersection that necessitated a case-management system to co-ordinate and bring together information from each of these areas to ensure that private family law disputes are resolved in a timely way that provides for the safety and ongoing best interest of children.

The resource-intensive Magellan process is applied in a very narrow band of cases. In recent years, between 268 (2008–2009) and 141 (2012–2013) Magellan cases were started in the FCoA annually. This is very small when considered as a proportion of all parenting applications: the wider context for the 141 Magellan cases started in 2012–13 is a total

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218 Thea Brown with Rosemary Sheehan, Margarita Frederico and Lesley Hewitt, *Resolving Family Violence to Children: The Evaluation of Project Magellan, A Pilot Project for Managing Family Court Residence and Contact Disputes When Allegations of Child Abuse Have Been Made*, Monash University, Melbourne, 2001, p v.

219 Family Court of Australia, *Annual Report 2004–2005*, Family Court of Australia, Canberra, 2005, p 4.

220 Daryl Higgins, *Co-Operation and Co-Ordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model*, Family Court of Australia, Canberra, 2007.

221 ibid.

of 1423 final order applications in matters involving children (924 parenting applications only and 399 parenting and financial applications) filed in the FCoA[222] and the 17,364 final order applications filed in the FCCoA, 54 per cent of which involved children only and 11 per cent of which involved children and property.[223]

7.6.3 PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN COURT PROCESSES

The rationales for supporting the participation of children and young people in decisions about their care were discussed at the start of this chapter. The mechanisms for doing this in FDR processes have been discussed in the preceding section. In this section, we consider the ways in which child engagement occurs in court processes. In addition to the provision specifying that an object of Part VII of the *FLA* is to give effect to CRC, Part VII contains a range of other provisions relevant to the question of child focus. Children's views are one of the 'additional considerations' that guide decision making of what orders might be in a child's best interests and the court is obliged to consider any views the child has expressed (section 60CC(3)(a)). Children are not required to express any views, however (section 60CE).

There are three main and potentially overlapping ways that children and young people may have direct involvement in the court process. First, in some circumstances, an independent children's lawyer (ICL) may be appointed to represent the child's best interests, usually involving cases where there is family violence and/or child abuse. Where children express a view, ICLs are required to put that information before the court (section 68LA(5)(b)). ICL appointments are made in about a third of parenting matters, and recent research has examined ICL practices in some depth and is discussed further below. The second way children may have direct involvement in the court process is through family consultants, who in most circumstances are required to speak with the child, ascertain their views and inform the court of their views: section 62G(3A) and (3B) (see above 7.6.1). There is a dearth of empirical evidence available on practice and children's experience in this context. The third way, which rarely occurs in the Australian context, is through judicial interviews.[224] There are three other avenues for child involvement that are also rarely applied. In theory children can give evidence with the leave of the court.[225] Children may also be a party in a case, though this is very unusual and would occur through a guardian *ad litem* (a litigation guardian).[226] Finally, they may also intervene in proceedings through a guardian *ad litem*.[227]

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222 Family Court of Australia, *Annual Report 2012–2013*, Family Court of Australia, Canberra, 2013, pp 42, 59.

223 ibid., pp 5, 7.

224 For a discussion on judges' views on meeting with children see Michelle Fernando, 'What Do Australian Family Law Judges Think about Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51, 77. Fernando notes that two sets of court practice directions providing for judges to meet with children have been revoked but that discretion to do so nonetheless exists. A recent example of where a judge chose to speak with a child subject to proceedings is in *Cannon & Acres* [2014] FamCA 104.

225 Under s 100B of the *FLA*, a child must not swear an affidavit, be called as a witness, or remain in court during the proceedings unless the court orders otherwise. This discretion is rarely exercised: Bryant, above n 166, p 135.

226 ibid., p 134. Under *FLA* s 65C(b), a child can apply for a parenting order.

227 Section 92 *FLA*, pt 6.3 of the *Family Law Rules; RCB as Litigation Guardian of EKV, CEV, CIV and LRV and the Hon Justice Colin Forrest* [2012] HCA Trans 178 (7 August 2012).

Legislative provisions articulating the role of the ICL were enacted in 2006, and essentially codified pre-existing case-law principles. One of the significant aspects of these principles is the role of the ICL as a best interests representative. This means that the child is not their client and that ICLs have an obligation to advocate best interests outcomes rather than acting on the child's instructions (section 68L, section 68LA(2), section 68LA(4)). Like family consultants, ICLs may speak to children to ascertain their views (section 68L(5)); however, they also have the discretion not to do so on the basis of the child's age or maturity or 'some other special circumstance' (section 68LA). Other duties include (section 68LA(5)) acting impartially with the parties to the proceedings, ensuring any relevant views expressed by the child are fully put to the court, analysing documents and putting their significant elements before the court, minimising trauma to the child in relation to the proceedings and facilitating agreement in the proceedings. ICLs are not obliged to disclose to the court matters that the child communicates to them (section 68LA(6)), unless the ICL forms the view that such a disclosure is warranted in the best interests of the child (section 68LA(7)).

At a conceptual level, empirical studies on Australian family law discourses about child participation have revealed two main philosophical approaches. One approach, described by Patrick Parkinson and Judy Cashmore as the protectionist approach,[228] is concerned with shielding children from the conflict between their parents and minimising the direct involvement of children in family law proceedings. This approach is an underlying justification for practitioners such as ICLs and family consultants not speaking with children. The other approach, conceptualised in various ways, including by Nicola Ross as a child's rights approach,[229] views the child as having a legitimate interest in influencing the proceedings and their outcomes, on the basis that it is their lives and interests that are at issue. These two approaches are situated within a range of views and practices, both legal and sociological in character, that adopt significantly varying constructions of children and young people and their capacity, needs and interests in disputes between their parents. Fundamental questions that arise in relation to these constructions are whether family law disputes are *between parents* or *about children*: the former construction supports a protectionist approach and the latter a child rights approach.

Although there is evidence that a child's rights approach is gathering momentum, it remains emergent rather than achieving dominance. On the basis of a comparative perspective informed by research based on interviews with legal practitioners who represented children and young people in criminal jurisdictions, child protection and family law jurisdictions, Nicola Ross observes that 'a discourse of children's rights that would support children's participation was in its infancy in the family courts'.[230] She observed different practice orientations, drawing on earlier analyses of lawyers' ethical positions by Christine Parker and Adrian Evans,[231] among family law ICL practitioners, which she characterised as

228 Parkinson and Cashmore, above n 45.

229 Nicola Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26 *Australian Journal of Family Law* 214.

230 ibid., p 239.

231 Christine Parker and Adrian Evans, 'Alternatives to Adversarial Advocacy' in C Parker and A Evans, *Inside Lawyers, Ethics*, Cambridge University Press, Port Melbourne 2007.

either 'responsible' or 'relational'. 'Responsible' lawyering was the dominant approach and involved an emphasis on the ICL role as an independent best interests advocate and an officer of the court. 'Relational lawyers' followed the same principles as 'responsible lawyers', with an additional emphasis on child participation rights 'focused on a responsibility to children (even though they are not the ICLs' clients), their families and relationships'.[232]

Recent research examining the role of ICLs from multiple perspectives, including those of parents and children, in parenting matters has highlighted considerable complexity surrounding the question of participation, children's views and how they are put to the court.[233] The AIFS ICL Study identified three main ICL functions: supporting participation, gathering evidence and playing an 'honest broker' role in influencing the trajectory of the litigation and attempting to bring about settlement. All the professional groups involved in the research placed a much lower level of emphasis on the significance of the ICL role in supporting participation of children and young people compared with the significance accorded to evidence gathering, litigation management and settlement fostering. ICLs themselves placed the least level of emphasis on participation functions. In part, this reflects the historical development of the ICL role: when the function first started to be articulated in case law (fleshing out *FLA* section 65 providing for 'separate representation of a child') it was known as the 'separate-representative' and was conceived very much as the court's assistant (one decision framed the role as similar to counsel assisting a Royal Commission: *In the Marriage of Bennett v Bennett* (1991) 17 Fam LR 561. These developments preceded Australia becoming signatory to CRC. The influence of CRC started to be evident in case law from around 1994, with the decision in *Re K* (1994) 17 Fam LR 537 outlining the circumstances in which a 'separated representative' should be appointed and what their functions were. The explanation of the role of case law was augmented by *Guidelines for Child Representatives* developed by a FCoA-auspiced committee, which have had several iterations.[234] Recognition of the importance of supporting child participation is increasing, but practice remains uneven in this respect.

The findings of the AIFS ICL Study show that the ICL role is valued by professionals, especially judges, and that their evidence gathering and litigation management functions are accorded particular significance.[235] A further important finding of the research is that their participation function is complex and contested and that varying approaches to this function are evident among ICLs. The research acknowledges that participation is multi-faceted, and may involve three main elements: familiarisation of the ICL and the child; explanation of processes and potentially outcomes; and consultation on views, outcomes and processes. It describes two orientations among ICLs: a high participation orientation among a minority of ICLs where facilitating children's participation is seen as a core function and undertaken for all three purposes and a cautious orientation to facilitating children's participation, which is dominant. The cautious orientation to participation sees

232 Ross, above n 225, p 225.
233 Kaspiew et al., 2013, above n 10.
234 Bryant 2006 above n 166; Kaspiew et al., 2103, above n 10, p 4.
235 Kaspiew et al., 2013, above n 10; Chapter 3.

this as a function to be carried out in collaboration with, or in some instances mainly by, family consultants or other social science experts. Cautious orientation ICLs do not have direct contact with children and young people on a frequent basis and are particularly concerned about direct contact for consultation. A range of justifications is raised for the cautious orientation. These include concern about a lack of training and disciplinary expertise in eliciting and interpreting children's views, concerns about subjecting children to too much engagement with professionals (systems abuse) and a concern that they may receive a disclosure that would mean they would have to cease acting in the matter and be a witness in the proceedings.

The potential for negative repercussions to arise from ICLs taking a cautious approach with children and young people was also revealed in the AIFS ICL study. Interviews with parents/carers ($n = 24$) and children/young people ($n = 10$) who had been involved in a matter with an ICL yielded accounts of mainly negative experiences with ICLs.[236] Although a couple of parents, and one young person, reported largely positive experiences, these were the minority in the small qualitative sample involved in this aspect of the research. The main sources of disappointment were a lack of meaningful contact between the ICL and the children and young people in the case and unmet expectations about what the ICL would do to support child participation and ensure the court understood the child's perspective. Importantly, all of the children interviewed had been involved in matters where their safety—broadly defined to mean physical or emotional safety—was at risk. In several cases parents raised concerns about ICL's competence that were consistent with concerns raised by professionals, focusing on a lack of impartiality and rigour in the way the ICL role was discharged. While professional approaches to engaging with children in such circumstances have traditionally reflected significant caution for the reasons underpinning the cautious participation orientation outlined above, the AIFS ICL research concludes that the interviews with children:

> suggest they have an acute need for someone to be looking after their interests in, and facilitating their understanding of, the processes affecting them, particularly in circumstances where safety concerns and family law proceedings are unfolding in parallel.[237]

The functions that professionals place emphasis on—litigation management and evidence gathering—had little visibility for parents and especially children.

In conclusion, this section of the chapter has examined court processes in parenting matters. The FCCoA hears the vast majority of parenting matters with a much smaller proportion being heard in the FCoA. A significant procedural shift initiated by the FCoA through the Children's Cases Program and consolidated with the enactment of Division 12A of Part VII in 2006 has seen judges accorded a range of powers and duties that support a pro-active and less adversarial approach to managing children's cases. Pre-dating this was a move to specialisation for matters involving allegations of sexual abuse and serious physical abuse in the FCoA through the Magellan program. This resource intensive process is applied

236 ibid., chapter 8.
237 ibid., p 166.

in a small proportion of cases in part to ameliorate the practical problems the constitutional division of powers between state and territory and federal levels of government pose when family law matters also involve child protection issues.

Both family consultants and ICLs may have direct engagement with children and young people in court processes. Although the empirical evidence base on the practices of ICLs is growing, there is little research on family consultants, the impact of their practices on children and the ways in which the practices of family consultants and ICLs may overlap or complement each other. Overall, the existing evidence suggests a lack of philosophical and practical coherence in the way child participation is currently approached in children's matters, although efforts to move towards more child-focused processes are evident.

7.7 ONGOING SUPPORT

The question of the extent to which parents are offered support by family law system services that extends beyond making their initial parenting arrangements has been the subject of long-standing local concern. The *Pathways Report* considered that one of the key functions of a family law system should be 'ongoing support, comprising services that are available immediately after separation and following initial decision making,'[238] whether decisions were made by the parents themselves or by a court. In particular, the report recommended that:

> flexible community support services be available following the handing down of court decisions about parenting arrangements and to assist with future resolution of difficulties arising from changing family circumstances, acknowledging that some families may need these supports intermittently over an extended period.[239]

The *Every Picture Report* also made recommendations for education and supportive services to promote shared parenting after separation.[240]

The need of this kind of ongoing support is indicated particularly clearly by recent research findings on the extent to which conflict, negotiation and reconsideration of parenting arrangements continue well beyond the post-separation period for some families.[241] In recent years, two services aimed particularly at providing support for the implementation of parenting arrangements, Children's Contact Centres and the Parenting Orders Program (POP),[242] have expanded. There is also a range of other services funded by the Federal Government that may assist separated parents in this phase. They include FRCs, Post Separation Cooperative Parenting programs (delivered through FRCs and other family services), the Supporting Children after Separation Program,[243] and Family Relationships

238 *Pathways Report*, above n 6, p 21.
239 ibid., Recommendation 15.2, p 65.
240 *Every Picture Report*, above n 7, Recommendation 7.
241 Qu et.al., 2014, above n 10, p 63.
242 The Contact Orders Program was piloted in 1999 and evaluated between 2000 and 2002: Commonwealth Attorney-General's Department, *The Contact Orders Program: A Summary of the Independent Evaluation of the Contact Orders Pilot*, Australian Government Publishing Service, 2003. The program was intended to help families undergoing separation to manage child contact arrangements and orders. The evaluation concluded that it has many positive benefits and should be continued and 'strategically expanded'.
243 For a discussion of these services see Morag McArthur, Lorraine Thomson, Merrilyn Woodward, Justin Barker, Megan Layton and Gail Winkworth, *Evaluation of the Supporting Children after Separation Program and the Post Separation Cooperative Parenting Program*, Institute of Child Protection Studies, Canberra, 2011.

Counselling. Other relevant services include Men's Line Australia run by Crisis Support Services Inc, which aims to provide relevant and accessible telephone counselling and referral services to men who are seeking to manage their relationships with partners, ex-partners and children, particularly following divorce or separation.[244]

Guidance in relation to the post-settlement or post determination phase is also present in Part VII of the *FLA*. A court making an order under Part VII is required to inform parties 'about the family counselling services, FDR services and other courses, programs and services available to help the parties adjust to the consequences of that order' (section 62B). A parenting order may require the parties to consult with an FDR practitioner to assist with resolving disputes about the order or reaching agreement about changes to the order (section 64B(4A)). A court making a parenting order can require the parties' compliance with the order to be supervised by a family consultant, and can require a family consultant 'to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order' (section 65L). A court may also 'make an order directing a party to the proceedings to attend a post-separation parenting program' (section 65LA).[245]

Two of the more common services used to support the implementation of agreed or court-ordered arrangements are the POP and Children's Contact Services (CCSs). POPs are offered in 20 locations, with the number of funded services receiving a boost as part of the 2006 family law reforms. These programs are intended to assist parents 'in high conflict' to work out and manage their parenting arrangements and services are provided to both parents and children.[246] They apply child-focused and child inclusive approaches (see 7.5.1.4) in providing counselling, education and mediation as well as referrals. Host organisations may charge a fee for service but they may not refuse to provide services because of an inability to pay. In the past three years the number of clients of POP services recorded in administrative records has grown from 8,457 in 2010–11[247] to 11,301 in 2012–13[248] but there is little empirical evidence publicly available on how these services operate or client experiences of them.

CCSs have become an increasingly important part of the family law system in Australia and overseas[249] in parallel with policy developments designed to ensure that parent–child (particularly father–child) relationships are sustained after separation. These centres may provide direct supervision for parent–child contact visits that occur at the centre and are continually supervised in a child-friendly environment or they may provide a supervised neutral handover point for visits that occur away from the centre. The aims and objectives of the federally funded services have been described as being:

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244 <www.mensline.org.au/Home.html>.

245 A 'post-separation parenting program' is defined in s 4. Conditions for providers of post-separation parenting programs are set out in s 65LB.

246 Department of Families, Housing, Community Services and Indigenous Affairs, Family Support Program, Family Law Services, Part C: Parenting Orders Program, *Family Support Program Guidelines,* 2012.

247 Attorney-General's Department, *Annual Report 2010–2011*, Attorney-General's Department, Canberra, 2011.

248 Attorney-General's Department, *Annual Report 2012–2013*. Attorney-General's Department, Canberra, 2013.

249 Grania Sheehan and Rachel Carson, 'Protecting Children's Rights in Contact Disputes: The Role of Children's Contact Services in Australia' (2006) 44 *Family Court Review* 412, 412.

> to assist families to move, where possible, to self-management of contact arrangements, both in terms of changeover and unsupervised contact. Children's Contact Services must ensure that the children's best interests are kept at the centre of the contact process. Services should only accept cases after careful assessment and where they consider that their facilities and resources allow them to deliver services that are safe and appropriate for all parties.[250]

In recent years, it appears that information about parent–child interactions in CCSs have increasingly been sought for court proceedings as they provide a source of independent insights into the nature of the parent–child relationship.[251] Australia has 65 of these centres funded by the Federal Government and anecdotal evidence indicates that there may be a growing number of privately operated services that aren't subject to regulation or scrutiny.[252] Administrative data show that the number of clients using the 65 government funded centres increased from 38,163 in 2010–2011 to 50,573 in 2012–13.

CCSs play a particularly important role in cases where there is family violence, child abuse, or allegations of such, but where parenting time has been ordered or agreed to nonetheless.[253] So, for example, if a court has made a finding that there is an unacceptable risk to a child of unsupervised parenting time, it may be willing to order supervised time, particularly at a CCS. 'Contact services are thus seen by courts in Australia as a way of balancing the rights of children to have regular contact with both parents and the need to be protected from harm.'[254] To some extent, then, they have enabled courts to make orders for parenting time, especially at an interim stage, which they would not have made in the absence of such a service.

There is minimal recent research on the operation of CCS services, including the important questions of how they support families moving to 'self-management' and the impact on each parent and the children of contact arrangements occurring in this way. One study published in 2005 found that children's contact centres were seen as a way of balancing children's right to regular contact with the need to be protected from harm.[255] In light of an increased demand for CCS services, the Attorney-General's Department instigated a consultation on the role of CCS and whether some functions—such as providing supervision for handovers—could be performed by other services.[256] The documents associated with consultation focused on these questions about CCS operation: how high waiting times could be reduced and how case prioritisation should occur; whether standardised protocols should be developed for providing guidance about

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250 Department of Families, Housing, Community Services and Indigenous Affairs, Family Support Program, Family Law Services, Part C: Children's Contact Services, *Family Support Program Guidelines,* 2012.

251 Attorney-General's Department, *Children's Contact Services—Consultation Paper Part 2*; *Children's Contact Services—Consultation Paper 6* Attorney Generals Departments Canberra.

252 Fitzgerald and Graham 2011, above n 48.

253 ibid., p 488.

254 ibid.

255 Grania Sheehan and Rachel Carson, 'Protecting Children's Rights in Contact Disputes: The Role of Children's Contact Services in Australia' (2006) 44 *Family Court Review* 412, 412.

256 Attorney-General's Department, *Children's Contact Services—Consultation Paper Part 2* above n 251.

who should receive services and when they should be withdrawn; the conditions under which supervised contact should be withdrawn and when supervised contact on a long-term basis might be appropriate; whether there should be a parallel service available on a fully self-funded basis; whether there should be a mandatory accreditation system for CCS centre staff; the impact the CCS environment has on children's well-being; and the focus of future research.[257] At the time of writing, it was unclear what policy action would follow the consultation.

7.8 CONCLUSION

In charting the procedural territory of parenting disputes, the discussion in this chapter further develops some of the important themes in this book. Consistent with the evidence discussed in Chapters 5 and 6, the context for the application of family law system processes is a spectrum of families, including a majority who seem to sort out their parenting arrangements with little use of the system and little difficulty. Other sub-groups in the separated population of families make greater use of the system to varying extents and with some repetition. The evidence now available establishes clearly that significant proportions of families who use both FDR and court processes are characterised by substantial complexity, including family violence, child safety concerns, negative inter-parental relationships, mental ill-health and substance misuse, with these factors alone or in combination.

As practice in the post-2006 family law system has developed, it has become increasingly obvious that the complexity of system users poses significant challenges for services, professionals and agencies across the system. This is evident in many areas discussed in this chapter, including the way that FRC approaches have had to be adapted to accommodate a significant emphasis on screening and assessment for family violence and child abuse. One of the most significant practice and policy challenges in the contemporary environment is to understand and manage the parameters of matters suitable for FDR. The procedural distinction between cases involving family violence and child safety and those not involving these issues suggested in the framing of *FLA* section 60I is clearly not a distinction that is sustainable in everyday practice, as the data on the resolution of matters involving family violence demonstrate. Clearly, considerable complexity surrounds the clinical judgments that must be made about a matter's suitability for FDR. The implications of inappropriate practices in this regard are serious, and may include inappropriate and potentially dangerous negotiated outcomes, and families being shuttled from one service to another, in addition to the inappropriate application of resources to matters not amenable to resolution through non-court based processes. A significant issue in this regard is the changed legal environment in which practice is occurring after 7 June 2012: the question of whether the amendments described in Chapter 6 and examined more comprehensively in Chapter 8 change the decisions made about whether or not a matter is litigated and on what basis they are settled if not litigated has yet to be answered.

257 ibid.

A further theme highlighted in this chapter is that both legal and therapeutic approaches have a role to play, in parallel or in combination, in light of the evidence of the complexity of family law system users and the fact that the issues that they bring to services have elements that may be legal and social in character. A significant shift in the policy and practice environment since 2006 has been recognition of the necessity for legal and relationship support services to be capable of working together to ensure that clients' needs are met effectively and expeditiously. At the same time, the evaluation of the CFDR pilot by Kaspiew and colleagues and Dimopoulos's evaluation of the Geelong FCC FRC pilot shows collaborative work of this nature is intensive and challenging, not the least because of the necessity to develop inter-disciplinary understandings and ways of working.

Perhaps the most significant challenge highlighted in this chapter concerns the interests of children and young people. Since 2006, some positive developments have occurred, including the development of child-focused and child inclusive family dispute resolution processes and moves to implement less adversarial court processes. However, there is little empirical evidence on which to base an understanding of the impact of child-focused and child-inclusive processes in FRCs. The period since 2006 has seen a shift in caseload in family law matters to the FCCoA, resulting in very few children's matters being heard in the FCoA, under the Less Adversarial Trials process. Studies by Kaspiew and colleagues and Graham and Fitzgerald on the participation of children and young people in court and FRC processes respectively highlight a lack of coherence in the way that professionals approach participation and the way that parents and children and young people experience it. The recent evidence in this regard suggests that the philosophy and practice of participation in the Australian family law system can really only be considered as emergent. The following chapter examines how children's needs are accommodated in the application of the substantive parenting provisions in Part VII, including the interpretation of the best interests principle.

CHAPTER

8

FRAMEWORK AND PRINCIPLES FOR DECISION MAKING IN CHILDREN'S MATTERS

8.1 INTRODUCTION

In this chapter, we examine the application of the legislative framework for the resolution of parenting disputes. As discussed in Chapters 5 and 6, the framework for resolving parenting disputes was substantially reformed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the 2006 amendments). In response to dissatisfaction among fathers about the amount of time they were able to spend with their children and strong support for shared parenting among other family law stakeholders, the new legislative framework introduced a presumption of equal shared parental responsibility (a broad term used to describe the ability to engage in major decision making), which was linked within the legislation to shared parenting time (which involves children living across two households, though not necessarily for equal time). Though the reforms did not include a presumption in favour of shared time, in this chapter we highlight the ways in which shared time has come to be encouraged over other parenting outcomes.

The *legislative framework* created by the 2006 amendments is extremely complex. One of the first tasks for the Full Court of the Family Court of Australia (Full Court of FCoA) was to offer guidance regarding their interpretation and application. That guidance was provided in *Goode v Goode*[1] (Bryant CJ, Finn and Boland J), a unanimous decision handed down soon after the amendments came into force, and has become known as the *legislative pathway* for making parenting orders. This chapter provides a detailed overview of the legislative pathway developed in *Goode*, focusing in particular on the interrelationship between the three key elements of Part VII: (1) the best interests of the child test; (2) the presumption of equal shared parental responsibility (ESPR); and (3) the link between ESPR and the physical care arrangements for the child. As discussed (8.4.2.3), a key aspect of the legislative framework is that it 'did not actually create a presumption of equal time, but it came close, because equal time (or substantial and significant time) was the only outcome that the court was specifically required to consider when ordering equal-shared parental responsibility'.[2] A further key aspect is that although the legislative framework sets out a different approach to be taken in cases where there are allegations of family violence and/or child abuse from that taken in cases where there are not, the legislative pathway set out in *Goode* makes it very difficult to overcome the presumption of ESPR and/or secure an order for little or no time, except in the most extreme cases of violence.[3] It is not yet clear what impact the 2012 family violence amendments (Chapter 5) might have on this pattern.

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1 *Goode v Goode* [2006] FamCA 1346 (*Goode*).

2 Bruce Smyth, Richard Chisholm, Bryan Rodgers and Vu Son, Legislating for shared-time parenting: Insights from Australia? (2014, forthcoming) 77 *Journal of Law and Contemporary Problems*.

3 Kaspiew's empirically based analysis of the treatment of violence in litigated children's cases prior to the 2006 amendments concluded 'that a history of violence presents no barrier to contact unless it is extremely severe and has a firm evidential basis' and that 'connections between a history of violence and parenting capacity remain substantially unexplored except in extreme cases.' The AIFS evaluation of the 2006 amendments also demonstrated that greater emphasis had been given to 'meaningful relationships' than protection from harm in litigated cases (evidenced by the increase in court ordered shared time arrangements post-2006 than pre-2006). Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112, 112; Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009.

8.2 APPLYING FOR PARENTING ORDERS

As discussed in Chapter 7, parties can only apply for parenting orders if they have first made a genuine effort to resolve their dispute at a family dispute resolution (FDR) service (section 60I). Exceptions to this rule include applications for consent orders, urgent matters, and where there has been or is the risk of family violence or child abuse (section 60I(9)). The jurisdictional connection required for instituting proceedings related to children under the *Family Law Act 1975* (Cth) (*FLA*) is addressed by section 69E and is discussed at 3.4.2.

8.2.1 WHO CAN APPLY FOR PARENTING ORDERS?

The range of individuals who can file an application for parenting orders has expanded in recent decades. Courts now have the power to make parenting orders (section 65D) on application by either or both of the child's parents (section 65C(a)), the child (section 64C(b)), a grandparent of the child (section 65C(ba)), or any other person 'concerned with the care, welfare or development of the child' (section 65C(c)). The scope of these provisions is wide, and is broadened further by section 64C, which states that a parenting order can be made in favour of a parent of the child or 'some other person'. Applications by non-parents are discussed in detail at 9.5.

8.2.2 WHAT ARE PARENTING ORDERS?

A parenting order is an order that deals with any aspect of parental responsibility for a child, with the main forms of those orders being about who can make major decisions in relation to the child (for example, regarding the child's education, health and religious upbringing: Chapter 9), and with whom a child will live and the time a child is to spend with a parent or other person. For example, an order may be made that parents will have ESPR for a child and that the child will 'live with' one parent and 'spend time' (as stipulated in the orders) with the other parent. This terminology was intended to avoid the 'winner/loser' mentality of previous legislative regimes, but the lack of any obvious content or meaning in the terms now used makes them cumbersome.

The legislation provides a non-exhaustive list of the types of issues a parenting order may deal with (section 64B(2)):

(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(c) the allocation of parental responsibility for a child;
(d) if two or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
(e) the communication a child is to have with another person or other persons;
(f) the maintenance of a child;
(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
    (i) a child to whom the order relates; or
    (ii) the parties to the proceedings in which the order is made;

(iii) the process to be used for resolving disputes about the terms or operation of the order;

(iv) any aspect of the care, welfare of development of the child or any other aspect of parental responsibility for a child.

Other orders that may be sought concerning children include a declaration of parentage (section 69VA)(Chapter 4)), location orders (sections 67J–67P), and recovery orders (sections 67Q–67Y).

8.2.3 LOCATION AND RECOVERY ORDERS

A location order is designed to assist people with parenting orders locate the child the subject of the parenting order, where the child's whereabouts are unknown to them. A location order may be directed either to an individual or to a government body, such as Centrelink, and will require the person to provide the registry manager of the court with information about the child's location, which they either have at the time, or obtain during the life of the location order (section 67J).[4] If the court decides it is in the children's best interests, it can order that the child be returned to the applicant. Location orders directed to a government official are called Commonwealth information orders (section 67J(2)).

It is an offence for information provided to the registry manager to be disclosed, except to certain officials (section 67P). Information may be disclosed to the legal advisor of the applicant for the order, with the leave of the court that made the location order (section 67P(1)(d)). These safeguards are important in protecting a victim of family violence, who may be hiding from a perpetrator and whose safety would be endangered by disclosure of their location to that perpetrator.

A recovery order is designed to secure the return of a child who has been taken or moved within Australia. A recovery order may do a range of things, including requiring the return of a child to a parent or other person who has a parenting order in their favour, and authorising or directing various persons to provide assistance in the recovery of the child (section 67Q). A recovery order may be applied for by a person with whom the child is supposed to be living under a parenting order, a person with whom the child is to spend time or communicate, a person who has parental responsibility for a child, a grandparent, or any other person concerned with the care, welfare and development of the child (section 67T). In proceedings for a recovery order, the court may make such an order as it thinks proper (section 67U). However, section 67U is subject to section 67V, which directs that, in deciding whether to make a recovery order, a court must regard the best interests of the child as the paramount consideration.

While section 121 protects the identity of participants to *FLA* proceedings and makes identification of a party, witness, or individual related to a party to proceedings a punishable offence, a court can make an order permitting publication of 'a notice

4 Location orders stay in force for 12 months or such longer period, as the court considers appropriate (s 67N(4)).

or report in pursuance of a direction of a court' as an aid to location or recovery of children who have been abducted or whose whereabouts are otherwise unknown (section 121(9)(d)).[5]

8.2.4 WHERE ARE APPLICATIONS FILED?

As for other *FLA* orders, most applications for parenting orders are filed in the Federal Circuit Court of Australia (FCCoA) (3.3). The FCoA deals with more consistently complex parenting matters, although the FCCoA's caseload also includes many cases involving complicated circumstances. More complex cases include cases that involve a child welfare agency and/or allegations of serious sexual abuse, severe family violence or mental health issues, international child abduction under the Hague Convention, or special medical procedures. Consent orders can be sought by filing an Application for Consent Orders at a Registry of the FCoA (7.5.1.5.3).

8.3 HOW ARE PARENTING ORDERS MADE?

If parties have been unable to resolve their parenting dispute via the non-court based processes discussed in Chapter 7, they may file an application with the court. The remainder of this chapter discusses the decision-making framework for the resolution of such disputes.

8.3.1 DECISION-MAKING FRAMEWORK OVERVIEW

The 2006 amendments produced an extremely complex set of provisions for the making of parenting orders. Described by the Full Court (Faulks DCJ, Boland and Stevenson J) in *Marvel & Marvel* as 'convoluted'[6] and by Warnick J in *Zabini & Zabini* as 'a dilemma of labyrinthine complexity',[7] the legislative pathway to be followed is not clear on the face of the provisions.

The lack of clarity with regard to the appropriate legislative pathway has created a number of practical challenges for lawyers, judges, and families in the family law system. The most obvious one relates to widespread misunderstanding regarding what the provisions say about shared time. For example, Rick O'Brien, then deputy chair (now chair) of the Family Law Section of the Law Council of Australia, observed in 2010 that the complexity of the legislation had created a misperception among the general community that the 2006 reforms 'somehow mandate equal shared time with children, or at the very least adopt that position as a rebuttable presumption.'[8] The impact of this widespread misunderstanding has led to parties entering into agreements on the basis that one or both feel that 'have no choice' but to agree to equal time, or because they believe that failure to agree to equal time

5 *Gillespie v Bahrin* [1993] FamCA 54.
6 *Marvel & Marvel* (No 2) [2010] FamCAFC 101, [87] (Faulks DCJ, Boland & Stevenson JJ) (*Marvel*).
7 *Zabini & Zabini* [2010] FamCA 10, [3].
8 Rick O'Brien, 'Simplifying the System: Family Law Challenges—Can the System Ever Be Simple?' (2010) 16 *Journal of Family Studies* 264, 266.

will lead to an adverse result in court (Chapter 6). In the case of disputes involving family violence, the lack of a clear legislative pathway has serious implications (Chapters 5 and 9).

Despite the complexity of the 2006 amendments and the lack of a legislatively mandated approach, a common framework for determining parenting orders has emerged. First articulated by the Full Court in *Goode*[9] (an appeal by the father against interim orders that the children live with the mother and spend time with the father), the 'legislative pathway' (as it has come to be known)[10] sets out three related stages of analysis through which courts must proceed when making parenting orders.[11] However, prior to engaging with the three stages, the Full Court indicated that, while the *FLA* does not specifically require it,[12] identifying the competing proposals of the parties is the first step.[13]

The three stages, discussed in detail below, are:

1. a best interests of the child assessment (section 60CC), with the objects and principles of Part VII (section 60B) informing the analysis;
2. a determination of whether the presumption in favour of equal shared parental responsibility (ESPR) applies (section 61DA);
3. a determination of the appropriate care arrangements (that is, parenting time, section 65DAA).[14]

It is notable that some decision makers undertake these steps in reverse and the Full Court has accepted and approved this divergent approach. In *Starr v Duggan*, the Full Court (Boland, Thackray and Watts JJ) indicated that the order of the three-stage analysis as outlined in *Goode* is recommended, but not mandatory, and that 'a failure to follow what we see as a logical approach would not lead to an appealable error unless such error arose from a failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered'.[15] In recent years, however, the order of analysis specified in *Goode* has become the predominant approach of the Full Court. A unanimous High Court, in considering the appeal in *MRR v GR,* also dealt with the stages in this order.[16]

While the legislative pathway outlined above does not distinguish between cases involving family violence or child abuse and cases that do not, a distinction is in fact made on the face of the legislation where family violence or child abuse is present. Notably, the presumption of ESPR does not apply if there are reasonable grounds to believe that a parent

9 *Goode v Goode* [2006] FamCA 1346.
10 *SCVG & KLD* [2014] FamCAFC 42, [71].
11 *Goode v Goode* [2006] FamCA 1346, [81].
12 Although in *SCVG & KLD*, the Full Court held that the requirement in *Goode* that the court identify the proposals of the parties does find its source in the Act; *SCVG & KLD* [2014] FamCAFC 42, [74] (Ainslie-Wallace, Ryan and Stevenson JJ).
13 *Goode v Goode* [2006] FamCA 1346, [65].
14 The stages of analysis are summarised in *Goode*: *Goode v Goode* [2006] FamCA 1346, [81].
15 *Starr & Duggan* [2009] FamCAFC 115, [38], citing with approval *Taylor & Barker* [2007] FamCA 1246, [63]. See also *Sealey v Archer* [2008] FamCAFC 142.
16 *MRR v GR* (2010) 240 CLR 461; [2010] HCA 4.

of the child (or a person who lives with a parent of the child) has engaged in (1) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or (2) family violence (section 61DA(2)). Absent the applicability of the presumption of ESPR, courts must proceed to a best interests analysis only. The Full Court held in *Goode* that the effect of this was to leave all options open to the court:

> When the presumption of equal shared parental responsibility is not applied, the Court is at large to consider what arrangements will best promote the child's best interests, including, if the Court considers it appropriate, an order that the child spend equal or substantial and significant time with each of the parents. These considerations would particularly be so if one or other of the parties was seeking an order for equal or substantial and significant time but, as the best interests of the child are the paramount consideration, the Court may consider making such orders whenever it would be in the best interests of the child to do so after affording procedural fairness to the parties.[17]

As discussed below, the effect of this interpretation has been that orders for ESPR and/or shared time can still be made even where the presence of family violence or abuse renders the presumption inapplicable. This outcome is not uncommon.

8.3.2 INTERIM ORDERS

Interim orders are made where parents cannot agree on the arrangements for their children in the time between their application for orders and a final determination. Parties must have made an application for final orders in order to apply for interim orders. Interestingly, almost all of the key decisions regarding the legislative pathway for determining parenting disputes, including *Goode* and *Marvel*, were interim decisions. Given this, while our focus is on fully litigated matters, we consider interim orders first.

Questions about the appropriate legislative pathway to follow at the interim stage have arisen for two main reasons. The first reason relates to a lack of fit between the complexity of the pathway and the practical constraints operating at interim hearings: interim orders are made following a hearing of no longer than two hours, and usually on the basis of affidavit evidence, with cross-examination of witnesses only allowed in exceptional circumstances.[18]

The second reason relates to the impact of the 2006 amendments on the sorts of interim orders that should be made, given pre-2006 case law to the effect that the child's pre-separation living arrangements should normally be maintained. Specifically, in 1998 a unanimous Full Court (Ellis, Lindenmayer and Jordan JJ) had laid down some 'relevant criteria for the determination of interim proceedings for residence and contact' in *Cowling and Cowling*.[19] These criteria emphasised the desirability of maintaining stability for the child at the interim stage, so that, where the evidence shows that:

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17 *Goode & Goode* [2006] FamCA 1346, [65] (Bryant CJ, Finn and Boland JJ).
18 *Family Law Rules 2004*, rule 5.10.
19 *Cowling & Cowling* [1998] FamCA 19.

> the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary.[20]

Given the emphasis on meaningful relationships with both parents and shared care, the 2006 amendments prompted reconsideration of the approach in *Cowling*.[21] This occurred in *Goode*,[22] in which the Full Court concluded that 'there are passages in *Cowling* that do not sit comfortably with the Act as amended',[23] in particular the passage referred to above. The Court concluded that:

> It can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child.
>
> That is not to say that stability derived from a well-settled arrangement may not ultimately be what the Court finds to be in the child's best interests, particularly where there is no ability to test controversial evidence, but that decision would be arrived at after a consideration of the matters contained in s 60CC, particularly s 60CC(3)(d) and s 60CC(3)(m) and, if appropriate, s 60CC(4) and s 60CC(4A).[24]

Goode thus indicated a shift in focus post-2006 away from preserving stability and towards preserving (and possibly extending, or creating in the case of very young children) meaningful relationships prior to final determination. Yet despite this rejection of the main aspect of the *Cowling* decision, the Full Court was concerned to stress that some of the statements made in that decision remained 'apposite':[25]

> The procedure for making interim parenting orders will continue to be an abridged process where the scope of the enquiry is 'significantly curtailed'. Where the Court cannot make findings of fact it should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. The Court also looks to the less contentious matters, such as the agreed facts and issues not in dispute and would have regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future.[26]

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20 ibid., [22].
21 See Richard Chisholm, 'Interim Proceedings after the *Family Law Amendment (Shared Parental Responsibility) Act 2006*' (2006) 20 *Australian Journal of Family Law* 219.
22 *Goode* [2006] FamCA 1346.
23 ibid., [442].
24 ibid., [443].
25 ibid., [442].
26 ibid. See also *Lavender & Turner* [2007] FamCA 182.

Despite acknowledgement in *Goode* that the scope of the enquiry is 'significantly curtailed' in an interim application, the Full Court in *Marvel* confirmed that the legislative pathway remains the same for interim orders as it does for final orders.[27] Even if the interim application raises only a limited issue, such as the time a child should spend with a parent without any reference to parental responsibility or equal time, the legislation mandates that the three-stage process still be followed. To do otherwise is an error of law.[28] However, given the often limited information available at the interim stage, the court can conclude that applying the presumption of ESPR may not be appropriate in the circumstances of the case (section 61DA(3)).[29] While the Full Court in *Marvel* warned that section 61DA(3) should not be applied in a 'broad exclusionary manner', it nonetheless recognised that it is 'likely to have greater relevance in matters where a narrow issue is in dispute in interim proceedings, particularly if equal time or substantial and significant time orders are not in issue.'[30]

The issue of what legislative pathway is to be followed at an interim hearing when there is already an order for ESPR in place was addressed in the unanimous Full Court decision of *SCVG & KLD* (Ainslie-Wallace, Ryan and Stevenson JJ).[31] In *SCVG*, the court concluded that while the legislative pathway for interim orders remains the same as it does for final orders, the level of inquiry required will depend on the overall circumstances of the case. The parents in *SCVG* had been engaged in parenting litigation for over eight years in relation to their children who were aged 10 and 12 by the time of the Full Court decision. Their most recent final orders, made in 2010 by Altobelli FM, were for ESPR, that the children live with the mother, and that the father have substantial and significant time. Throughout the litigation, equal time had been consistently rejected as not being in the best interests of the child. When the mother sought interim orders to suspend contact on the basis of the father's arrest for a number of offences for which he was later convicted, the father argued that Faulks DCJ, who had heard the interim matter, was required because of the existing order for equal shared parenting responsibility to consider an order for equal time under section 65DAA. The mother submitted that earlier courts had considered and rejected equal time and that it was therefore not necessary to revisit it where those findings and orders were not in issue. The question for the court was what the appropriate 'legislative pathway' should be in such a case.

The Full Court noted that neither *Goode* nor *Marvel* addressed the application of section 65DAA in a case where an earlier final order for ESPR is to continue, equal time has previously been refused, and it is common ground that an equal time order would not be in the child's best interests. It was therefore necessary to determine the issue. It was ultimately concluded that even where, in earlier proceedings, a court has ordered ESPR but rejected equal time, it is still necessary to reconsider section 65DAA. As the Court explained:

> [Section] 65DAA(1) operates '... if a parenting order provides (or is to provide) ... that a child's parents are to have equal shared parental responsibility for the child'.

27 *Marvel* [2010] FamCAFC 101, [106] (Faulks DCJ, Boland & Stevenson JJ).
28 ibid., [108].
29 ibid., [107].
30 ibid., [107].
31 *SCVG & KLD* [2014] FamCAFC 42 (*SCVG*).

> The use of both present and future tense demonstrates that the provision is triggered by an order already in existence, irrespective of whether that order was made in the current or earlier proceedings. The effect of this is that even if an earlier court has rejected a prior application for equal time or substantial and significant time, if another application for the same type of order is commenced, where there is an order for equal shared parental responsibility, section 65DAA must be addressed again.[32]

Though the Full Court rejected the mother's submissions with regard to the appropriate legislative pathway required in interim hearings where a pre-existing order for ESPR is in force, it held that the trial judge had, in concluding via his section 60CC analysis that an order for equal time would not be in the children's best interests, considered both section 61DA and section 65DAA. As the Court explained:

> In this case, equal time required scant consideration; such an order was not sought, there was no expert evidence that suggested equal time would be in the children's best interests and his Honour's findings made pursuant to section 60CC were such that it was open to him to find in accordance with section 65DAA(1) that equal time would be in the children's best interests.[33]

Thus, the level of explicit inquiry required by the trial judge was diminished in that case, although no general guidance was offered regarding what is likely to suffice.

While the legislative pathway for interim orders is identical to that required for final orders, where there are allegations of child abuse or family violence in interim proceedings, the court must meet a number of additional requirements. Section 67ZBB requires that where a notice has been filed under section 67Z(2) (child abuse) or section 67ZBA(2) (family violence) indicating an allegation that there has been, or there is a risk of, abuse or family violence, the court must (section 67ZBB(2)):

(a) consider what interim or procedural orders (if any) should be made
  (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
  (ii) to protect the child or any of the parties to the proceedings; and
(b) make such orders of that kind as the court considers appropriate; and
(c) deal with the issues raised by the allegation as expeditiously as possible.

The court is required to take this action as soon as practicable after the notice is filed and 'if it is appropriate having regard to the circumstances of the case—within 8 weeks after the document is filed' (section 67ZBA(3)(b)). Under this new regime, which came into effect with the enactment of the *Family Law Amendment (Family Violence) Act 2011* (Cth) (the 2012 amendments), decisions on interim matters in cases involving allegations of violence or abuse should be made more quickly than other interim decisions. However, serious concerns were raised prior to the 2012 amendments about the lack of resources available to judges making interim decisions and the inadequacy of screening in cases where family violence or abuse has been alleged (Chapter 5).[34] The extent to which those concerns have

32 ibid., [91].
33 ibid., [84].
34 Richard Chisholm, *Family Courts Violence Review*, report to Attorney-General, 27 November 2009, pp 80–4, <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.pdf>.

been resolved (particularly given cuts to legal aid) is not yet clear.[35] As Richard Chisholm has observed, 'One of the greatest practical problems in cases involving family violence issues is what to do in interim cases.'[36]

A final issue raised by interim orders is the extent to which outcomes at the interim stage influence final orders. The influence arises largely from the fact that interim orders are usually in place for 12 months or more, creating a 'status quo' that may be perceived as difficult to overcome. This argument is bolstered by the requirement that the court, when assessing the child's best interests, take into account the effect on the child of changes in circumstances (section 60CC(3)(d)). By contrast, section 61DB, added in 2006, requires that '[i]f there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of *parental responsibility* made in the interim order'. The impact of section 61DB appears minimal, however, given that most disputes about the status quo relate to the *time* a child has with a parent, not parental responsibility.

It is clear from decisions such as *Dicosta & Dicosta*[37] (discussed at 8.4.1.3.6.2) and *Escott & Lowe*[38] that the status quo created by an interim order remains a relevant consideration at trial. In *Escott*, Rose J, making final orders, refused the father's application to depart from interim parenting orders that he have substantial and significant time (which were already a dramatic deviation from the mother's primary care of the parties' two children, aged eight and six pre-separation) to an equal time arrangement on the basis that 'the likely effect of changes in the circumstances of the two children' would cause 'significant difficulties'[39] due to the combined effect of the children's 'young ages', the mother's role as their primary carer, and the parents' 'difficulties of communication and attitudes as well as parenting style'.[40] There is no doubt, however, that, because of the legislative emphasis on the benefit of the child having a meaningful relationship with both parents, the weight to be given to interim parenting arrangements has, since the 2006 amendments, been diminished.

8.4 THE THREE-STAGE LEGISLATIVE PATHWAY

As noted above, the legislative pathway for determining parenting orders consists of three stages:

1. a best interests of the child assessment;
2. a determination of whether the presumption in favour of equal shared parental responsibility applies;
3. a determination of the appropriate care arrangements.

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35 Jane Lee, 'Family Court Children "Compromised" as Parents Represent Themselves', *The Age* (online), 17 March 2014, <www.theage.com.au/victoria/family-court-children-compromised-as-parents-represent-themselves-20140317-34x1t.html>.

36 Chisholm, 'Family Courts Violence Review', above n 34, p 80.

37 *Dicosta & Dicosta* [2008] FamCAFC 161.

38 *Escott & Lowe* [2007] FamCA 307.

39 ibid., [80].

40 ibid.

8.4.1 STAGE 1: THE BEST INTERESTS OF THE CHILD

The legislation requires that, in deciding whether to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration (section 60CA). Given that the best interests of the child inform every stage of the decision-making process, it is logical that this assessment should be the first stage in the decision-making framework for parenting orders. This point was emphasised in *Goode* where it was stated that throughout the three-stage process 'the child's best interests remain the overriding consideration'.[41] The term 'interests' is defined in section 4(1) as including matters related to the care, welfare or development of the child. The definition suggests a concept having broad application, encompassing all matters relevant to the raising of child.

Prior to the 2006 amendments, courts were required to consider a checklist of factors provided in the legislation when determining the child's best interest, but no further guidance was given.[42] Determining an individual child's best interests on the basis of the checklist was a matter entirely for judicial discretion. The 2006 amendments curtailed this discretion by adding section 61DA—the presumption of ESPR—which requires that when a court is considering who will have parental responsibility in respect of a long-term issue, it is presumed that the child's best interests will be served by responsibility being shared equally between the parents, subject to the presumption (1) not being applicable due to exceptions relating to family violence and child abuse; or (2) being rebutted by evidence that it would not be in the child's best interests. When the court proposes to make an order for ESPR, discretion is further curtailed by the requirement to consider whether shared time is in the child's best interests and reasonably practicable (section 65DAA), although the best interests requirement here illustrates the circularity evident in the legislation and the pathway.

Further, prior to the 2006 amendments, the best interests criteria were presented as a list of relevant factors in no particular order. The 2006 amendments introduced a 'two-tiered'[43] list, which consists of primary considerations and additional considerations that must be taken into account in determining what is in a child's best interests (section 60CC). The best interests criteria are to be read in light of the objects and principles underlying Part VII, which are located in section 60B. The mirroring of the section 60B objects in section 60CC suggests an intention to embed them into the decision-making process.

8.4.1.1 THE PRIMARY AND ADDITIONAL CONSIDERATIONS

The primary considerations, which reflect the first two objects in section 60B, are:

1. the benefit to the child of having a meaningful relationship with both of the child's parents; and
2. the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

41 *Goode* [2006] FamCA 1346, [65].
42 The checklist was found in s 68F of the pre-2006 *FLA*.
43 Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two-Tiers' (2006) 20(2) *Australian Journal of Family Law* 179.

The primary considerations, referred to by Brown J in *Mazorski & Albright* as the 'twin pillars',[44] have attracted considerable analysis, most pertaining to the question of how the two primary considerations interact. In particular, how should the risk of harm be weighed up against the benefit of a meaningful relationship? A series of post-2006 amendment reviews and evaluations (Chapters 5 and 6) suggested that the lack of guidance with regard to the relationship between the two primary considerations was an important factor contributing to children being exposed to family violence.[45] There was also sustained criticism of the notion that judges could 'balance' the competing effects of the primary considerations in cases of violence.[46] For example, Richard Chisholm's *Family Courts Violence Review* stated that the 'twin pillars formula is not an ideal guide to children's best interests' and that the current law, 'while it deals with protection against violence and abuse as well as the value of parental involvement ... deals with the latter in more detail, and overall gives the impression that parental involvement is more important than protecting children and adults from violence and abuse'.[47] As discussed in Chapter 5, these criticisms gave rise to section 60CC(2A), which was added by the 2012 amendments, making clear that the court 'is to give greater weight' to the need to protect children from abuse, neglect or family violence than to the benefit of the child having a 'meaningful relationship' with both parents. A mirror provision (section 60D(1)) applies to 'advisors' (defined in section 60D(2)).

The additional considerations are set out in section 60CC(3) (Chapter 6). Initially, section 60CC(3) had included as an additional consideration—'the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent'—or the so-called 'friendly parent rule'.[48] The Explanatory Memorandum accompanying the Family Law Amendment (Family Violence) Bill 2011, which removed this provision, referred to three major government-commissioned reports on the effects of the 2006 amendments all of which noted 'the impact this provision had in discouraging disclosures of family violence and child abuse.'[49] The Memorandum stated that each of the reports indicated that 'parties were not disclosing concerns of family violence and child abuse for fear of being found to be an "unfriendly parent"'.[50] The discouraging effect that the 'friendly parent provision' had on parents raising concerns about violence and abuse from 2006, until its removal five years later, was one

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44 *Mazorski & Albright* [2007] FamCA 520, [3].

45 See Dale Bagshaw, Thea Brown, Sarah Wendt, Alan Campbell, Elspeth McInnes, Beth Tinning, Becky Batagol, Adiva Sifris, Danielle Tyson, Joanne Baker and Paula Fernandez Arias, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experience and Views of Children and Adults from Families who Separated Post-1995 and post-2006' (2011) 86 *Family Matters: Australian Institute of Family Studies Journal* 49, 60; Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3, chapter 10.

46 See Zoe Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future under the New Family Law System?' (2007) 21 *Australian Journal of Family Law* 87; Donna Cooper, 'Continuing the Critical Analysis of "Meaningful Relationships" in the Context of the "Twin Pillars"' (2011) 25 *Australian Journal of Family Law* 33. See more generally Helen Rhoades, Charlotte Frew and Shurlee Swain, 'Recognition of Violence in the Australian Family Law System: A Long Journey' (2010) 24 *Australian Journal of Family Law* 87.

47 Richard Chisholm, above n 34, pp 129–30.

48 The former section 60CC(3)(c) was removed *by the Family Law Amendment (Family Violence) Act 2011 (Cth)*.

49 Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3; Chisholm, 'Family Courts Violence Review', above n 34; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, Family Law Council, 2009.

50 Explanatory Memorandum to the Family Law Amendment (Family Violence) Bill 2011 (Cth), [32].

of the key factors behind the 2012 amendments. However, given that encouragement to be a 'friendly parent' (that is, a parent who is seen to support the other parent's ongoing relationship with the child) was strong before the 2006 amendments,[51] this philosophy may remain influential despite the repeal of the provision.

8.4.1.2 THE RELATIONSHIP BETWEEN THE 'TWO TIERS'

No guidance is provided in the legislation with regard to the relationship between the primary and additional considerations. However, as Dessau J indicated in *M and S*,[52] the Explanatory Memorandum for the Family Law Act (Shared Parental Responsibility) Bill sheds some light on the distinction:

> The intention of separating the primary considerations from the additional considerations was to '... elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act.'
>
> The memorandum went on to explain that they were elevated as they deal with 'important rights of children and encourage a child-focused approach', although it was acknowledged that there may be some instances where the secondary considerations outweigh the primary ones.
>
> In the second reading speech in the Senate on 11 May 2006, it was noted that the Report on the Bill referred to the primary considerations in s 60CC(2) as intended to 'draw appropriate attention to the objects' provisions in a positive way', and likely to assist in directing the court's attention to those objects, 'particularly in relocation cases'. That point, however, was not expanded upon further.[53]

Two points can be gleaned from Dessau J's summary of the Explanatory Memorandum. First, the decision to elevate the primary considerations above the others was designed to make decision makers focus more on the objects of Part VII contained within section 60B. Second, it was clearly envisaged that the primary considerations would not always trump the additional considerations. The latter conclusion has been supported by the Full Court, which has consistently held that the legislation does not operate so that the primary considerations outweigh the additional considerations.[54] Rather, all relevant considerations should be taken into account, with 'particular emphasis' being placed on the primary considerations.[55]

Indeed, a common approach is for the court to assess evidence in relation to the additional considerations first and then use the findings to assess the primary considerations. For example, in *Escott and Lowe*, Rose J observed that the two tiers are interrelated and that the findings of fact in relation to the additional considerations provide 'the substratum of facts or factual platform' for consideration of the primary considerations.[56] Conversely,

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51 Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112; Rae Kaspiew, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' (2007) 29(1) *Sydney Law Review* 131.

52 *M & S* [2006] FamCA 1408.

53 ibid., [33]–[34].

54 *Marsden & Winch (No 3)* [2007] FamCA 1364, [76]–[78]; *Aldridge v Keaton* (2009) FamCAFC 229, [74]; *Slater v Light* [2011] FamCAFC 1, [45]; *Champness & Hanson* [2009] FamCAFC 96, [101]–[103].

55 *Marsden & Winch (No 3)* [2007] FamCA 1364, [78].

56 *Escott & Lowe* [2007] FamCA 307, [35].

however, some judges choose to assess each factor in turn, beginning with the primary considerations and working through the list.[57] In reality, taking the latter approach still tends to involve using findings with regard to the additional considerations to inform the making of findings as to the primary considerations.

There has been considerable debate about the extent to which the division of the best interests considerations into two tiers has been useful. Patrick Parkinson has supported the bifurcated approach on the basis that the additional considerations simply 'amplify' the primary ones, and that there is little danger of inconsistency between them.[58] Richard Chisholm, however, has criticised the approach on several bases.[59] First, he has questioned the need for the two-tier approach on the grounds that the primary considerations are already given enough emphasis elsewhere, including section 60B. Second, he has argued that the approach downgrades the importance of children's views, which appear only as an additional consideration. Third, he has argued that 'it seems inevitable that the two-tier formulation will lead to confusion and legal complexity'. Finally, he suggests that the hierarchy is not soundly based, pointing out that:

> Rather than reflecting some coherent view about children and their needs, the formulation seems to reflect something quite different, namely a political desire to be even-handed between the two opposing adult views or concerns that have pervaded the public debate: the men's concerns to stay involved with the children, and the women's concerns that this may expose the children to violence.[60]

A number of submissions to the Senate's 2011 inquiry into the Family Violence and Other Measures Bill 2011 recommended that the two tiers be abolished.[61] These submissions argued that a single set of factors, where safety of children is the first consideration and given priority, would better serve the best interests of children. The two-tiered approach was also criticised on account of its complexity and the confusion it caused for parents, the judiciary, and family law professionals alike.[62] Although the Senate report stated that 'a large number of submissions' recommended removing the two tiers, they were retained.[63]

8.4.1.3 INTERPRETING THE PRIMARY CONSIDERATIONS

The two primary considerations are the benefit to the child of having a meaningful relationship with both of the child's parents and the need to protect the child from physical or psychological harm. As discussed in Chapter 6, following the 2012 amendments, in

57 *Melrose & Melrose* [2010] FamCA 398; *SCVG v KLD* [2010] FMCAfam 641, [119ff]; *Hutley & Hutley* [2012] FamCA 679.

58 Patrick Parkinson, above n 43.

59 Richard Chisholm, 'The Family Law Amendment (Shared Parental Responsibility) Bill 2006: Putting Children at Centre Stage?', paper presented at the Contact and Relocation: Focusing on the Children conference, convened by the Centre for Children and Young People, Southern Cross University, Byron Bay, May 2006.

60 ibid., p 7.

61 See, for example, the joint submission of John Dewar and Helen Rhoades, Submission 9; and that of the Family Law Council, Submission 113, Senate Legal and Constitutional Affairs Legislation Committee, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (August 2011).

62 John Dewar and Helen Rhoades, Submission 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (August 2011).

63 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (August 2011), p 76.

applying the considerations, the court is to give greater weight to the consideration that children be protected from harm.

8.4.1.3.1 The benefit to the child of having a meaningful relationship with both parents

The Act gives no guidance as to how to interpret the first of the primary considerations. In particular, the question of what is meant by a 'meaningful relationship' is left unanswered. One of the first cases to address the question was the Full Court (Bryant CJ, Faulks DCJ and Boland J) decision in *McCall & Clark*,[64] which remains the leading authority.

McCall was a parenting dispute concerning a four-year-old boy. The child lived with his mother in Dubai, which he had done since his parents had separated when he was six months old. The father lived in Brisbane. While the father had visited on several occasions he had never had the child stay with him overnight. The dispute arose because the mother wanted to remain with the child in Dubai, while the father wanted orders that he return to Brisbane. The matter came before Slack FM who was required to consider the benefit of the child having a meaningful relationship with his father. Focusing on the *existing* relationships between the boy and each of his parents, Slack FM held that 'it is difficult to see how with that amount of time spent with his father that he could have developed a close emotional attachment to his father'.[65] This led to the federal magistrate's finding that he 'could not reach a conclusion that the child has a significant emotional attachment to his father at the present time'.[66] An order was made for ESPR, but it was ordered that the child live with his mother in Dubai. The father's time with the child would differ depending on whether he chose to relocate to Dubai or not.

The matter was appealed to the Full Court on the basis that, by focusing solely on current relationships, Slack FM had failed to give adequate consideration to the benefit to the child of having a meaningful relationship with both parents and how that relationship could be achieved and fostered in the future. The Full Court set out three possible interpretations of the phrase 'meaningful relationship' in section 60CC(2)(a):

(a) that the legislation requires a court to consider the benefit to the child of having a meaningful relationship with both of the child's parents by examination of evidence of the nature of the child's relationship at the date of the hearing, to make findings based on that evidence, which findings will be reflected in the orders ultimately made ('the present relationship approach');

(b) that the legislature intended that a court should assume that there is a benefit to all children in having a meaningful relationship with both of their parents ('the presumption approach'); and

(c) that the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents ('the prospective approach').[67]

64 *McCall & Clark* [2009] FamCAFC 92 (*McCall*).
65 ibid., [30] (Bryant CJ, Faulks DCJ, Boland J, citing [35] of the judgment of Slack FM).
66 ibid., [30] citing [37] of the judgment of Slack FM.
67 ibid., [118].

The Full Court concluded that 'the preferred interpretation of benefit to a child of a meaningful relationship is the "prospective approach" although, depending upon factual circumstances, the present relationship approach may also be relevant.'[68] The Court explicitly rejected the presumption approach, stating that 'if the legislature intended to elevate the benefit to a child of a meaningful relationship to a presumption it would have said so in clear and unambiguous language.'[69] It is therefore necessary when applying section 60CC(2)(a) that, if it is in a child's best interests, orders be framed to ensure that the child has a meaningful relationship with both parents. The present relationship between the parent and child may also be relevant, but the fact that a significant relationship has not yet been established does not prevent the court from making 'appropriate' orders. In reaching these conclusions, the Full Court noted that while the legislation requires a court to focus on the *benefit* to the child of a meaningful relationship and that in most instances this benefit will be a positive one. However, the Court also made clear that 'there will also be some cases where there will be no positive benefit to be derived by a child by a court attempting to craft orders to foster a relationship with one parent if this would not be in the child's best interests.'[70]

A further issue to be resolved in *McCall* was what is meant by the term 'meaningful'. The Act does not include a definition of 'meaningful'. Nor does it provide any specific criteria to assess how parents either have, or should have, a 'meaningful involvement' in a child's life. Turning to the dictionary definition, read through the interpretive lens of the section 60B objects, the Full Court cited with approval the approach taken by Brown J in *Mazorki & Albright*:[71]

> What these [dictionary] definitions convey is that 'meaningful', when used in the context of 'meaningful relationship', is synonymous with 'significant' which, in turn, is generally used as a synonym for 'important' or 'of consequence'. I proceed on the basis that *when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child. It is a qualitative adjective, not a strictly quantitative one.* Quantitative concepts may be addressed as part of the process of considering the consequences of the application of the presumption of equally shared parental responsibility and the requirement for time with children to be, where possible and in their best interests, substantial and significant.[72]

As Brown J suggests, framing orders to ensure that a child has a meaningful relationship with both parents does not necessarily mean that the child must spend a lot of time with

68 The Court went on to note that while present relationships are clearly part of the best interests analysis—s 60CC(3)(b) requires a court to explore existing relationships between a child and their parents and other persons, including grandparents—if the interpretation set out in (a) were 'exclusively applied, it would limit a court making appropriate orders in circumstances where a significant relationship had not been established between a child and a parent at the date of trial'. *McCall* [2009] FamCAFC 92, [119].

69 ibid., [120].

70 ibid., [122].

71 ibid., [109]–[115].

72 *Mazorki & Albright* [2007] Fam 520, [26] (emphasis added).

each parent. For example, in *Charles & Charles*[73] Cronin J held that reducing the time spent with the father would encourage a 'more meaningful' relationship, primarily because it would reduce the amount of stress the children experienced. The parents in *Charles* has been sharing the care of their two children aged nine and seven, roughly equally. The mother wanted to change the arrangement so she was the primary carer, while the father wanted equal time to continue. The mother's evidence was that the father was excessively controlling of the children's lives to the extent that they did not have independence to develop their own personalities.[74] Cronin J agreed, stating that 'it is difficult to resist the view that the children are placed under an enormous amount of pressure by the husband to conform to a view that he holds about how they should be brought up. That comes out clearly from the intensity of the husband's view about raising the children.'[75] Ultimately, Cronin J concluded that with less time, 'the relationship between the [father] and the children ... may develop into something less stressful than it has been.'[76] The children's time with the father was reduced from six days a fortnight plus an afternoon after school to five days a fortnight.

While the decision in *Charles* resulted in less time with the father, that time was still significant; indeed, it is not clear how it might have made a difference to the issues faced by the children. The case in the end tends to confirm the emphasis in the case law when applying section 60CC(2)(a) on achieving and fostering a positive and significant relationship with both parents even in the presence of significant difficulty, and the absence of an existing relationship.

8.4.1.3.2 Protection from harm and family violence

The second primary consideration is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (section 60CC(2)(b)). As discussed in Chapter 5, family violence is a key characteristic of the families engaged in the family law system. As discussed in that chapter, since the early 1990s it has been increasingly understood that family violence relevant to parenting disputes extends well beyond physical violence, and well beyond violence targeted at children, with increasing understanding being reflected in the *FLA* since the *Family Law Reform Act 1995* (Cth) (the 1996 amendments). Yet, as discussed in Chapters 5 and 6, research evaluating the effect of the 2006 amendments consistently demonstrated that greater emphasis had been given to 'meaningful relationships' than protection from harm in litigated cases (evidenced by the increase in court ordered shared time arrangements post-2006 compared to pre-2006).[77] The 2012 amendments, also discussed in Chapter 6, introduced a suite of changes with the aims of strengthening the protection given to victims of violence and ensuring that parents were not discouraged from raising concerns about violence

73 *Charles & Charles* [2007] FamCA 124.
74 ibid., [157].
75 ibid., [88].
76 ibid., [157].
77 Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3; Chisholm, *Family Courts Violence Review*, above n 34.

or abuse. These changes, which are discussed in Chapter 5, included the introduction of section 60CC(2A), amendment of section 60CC(3)(k) such that courts are permitted to consider *all* family violence orders, whether interim or final,[78] and new definitions of 'abuse' (section 4) and 'family violence' (section 4AB).

8.4.1.3.3 Interpreting the 2012 family violence amendments

As the new family violence provisions only took effect on 7 June 2012, and do not apply to cases commenced prior to that date, their impact is still being determined (Chapters 5 and 6). Most of the existing judgments relate to interim matters and there is, as yet, no Full Court case interpreting and applying the amendments. However, some early trends have been identified. Research conducted extra-curially by Justice Strickland, a sitting member of the Full Court, suggests that the amendments have increased the number of instances in which allegations of family violence are made.[79] In his survey conducted with registrars, Strickland J found that 31 per cent thought that family violence allegations were being made more frequently in affidavits filed in the family courts since the 2012 reforms, primarily because of the expanded definition of family violence.[80] They reported that there were more allegations of financial and emotional abuse and psychological and controlling behaviour than purely physical abuse. Yet, as Zoe Rathus has argued, there are inconsistencies within the definition of family violence in section 4AB that may render its application narrower than the legislature intended (Chapter 5).[81] Justice Strickland and Kristen Murray have also suggested that, though there are very few cases to analyse, 'the impression is created that s 60CC(2A) is not being invested with as much force as perhaps the legislature anticipated or intended'.[82]

One of the early decisions applying the new provisions in more than a cursory manner is the Federal Magistrates Court of Australia (FMCoA, as the Court was then known; it became the FCCoA in 2013) decision in *Carra & Schulz*.[83] In summary, *Carra & Schultz* underlines the requirement that coercion, control or fear be established, and also suggests that judges will be alive to spurious use of the new provisions by litigants. The case involved a dispute as to what constitutes family violence under the *FLA*. The father filed an application seeking orders to spend time with his six-year-old daughter. He also filed a Notice of Child

78 The previous version of s 60CC(3)(k) limited consideration to final orders.

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

80 It is possible that the increase in allegations identified in Strickland J's survey, conducted soon after the 2012 amendments came into force, represent what has been referred to in the policy context as a 'disappearing nudge effect', whereby a policy change produces a brief behavioural effect but then things return to the status quo. Bruce Smyth et al., above n 2.

81 Rathus, above n 46, p 360. Similar arguments have been made elsewhere: Patrick Parkison, 'The 2011 Family Violence Amendments: What Difference Will They Make?' (2012) 22 *Australian Family Lawyer* 1, 5; Steven Strickland and Kristen Murray, 'A Judicial Perspective on the Australian Family Violence Reforms 12 Months On', forthcoming, (2014) 28 *Australian Journal of Family Law*. See also Adiva Sifris and Anna Parker, 'Family Violence and Family Law: Where to Now?' (2014) 4 *Family Law Review* 3, who argue that further *FLA* reform is needed to recognise that family violence is the norm rather than the exception.

82 Strickland and Murray, ibid.

83 *Carra & Schulz* [2012] FMCAfam 930 (Carra).

Abuse, Family Violence and Risk of Family Violence (Form 4), alleging that the mother was violent in failing, or refusing to allow him, to spend time with and communicate with his daughter other than occasional phone calls. Relying on the examples of what might amount to family violence in the new definition, the father argued that the mother's behaviour amounted to 'preventing [him] from making or keeping connections with his ... family' (section 4AB(2)(i)). Hughes FM rejected the assertion that the mother's behaviour amounted to family violence. First, her Honour confirmed that only subsections (1) and (3) formed the operative part of the section. Thus, the essence of the definition in section 4AB(1) is behaviour that coerces or controls a family member or causes them to be fearful. The examples provided in section 4AB(2) must be understood in light of this requirement. Turning to the applicability of the legislative example relied upon by the father, Hughes FM held that it 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.'[84] There was no evidence in this case that the mother was trying to coerce or control, or that the father was fearful.[85] In fact, Hughes FM held that 'there may be good reasons' for the mother preventing contact as there had been previous orders that parenting time with the child be supervised.[86]

The decision in *Carra* reinforces the requirement of coercion, control or fear. It also seems to suggest that if a parent fleeing family violence were prevented from communicating with the child by the perpetrator, the definition of family violence might be met if the severing of communication was a measure used to coerce or control the fleeing parent, or cause them be fearful for themselves or the child. What is clear from the decision, however, is that coercion, control or fear must be demonstrated if the definition of family violence is to be met, and the examples in section 4AB(2) do not form part of the definition.

Longer & Longer[87] also provides some insight into how the new provisions will be interpreted. *Longer* involved the making of a final order in a case filed before the commencement date of the family violence reforms, but handed down eight months after the amendments had come into force. While the amendments were not applicable to the decision, Terry FM nonetheless addressed the concepts of coercion and control in her decision. The mother's allegations included a number of incidents in which the father had slapped her face, grabbed her hair and throat, pushed her onto a bed (after she threw an item of clothing at him), and struck her on the side of the head after she pushed a computer lid down on his fingers during an argument. The mother also described abuse of a more psychological nature and maintained that the father was 'a violent and coercive and controlling man.'[88] She claimed that he owned guns, would not let her hold bank accounts or drive the car, resented her studies, and disconnected the internet when she had assignments due. She also said he frequently belittled her, calling her a 'stupid, lazy, selfish person' with 'no morals'.[89] The father admitted a number of the incidents but also

84 ibid., [7].
85 ibid., [7].
86 ibid., [9].
87 *Longer & Longer* [2013] FMCAfam 257 (*Longer*).
88 ibid., [60].
89 ibid., [71].

made allegations of violence against the mother that included throwing things, slapping, punching and scratching him, and calling him offensive names.

Although her Honour correctly applied the pre-2006 definition of family violence, she addressed the mother's assertion that the father exercised 'coercion and control' over her, ultimately rejecting it. While Terry FM accepted that the father was a 'rigid' man who would have been difficult to live with, he had *not* 'engaged in coercive or controlling violence or engaged in a reign of terror to get his own way'. As Rathus has stated with regard to the decision *Longer*:

> 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. However, those features were ultimately used to find that the father's behaviour was not in that category.[90]

8.4.1.3.4 What level of family violence is necessary before it will outweigh continuation of a parent–child relationship?

In this section, we explore the circumstances in which the family law courts appear more likely to make orders that one parent have no parental responsibility or parenting time with a child due to family violence. The research suggests that the application of the law in the pre-2012 environment produced the result that only severe, well-evidenced violence would outweigh the perceived harm associated with the child losing their relationship with the offending parent, a trend that was identified both prior to and since the 2006 amendments.[91] However, there is significant variability in how judges construe 'bad behaviour' on the part of parents, sometimes producing inconsistent results.

Indeed, it is rare for judges to completely sever the relationship between a child and parent due to family violence or abuse, and they are clearly reluctant to do so. This is, in part, because courts have available to them a number of protective orders that are believed to adequately address the risk to the child. The most common option utilised, particularly in high-risk cases, is supervised contact. Supervised contact, discussed in more detail in Chapter 7, is where parenting time is exercised at a contact centre, or is supervised within the home by another family member, such as a grandparent. Where there is a risk of violence during the handover of the child, courts can order that handovers take place in a neutral, often public, place, such as a school, park, or restaurant. While the risk of family violence or abuse is usually the reason for using a contact service, research on children's experience of supervision at contact centres is generally positive. For example, most of the children interviewed in a large-scale study of Australian contact centres reported feeling safe while using the centre. For these children 'the centre appeared to have successfully buffered them from experiencing their parents' anxieties about contact, inter-parental conflict and

90 Rathus, above n 46, p 374.

91 Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112, 112; Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3.

violence, and their contact parent's drunken and abusive behaviour.'[92] However, in a small number of cases, having supervised contact did not protect children from their parents' ongoing animosity towards one another, or the contact parent's abusive behaviour towards the children.[93] Supervised access is also not seen as a long-term solution.[94] Where an order is made that the time a parent spends with a child be under supervision indefinitely, there needs to be 'cogent reasons to support such orders.'[95] It is thus not uncommon for orders to include 'sunset clauses', whereby supervision will cease, sometimes because the child has reached a certain age.[96]

The 2014 FCoA decision of Benjamin J in *Cannon & Acres*[97] is an example of where a combination of family violence and abuse resulted in an order that all contact and communication between the father and his 12-year-old daughter cease. Parenting litigation had commenced when the child was five and initially she had 'endeavoured to meet what she perceived as the needs of her parents by making them happy'.[98] However, after seven years of extensive conflict and family violence (the conduct included assault, harassment, verbal abuse, and stalking of both the mother and child and was held by Benjamin J to meet the definition of 'family violence' in section 4AB(1)), the child concluded that 'enough was enough' and told her mother that she no longer wanted to see or communicate with her father.[99] The father was also found to have frequently instituted 'vexatious proceedings' (section 102Q(1)) against the mother. Despite this 'persistent abhorrent behaviour', Benjamin J held that the mother had 'remained child focussed' and maintained the child's relationship with her father.[100] In reaching the conclusion that parenting time between father and daughter should cease, Benjamin J cited the father's violent behaviour, as well as the fact that he had 'little or no insight into his obsessive and uncontained behaviour' and 'is unable or unwilling to see how his behaviour has impacted upon the mother ... with consequential impact upon the child'.[101] The mother was awarded sole parental responsibility and the father was barred from spending time with the child. The father was also prohibited under section 102QB from instituting proceedings against or in relation to the mother or the child without first having been granted leave.[102] In reaching the conclusion that

92 Grania Sheehan, Rachel Carson, Belinda Fehlberg, Rosemary Hunter, Adam Tomison, Regina Ip and John Dewar, *Children's Contact Services: Expectation and Experience: Final Report*, Griffith University, Brisbane, June 2005, p 166.

93 ibid., 159–62.

94 *Moose & Moose* [2008] FamCAFC 108 (May & Boland JJ).

95 ibid., [10].

96 See *Thistle & Thistle (No. 2)* [2014] FamCA 67. In *Thistle* the father was accused of sexually abusing the mother's daughter from a previous relationship. The allegations were made by the child when she was 11 years old, absent any conflict between the parents. Despite feeling 'uncomfortable' with regard to the allegations, Kent J awarded supervised contact to the father, initially at a contact centre and later supervised by his new partner. However, supervision was to cease when the child turned 13. See also *Champness & Hanson* [2009] FamCAFC 96; *Moose & Moose* [2008] FamCAFC 108; *Slater & Light* (2013) [2013] FamCAFC 4.

97 *Cannon & Acres* [2014] FamCA 104.

98 ibid., [4].

99 ibid., [7].

100 ibid., [86].

101 ibid., [5].

102 ibid., [494]. The effect of the order was that the father was prohibited from instituting proceedings under the *FLA* against or in relation to the mother or the child without first having been granted leave to commence that proceeding pursuant to s 102QD of the Act.

contact should cease, Benjamin J explicitly noted that he gave greater weight to section 60CC(2)(b), as required by section 60CC(2A).[103] The father's violence was not, however, as severe as is commonly evident in cases where no orders for ESPR or parenting time are made. Rather, it was a combination of section 60CC factors, including the child's views and maturity, the mother's support of the father/child relationship, the father's lack of insight, and the family violence, that was influential in the reasoning justifying the order.

Edwards & Granger,[104] also decided by Benjamin J, provides a more typical example of the sort of violence that has led to orders for no ESPR or parenting time. In *Edwards & Granger*, the father's pre- and post-separation family violence resulted in a finding that he should no longer have parental responsibility in relation to, or spend any time with, his two children, aged 10 and seven. The violence included a horrific attack and sexual assault of the mother after she told the father she wished to end the marriage, and for which the father was convicted and imprisoned. The mother suffered physical, emotional and psychological injuries as a result of the attack and required ongoing psychological treatment. Despite his conviction, the father refused to acknowledge the attack had occurred and asserted that the sex was consensual. He also indicated to various experts in the trial, as well as the mother, that 'he would not be constrained by court orders.'[105] Prior to his incarceration, the father took occupation of the matrimonial home, refusing to participate in the sale of the property. He lived in the home for some time with a friend, but made no loan repayments (although he had some capacity to do so) and did not obtain any rent from his friend. The mortgagee eventually sold the home. As a consequence, the mother was left with a liability of about $80,000, the father having become a bankrupt. The paternal grandmother, who also sought time with the children, supported the father's application and insinuated that the mother had 'fabricated' the attack. Other members of the father's family repeatedly engaged in harassment of the mother and child.

On the basis of the father's extensive violence, the enormous impact it had on the mother, and the father's complete denial of it ever happening, Benjamin J concluded that the father posed an unacceptable risk of physical and psychological harm to the children and, if parenting time were permitted, to the mother.[106] It was therefore concluded that the mother have sole parental responsibility for the children and that the father have no parenting time. Due to Benjamin J's belief that the father would approach the mother, as well as the mother's fear of him, pursuant to section 68B the father was also restrained from directly or indirectly approaching or communicating with the mother and/or the children, going within 500 metres of the mother or children, and going within 500 metres of the children's school, the mother's place of employment, or the home or place where the mother and children are living or staying. Finally, due to the father's previous breaches of family violence orders, and his public assertions that he refused to be bound by court orders of any kind, Benjamin J made an order under section 68C empowering a police officer, on

103 ibid., [282].
104 *Edwards & Granger* [2013] FamCA 918.
105 ibid., [320].
106 ibid., [238]–[239], [244].

reasonable grounds, to arrest the father without warrant if the *FLA* orders he made were breached.

In *Edwards & Granger*, the violence perpetrated by the father was evidenced by his criminal conviction. However, because family violence usually occurs in the private realm, corroborative evidence is often not absent, making it difficult for a judge to assess the veracity of the allegations. A 2007 Australian Institute of Family Studies (AIFS) study, which examined the presence of corroborative evidence in cases where family violence or abuse is alleged, concluded that the stronger the probative value of the evidence, the greater the influence it appeared to have on decision making.[107] For example, it was found that the proportion of orders for overnight stays decreased when allegations were supported with evidence of apparently strong probative weight.[108] This was consistent with earlier qualitative research conducted by Kaspiew following the *Family Law Reform Act 1995* (Cth),[109] discussed in Chapter 6.

While the research indicates the importance of corroborative evidence for complainants, the Full Court (May, Coleman and Le Poer Trench JJ) in *Amador*[110] indicated that corroborative evidence is not necessary in order to raise an allegation of family violence or abuse. *Amador* was an international relocation case where the federal magistrate at first instance had accepted the mother's uncorroborated evidence that the father was violent to her and sexually assaulted her. The father's appeal argued that the federal magistrate had erred in making a positive finding of family violence without corroboration. The Full Court disagreed with the father, noting that the private nature of family violence means that corroboration cannot be expected in all cases. The Court explained:

> To the extent that it is submitted that the mother's allegations of 'horrific domestic violence' could only be accepted if objectively corroborated, we do not find that any such requirement exists. Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.[111]

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107 Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study*, Research Report No. 15, Australian Institute of Family Studies, Melbourne, May 2007.

108 ibid., p 102.

109 Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112.

110 *Amador & Amador* [2009] FamCAFC 196 (*Amador*). As discussed in Chapter 5, family violence is underreported to a significant extent. This approach is therefore more realistic than one that emphasis the need for corroboration (see John de Maio, Rae Kaspiew, Diana Smart, Jessie Dunstan and Sharnee Moore, *Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011*, Research Report, Australian Institute of Family Studies, Melbourne, 2013, in relation to disclosure of family violence).

111 *Amador* [2009] FamCAFC 196, [79], [81].

However, the Full Court in *Amador* did indicate that the more serious the allegation of family violence, 'the more important it will be to the child to investigate and determine the allegation', as '[t]he consequence of placing a child under the supervision and/or care of a person who has been violent may be far reaching and very detrimental to the child's welfare'.[112]

In addition, the Full Court in *Amador* appeared to draw a distinction with regard to the evidentiary burden between cases involving allegations of abuse against a child (where the 'unacceptable risk' test enunciated by the High Court of Australia (HCoA) in *M v M*[113] is applicable, though not always applied)[114] and an allegation of family violence by one party to another. In the latter situation, the Full Court suggests that it will be necessary to make findings where the evidence enables that to be done, particularly in the case of serious allegations. This is in contrast to the (HCoAs) view in *M v M* that when the FCoA is exercising its jurisdiction to make parenting orders in the child's best interests, determination of the veracity of allegations is secondary and not essential. In other words, determination of an unacceptable risk of harm to the child does not require a positive finding that the harm has occurred.[115]

The apparent suggestion in *Amador* that allegations of family violence between parties are to be handled differently from allegations of child abuse has been criticised by Richard Chisholm. While Chisholm accepts that there may be differences of degree between to the two scenarios with regard to the issue of evidence, there is no difference in principle:

> I suggest ... that in deciding whether to make a finding of child abuse or family violence, the court should carefully consider the consequences, especially for the child, of making or not making the finding. I hope that the Full Court's remarks in *Amador* will not be taken as meaning that there is some fundamental difference in principle between the handling of allegations of family violence directed at adults and the handling of allegations of child abuse. The decision in *A v A*, much relied on in *Amador*, itself indicates that there is no difference in principle: the Full Court there remarked that 'though the High Court was in *M and M* talking in terms of sexual abuse, the same principles apply to "other risks of harm" to the child.[116]

8.4.1.3.5 Unacceptable risk

As noted above (8.4.1.3.4) if the court is unable to make a conclusive finding with regard to family violence or abuse, it must still consider whether parenting orders will expose a child to an 'unacceptable risk' of harm.

The unacceptable risk test was first enunciated in the HCoA case of *M v M* in the context of allegations of child sexual abuse.[117] However, the concept of unacceptable risk

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112 ibid., [95].
113 *M v M (1988)* 166 CLR 69; [1988] HCA 68.
114 Rachel Carson, *Supervised Contact: A Study of Current Trends and Emerging Tensions since the Introduction of the Family Law Reform Act 1995 (Cth)*, PhD Thesis, Melbourne University Law School, 2011.
115 *M v M* [1988] 166 CLR 69; HCA 68, [20]–[23].
116 Richard Chisholm, 'How to Treat Allegations of Violence and Abuse: *Amador v Amador*' (2010) 24 *Australian Journal of Family Law* 276, 280.
117 *M v M* 166 CLR 69; [1988] HCA 68.

now extends across a wide range of risks that may impinge on the interests of the child, including cases of non-sexual abuse of a child,[118] family violence,[119] and parental drug use.[120] It has perhaps also been codified to a limited degree in the family violence context by section 60CG, which requires the court, when considering what order to make, and to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, to ensure that the order is '(a) consistent with any family violence order; and (b) does not expose a person to an unacceptable risk of family violence'. While the range of situations to which the unacceptable risk test applies has grown, due to its irregular and inconsistent use,[121] the recent application of the test has become the subject of significant criticism.[122] A recent analysis by Lisa Young and colleagues suggests that the test might appropriately be abandoned in light of the introduction of section 60CC(2A), which expressly prioritises children's safety over the benefit of a meaningful relationship with both parents, and thus removes the 'balancing act' required by the unacceptable risk test.[123]

The case of *M v M* involved allegations of sexual abuse by the father of the child for which there was no conclusive evidence. Evidentiary issues are common in cases where child sexual abuse is alleged[124] (specifically, '[t]he secrecy which usually surrounds sexual abuse, the nature of the offences which it involves, and the nature of the relationship between the perpetrator and the child, all militate against the furnishing of the type of evidence with which lawyers like to work'),[125] but concerns for the child's safety may nevertheless exist, making it necessary to develop a test that assesses risk in a context where evidence is limited or completely absent. In *M v M*, although the trial judge was not satisfied on the balance of probabilities that the father had abused the child, he considered that there was a possibility that the father had done so. To eliminate the risk of abuse, he made orders denying contact. The father appealed and eventually the case was heard by the HCoA. Rejecting the father's argument that the trial judge should have made a positive finding as to whether the abuse occurred or not, the Court held that the paramount issue in such cases is the best interests of the child, not the determination of whether the allegations are true. Thus, in deciding what is in the best interests of the child, the role of the court is to determine if there is a risk of sexual abuse occurring and the magnitude or degree of that risk. Ultimately, the test 'is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.'[126]

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118 In *Johnson & Page,* May, Boland and Stevenson JJ held that the unacceptable risk test is to be applied where there are allegations of 'sexual or other serious abuse'. *Johnson v Page* [2007] FamCA 1235, [62].

119 *Edwards & Granger* [2013] FamCA 918.

120 *Akston & Boyle* [2010] FamCAFC 56.

121 Rachel Carson's empirical research on the unacceptable risk test in the context of high-risk contact cases revealed that many judges did not discuss or apply the test, or did so in a cursory manner. Carson, above n 114, p 153.

122 John Fogarty, 'Unacceptable Risk: A Return to Basics' (2006) 20 *Australian Journal of Family Law* 249.

123 Lisa Young, Sandeep Dhillon and Laura Groves, 'Child Sexual Abuse Allegations and s 60CC(2A): A New Era' (forthcoming).

124 Ian Freckelton, 'Evidence in the Family Court: The New Regime' (2005) 12 *Psychiatry, Psychology and the Law* 234.

125 *In the Matter Of: N Appellant/Wife and S Respondent/Husband and the Separate Representative* [1995] FamCA 139 (Fogarty, Kay and Hilton JJ), [113] (Fogarty J, in dissent).

126 *M v M* (1988) 166 CLR 69; [1988] HCA 68, [25].

Though *M v M* still stands as the authoritative statement of the law in this area, the test has changed over time, consistent with legislative shifts towards maintaining parent–child relationships in 1996 and 2006. While the HCoA described the test as endeavouring to achieve a 'proper balance' between the 'risk of detriment' versus the 'possibility of benefit' to the child from contact,[127] the significant emphasis placed on the latter in the 2006 amendments appears to have shifted where that balance may lie. The Full Court's decision in *Re W*[128] is a good example of this re-balancing of the test. *Re W* was determined at first instance by the then Chief Justice of the FCoA, Nicholson CJ, who found that it was probable that the appellant had sexually abused his daughter over a period when she was less than four and just over five years old. Chief Justice Nicholson therefore concluded that all contact should cease on the grounds that the child could not be adequately protected in any form of unsupervised contact, and that the potential detrimental effects of supervised contact outweighed any benefit that she might receive from such contact. The father challenged the latter conclusion, arguing that no matter what the finding of the trial judge with regard to the abuse allegation, his conclusion that the proposals for supervised contact were more detrimental to the welfare of the children than no contact at all ought not reasonably have been open to him. The Full Court (Kay, Holden and O'Ryan JJ) allowed the father's appeal:

> The termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort. The Court should not shy away from reaching such a result in an appropriate case but at all times judges should be conscious that the adversarial or inquisitorial systems often reach results that are artificial. The truth does not always come out. A false negative finding accompanied by appropriate safeguards as to the future relationship between parent and child, such as adequate supervision to guard against possible abuse, may be far less disastrous for the child than an erroneous positive finding that leads to a cessation of the parent–child relationship. The Court needs to be remain conscious of this imperfection at all times.[129]

The decision of *Re W* prompted former appeal judge of the Family Court John Fogarty to criticise the Court, and the Full Court in particular, for deviating 'significantly from the principles and approach' outlined in *M v M*.[130] In particular, Fogarty expressed concern about the tendency of the Full Court to 'place undue emphasis as a starting point upon the consequences to the alleged abuser ... and the suggestion that it may be better to arrive at a false/negative than a false/positive, rather than emphasising that the interests of the child are paramount throughout.'[131] Fogarty pointed out that the alternative (where the allegations are true but not acted upon) 'may be as or more regrettable.'[132] Ultimately, Fogarty's

127 ibid.
128 *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 (*Re W*) (Kay, Holden and O'Ryan JJ).
129 ibid., [19].
130 John Fogarty, 'Unacceptable Risk: A Return to Basics' (2006) 20 AJFL 249, 251. See also Richard Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1.
131 ibid.
132 ibid., 283.

concern was that the current approach to the unacceptable risk test was undermining the paramountcy of the best interests of the child:

> The constant reference to the impact on the alleged abuser of a finding of abuse ... cuts across the fundamental emphasis on the interests of the child as the paramount consideration. This has also led to unjustified reversals of trial decisions.[133]

Fogarty's concerns are well warranted in light of the research on the long-term effects of child sexual abuse, which include a range of negative consequences for mental health and adjustment in childhood, adolescence and adulthood.[134]

Fogarty also criticised the Full Court for misunderstanding the standard of proof required in cases that raise the unacceptable risk test. In Fogarty's view, the Court seemed uncertain about the difference between the levels of proof required, in particular for proof of past abuse and proof of future risk. As he notes, 'there still remains vestiges of the view that conclusions about future risk can only be drawn from proved facts', a position clearly rejected by the HCoA in *M v M*. The correct position in Fogarty's view was that when assessing future risk, the court is entitled to take into account factors that are not proved but that nevertheless raise issues of concern. Similar concerns have been raised by Rachel Carson, whose analysis of the unacceptable risk test in the context of high-risk contact cases, focusing on pre-2006 cases, revealed an understanding of the test that focused on assessing the veracity of allegations, with 'the primary conception of harm as the loss or prevention of contact', rather than the harm that may ensue from experiencing abuse.[135]

Despite criticisms of the direction the unacceptable risk has taken, post-2006 decisions commonly support the approach taken in *Re W*, though the case law is inconsistent.[136] For example, in *Harridge & Harridge*,[137] Murphy J awarded a father supervised time with his two children, aged six and four, despite a conviction for three offences involving possession and distribution of child pornography. The access was to be supervised by the paternal grandparents, an outcome opposed by the mother and the independent children's lawyer on the basis that the grandparents had little insight into the psychological indicators underlying the father's offending behaviour. The mother had sought supervision at a child contact centre, but this was not an option due to the father being a registered sex offender. In reaching the conclusion that parenting time should be permitted, Murphy J sought to balance the risk of harm to the children with the 'possibility of benefit' to the children from contact with their father, stating:

> I find that the children would clearly benefit from the promotion and development of a meaningful relationship with their father and with their paternal grandparents ... In this case, however, as in so many cases that proceed to final hearing in this court, the Primary Consideration of the children having a meaningful relationship with both

133 ibid., 295.

134 Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, CFCA Paper No. 11, Australian Institute of Family Studies, Melbourne, 2013.

135 Carson, above n 114, pp 162–3.

136 For example, in the 2007 decision of *Johnson & Page* [2007] FamCA 1235, the Full Court (May, Boland and Stevenson JJ) referred with approval to the abovementioned article by Fogarty and endorsed his summary of the unacceptable risk test from *M v M*.

137 *Harridge and Anor & Harridge and Anor* [2010] FamCA 445.

> parents has the potential to collide directly with the other Primary Consideration, which predominates the need to protect children from specified harm. In my judgment that potential collision poses the central dilemma for this court in arriving at orders that best meet these very young children's best interests: does the potential for harm—or any 'unacceptable risk' of harm—justify impinging upon the present, and potential, meaningful relationship otherwise identified and, if so, how and to what extent?[138]

Weighing up these competing demands, Murphy J concluded that the children should spend time with the paternal grandparents for approximately one day every six weeks, during which the father could be present and supervised. While relatives and close associates of an alleged perpetrator are usually not considered to be appropriate supervisors because they are less likely to believe the abuse might have occurred and therefore to be vigilant,[139] the problem in this case was that, due to his conviction, the father was ineligible to use a children's contact service.

Where the court has found that a parent against whom allegations are made does not represent an unacceptable risk to the child, the other parent's 'genuinely held' belief that a risk exists will still be a relevant consideration in determining parenting orders.[140] This is because that belief may have a significant impact on a parent's capacity to parent the child and so impinge on the child's best interests.[141] The approach to be taken in such a situation is explained by the Full Court decision of *A & A*, a case where the mother had been seriously assaulted (to the point that the assault appeared to be an attempted murder) and believed the father to be the assailant:[142]

> If the wife [believes the events in question occurred], it is not a necessary component that the belief should be reasonably and objectively based. What is required at this level of the inquiry is that it was genuinely held. The reason for that ... is that if the wife genuinely holds that belief that may so impinge upon her capacity as the primary carer of the children to look after them that the question arises whether in the interests of the children contact should continue and/or whether it should be supervised to allay those apprehensions.[143]

The mother's belief in *A & A* as to her assailant, and the impact this had on her caregiving capacity, were identified as relevant to the best interests question, rather than the application of the unacceptable risk test. Thus any consideration of a genuinely held belief on the part of a parent that an unacceptable risk exists is a question to be considered in the context of the best interests analysis. In *A & A*, the mother's genuinely held belief was sufficient to warrant supervised contact.

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138 ibid., [49], [51]–[52].

139 In the: *Joanne Michelle Biegnaski Appellant and Michelle Biegnaski Responent Marriage of* [1993] FamCA 51 (Fogarty, Baker and Purvis JJ) (Biegnaski).

140 This situation must be distinguished from that described in s 60CG of the *FLA*, which requires that the court ensure that an order does not expose 'a person' (including the child's parent) to an unacceptable risk of family violence. The court can include in an order any safeguards it considers necessary for the safety of those affected by the order (s 60CG(2)).

141 *Bieganski* [1993] FamCA 51; *In the Marriage of Sedgley* (1995) 19 Fam LR 363.

142 *A & A* [1998] FamCA 25 (Fogarty, kay & Brown JJ).

143 *In the Marriage of A* [1998] FamCA 25, [3.28] (Fogarty, Kay and Brown JJ). See also *Gillee & Gillee* [2010] FamCA 1141.

The FCoFC (Bryant CJ, Ainslie-Wallace & Ryan JJ) decision of *Marsden & Winch*[144] is a recent example of the application of the approach in *A & A*. The question in *Marsden* was whether contact should be ordered with the father, who was *not* found to pose an unacceptable risk, but whose contact with the child would pose a risk that would 'exceed a moderate risk' to her and potentially to her friends who came into contact with the father.[145] Approximately 10 years before, the father had been convicted of wilful and obscene exposure on two occasions and of indecent behaviour on a further occasion, including public masturbation. For one year he had been romantically interested in a schoolgirl aged about 13 or 14 years, keeping stolen underwear belonging to the child and a photograph of her. The mother had developed post-traumatic stress disorder (PTSD), in large part due to the protracted litigation. In spite of psychological assessments recommending the father have supervised contact proceeding to unsupervised contact with the child, the trial judge concluded that parenting time should be denied.[146] In support of this conclusion, Watts J considered the impact contact would have on the mother, particularly with regard to her PTSD, the father's lack of candour about his offending, and the effect of the ongoing litigation on the mother. If contact were to proceed, Watt J held that it 'would have a profound effect on the mother's ability to parent' and that there was a seriously possible risk that the mother's 'mental status will deteriorate into a psychotic/delusional state'.[147] The father appealed the orders, but was unsuccessful, with the Full Court holding that 'it was not unreasonable that the mother maintained the views about him which she held.'[148]

By contrast, in cases where it has been held that there is no rational basis for the belief, the mother's fear for the children's safety has been assessed as 'delusional' and children have been removed from the mother's primary care.[149] For example, in *Tyler & Sullivan*, the mother was found to have 'formed an unshakeable belief that the child had been sexually abused by his father', including having been forced to participate in a paedophile ring[150]. She had absconded with the child to Europe to avoid him having contact with his father. Accepting expert evidence that the mother suffered from a 'delusional disorder', Watts J ordered that the child live with his father and that the mother have no contact. Given that the mother 'unshakeably and implacably' believed that the child was sexually abused, putting the child in the care of his mother was 'in fact a highly risky position into which to place' him.[151]

Cases in which it is held that is no reasonable basis for a parent's belief have often involved discussion of social sciences evidence regarding 'parental alienation'.

144 *Marsden & Winch* [2013] FamCAFC 177.
145 ibid.
146 *Marsden & Winch* [2012] FamCA 557.
147 ibid., [129].
148 *Marsden & Winch* [2013] FamCAFC 177, [123].
149 *Tyler & Sullivan* [2014] FamCA 178; *Mortone v Mortone* [2011] FamCA 309; *Morcombe v Preston* [2010] FAMCA 165.
150 *Tyler & Sullivan* [2014] FamCA 178, [949].
151 ibid.

8.4.1.3.6 Additional considerations

The additional considerations cover a variety of different issues, all of which must be considered by the court. As noted above with regard to family violence, they must be read alongside the primary considerations. Rather than discuss each consideration in detail, in the next section we discuss a number of cases that highlight the overlapping nature of the additional considerations, focusing on those that are raised most frequently.[152] Further discussion of specific issues that might arise in parenting disputes, some of which are captured by the additional considerations, such as culture, lifestyle and Aboriginal and Torres Strait Islander identity, are discussed in Chapters 4 and 9.

The relevance of children's views

Section 60CC(3)(a) makes clear that the views of the child, whatever the child's age,[153] are a relevant consideration when determining the best interests of the child. However, the weight given to them will vary according to a range of factors, 'such as the child's maturity or level of understanding' (section 60CC(3)(a)). Courts are not required to act on a child's views (even if the court considers they are validly held), though they must provide good reasons for not doing so.[154] As discussed in Chapter 7, children's views are established via family reports (section 62G(2)), independent children's lawyers (sections 68L and 68LA), or by other such means as the court thinks appropriate (section 60CD). A child cannot be required to express a view on a matter (section 60CE).

The decision *in the Marriage of R*[155] is a leading source of guidance on the weight the court accords to children's views. The case involved a child, C, who was 11 at the time of the trial before Guest J, and aged 12 at the time of the appeal. The child, along with her 14-year-old sister, no longer wished to see her father. While the father reluctantly accepted the older girl's position, he refused to accept the views of the 11-year-old. There was no suggestion that the father had been anything but a loving and actively involved parent prior to separation. At trial, Guest J made a number of unfavourable findings with regard to the mother and suggested that C's reluctance to see her father was a result of the mother's failure to encourage contact (as it then was) or present the father in a positive light. In view of these findings, Guest J held that while C's wishes were strongly held, he did not believe she appreciated the full range of factors at play or the long-term implications of her views. Orders for contact were made, albeit with a staggered introduction. On appeal, the Full Court (Nicholson CJ, Holden & Monteith JJ) upheld Guest J's decision, holding that:

> the principle is clear that a Court must take children's wishes into account, *but is not bound by them*. In this case his Honour found that the wishes expressed by the child should be given less weight than would normally be the case having regard to all of the evidence and particularly to the attitude of the mother to contact.[156]

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152 Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3, p 338.
153 *Marriage of Joannou* (1985) FLC 91-642; *Harrison and Woollard* (1985) 18 Fam LR 788.
154 *In the Marriage of R* (*Children's Wishes*) [2002] FamCA 383.
155 ibid. Note that *Marriage of R* is a pre-2006 decision when the *FLA* still referred to children 'wishes'.
156 ibid, [128] (Nicholson CJ, Holden and Monteith JJ) (emphasis added).

Thus, not only is a court not bound by a child's views, but also the weight attached to the views may be affected by the extent to which the child might have been influenced by the parent with which they reside.

Another relevant factor in deciding how much weight to attach to a child's wishes (and related maturity and understanding) is the age of the child. For example, in *Escott & Lowe*,[157] Rose J raised concerns that the two children, aged eight and six, who had requested an equal time arrangement, were perhaps doing so out of a desire to be 'fair' and that they lacked the maturity to fully appreciate what such an arrangement might mean for them. Relying on the evidence of the child expert, Rose J concluded:

> I have not given any weight to the expression of views by each of the two children. My reasons are that I accept the evidence of the child expert that given their young ages and consequent lack of maturity, they have a different conception of time compared to an adult and may not fully appreciate an adult concept such as a week with each parent.[158]

By contrast, the wishes of older children are generally accorded greater weight. A recent example, discussed earlier (8.4.1.3.4), is *Cannon & Acres*. Another example is *Melrose & Melrose*,[159] a case in which a number of the additional considerations were relevant. Strickland J held that the views of an articulate, mature, confident, and honest 14-year-old who no longer wished to see her father should be given 'great weight'. However, the judge's willingness to accept the child's views was encouraged by the fact that they were, in part, a product of the father's complete lack of insight, inflexible attitude, and unwillingness to take the advice of experts. The father had been encouraged to attend counselling and parenting courses, as well as address issues of personal cleanliness, alcohol consumption and smoking, but had refused the advice. He had also failed to take up opportunities to see his daughter in the past. Given the child's age and maturity and the father's refusal to '[change] his attitude and [put] the interests of the child ahead of his own', Strickland J concluded that the relationship between them should be primarily on the child's terms.[160]

Past care patterns

As our earlier discussion suggests (8.3.2), prior to the 2006 reforms, parenting decision making placed greater emphasis on past care patterns (the 'status quo'). Empirical research from the 1990s on litigated children's matters showed that this was a key factor in custody decision making.[161] Fathers argued, however, that a focus on past care patterns discriminated against them because they were more likely to work full time and be the main breadwinners, making it more difficult for them to demonstrate a past history of caregiving. To not recognise this fact when making parenting orders would mean that men were punished for being the breadwinner. Of course, women could make the same argument: to *not* recognise

157 *Escott & Lowe* [2007] FamCA 307.
158 ibid., [124].
159 *Melrose & Melrose* [2012] FamCA 398.
160 ibid., [160]–[161] (Strickland J).
161 Sophy Bordow, 'Defended Custody Cases in the FCoA: Factors Influencing the Outcome' (1994) 8 *Australian Journal of Family Law* 252, 258–60.

when making post-separation parenting decisions that women do the vast majority of caregiving labour pre-separation might also be said to be discriminatory.

Three of the additional considerations refer, to varying degrees, to pre-separation patterns of care. Section 60CC(3)(b) requires the court to consider 'the nature of the relationship of the child with each of the child's parents'. Section 60CC(3)(d) requires the court to consider 'the likely effect of any changes in the child's circumstances'. Section 60CC(3)(c) requires the court to consider the extent to which each of the child's parents has taken, or failed to take, the opportunity to (1) participate in making decisions about major long-term issues in relation to the child; (2) spend time with the child; and (3) communicate with the child. Read together, these three subsections require the court to consider past patterns of care and the potential effects of changing the child's current care arrangements.

As discussed above (8.3.2), the question of the weight to be given to the status quo is often an issue when making interim orders. The Full Court's decision in *Goode* held that the new emphasis in the 2006 amendments on the continued involvement of both parents meant that:

> where there is a status quo or well-settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant time by both parents in the care arrangements for the child.[162]

While that decision related to interim orders, it encouraged the view that status quo was no longer a particularly significant factor.

Pre-separation caregiving patterns do, however, remain relevant. In *Dicosta & Dicosta*,[163] for example, the Full Court (Finn, Coleman and Thackray JJ) held that section 60CC(3)(d) requires that 'there still be some consideration of the existing arrangements of the child in question, and that some weight be given to the likely effect on the child of a change in those circumstances, including separation from a parent'.[164] In *Dicosta*, the parents had a 'conventional' marriage in which the father had worked full-time in his own business while the mother was the full-time carer for the children, aged six and four. After the parents separated, the children initially remained with their mother but saw their father on alternate weekends. However, Brewster FM made an interim order that in any fortnight the children spend five nights with the father and nine nights with the mother. At the full hearing, five months later, the father sought equal time, an arrangement that would alter both the status quo during the marriage as well as what had developed after the interim hearing. The father was unsuccessful both at first instance and on appeal. Both Brewster FM and the Full Court held that an equal time arrangement was such a radical change in the children's circumstances that it would not be in their best interests, particularly given the conclusion by the family consultant that the children's primary attachment was to their

162 *Goode & Goode* [2006] FamCA 1346, [72].
163 *Dicosta & Dicosta* [2008] FamCAFC 161.
164 ibid., [35].

mother. Ultimately, the interim arrangement, which itself was a significant departure from the pre-separation status quo, remained in force.

8.4.2 STEP 2: APPLYING THE PRESUMPTION OF EQUAL SHARED PARENTAL RESPONSIBILITY (ESPR)

Once the best interests factors have been assessed and findings made in relation to them, the court turns to step 2 of the three-stage decision-making process: a consideration of whether the presumption of ESPR applies, does not apply, or is rebutted (section 61DA).

Section 61DA states that, when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility for the child. As noted earlier, the presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in (1) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or (2) family violence (section 61DA(2)) (although, as discussed in this section, ESPR is still ordered in cases in which family violence or abuse of the child is alleged). The presumption in favour of ESPR may also be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have ESPR for the child (section 61DA(4)). As noted above (8.3.2), the presumption of ESPR also applies when the court is making an interim order, unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied. Finally, the presumption in section 61DA relates solely to the allocation of parental responsibility. It does not provide for a presumption about the amount of time the child spends with each of the parents.

8.4.2.1 WHAT IS 'PARENTAL RESPONSIBILITY'?

The *FLA* gives little helpful guidance with regard to the meaning of the term 'parental responsibility', providing just that parental responsibility 'in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children' (section 61B). Any comprehensive attempt to list these would require reference to the common law as well as state legislation. However, the most common powers relate to the child's education, religion, medical treatment, and diet, as well as the name by which the child will be known, the place where the child will reside, the persons with whom the child may associate, and the discipline that the child is to receive. Also relevant is the power to make decisions related to the day-to-day care, welfare and development of the child.

8.4.2.2 WHO HAS PARENTAL RESPONSIBILITY?

Each parent of a child has parental responsibility, despite any changes in the nature of the relationship between the child's parents (section 61C). For example, parental responsibility is 'not affected ... by the parents becoming separated or by either or both of them marrying or re-marrying.' Parental responsibility can be displaced, however, by court orders.

A parenting order that provides for shared parental responsibility requires parents to consult and make a genuine effort to come to a joint decision about 'major long-term issues'

in relation to the child (section 65DAC). Subject to court orders, there is no duty, however, to consult on issues that are not major long-term issues (section 65DAE). The person with whom the child is spending time makes decisions about such issues.

'Major long-term issues' is defined as 'issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues ... about: (a) the child's education (both current and future); (b) the child's religious and cultural upbringing; (c) the child's health; (d) the child's name; and (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent' (section 4(1)). To avoid doubt, the definition includes a note stating:

> a decision by a parent of a child to form a relationship with a new partner is not, of itself, a *major long-term issue* in relation to the child. However, the decision will involve a *major long-term issue* if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

Relocation disputes are discussed at 9.7.1.

8.4.2.3 HOW DOES THE PRESUMPTION OF 'EQUAL SHARED PARENTAL RESPONSIBILITY' WORK?

As noted above, when making a parenting order in relation to a child, the court must apply the presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. If the court makes an order for ESPR, it then *must* consider whether an order for equal time is in the child's best interests and reasonably practicable under section 65DAA. What is not clear from either the legislation or case law is what a court should do if the presumption of ESPR is displaced. As noted earlier, legislative amendment in 2006 'did not actually create a presumption of equal time, but it came close, because equal time (or "substantial and significant time") was the only outcome that the court was specifically required to consider when ordering equal-shared parental responsibility'.[165]

8.4.2.3.1 When is the presumption of ESPR displaced?

To recap, section 61DA sets out three situations where the presumption of ESPR does not apply or may be rebutted:

(i) The presumption does not apply if there are reasonable grounds to believe that a parent of the child has engaged in family violence or abuse (s 61DA(2)).

(ii) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child (s 61DA(4)).

(iii) In the case of interim orders, the presumption can be displaced if 'the court considers that it would not be appropriate in the circumstances for the presumption to be applied' (s 61DA(3)).

165 Smyth et al., above n 2.

Despite the apparent clarity of these categories, it is not always clear in the cases whether a court has decided the presumption does not apply or whether it is being rebutted. In some cases, both options may be available. Where the argument is made that the presumption should be rebutted, the Full Court (Bryant CJ, May and Annslie - Wallace JJ) has held that, given the mandatory requirement to apply the presumption, explicit and cogent reasons for why ESPR is not in the best interests of the child must be provided.[166] The tendency for courts to require clear evidence of family violence or abuse suggests that in practical terms the same requirement operates in relation to non-application of the presumption.

However, in a growing number of cases it has been concluded that high levels of parental conflict may be sufficient to rebut the presumption of ESPR as not being in the child's best interests. The decision of Bell J in *Duncan & Dylan* is one such example.[167] The parents' relationship had been characterised by family violence, and the mother had made allegations that the father had viewed child pornography and sexually abused the child. While Bell J was 'more than satisfied' that abuse had not taken place, she concluded that the level of parental conflict meant that an order for ESPR was contrary to the interests of the child. Her Honour explained:

> I must confess I agonised over this. The mother opposes [ESPR], the father is proposing it. I must say that I think in a case such as this that the parties are not communicating exceptionally well with each other. The mother conceded that she could use a communication book, and that may diminish the feelings at this stage, but for years the expert has said unless there can be some sort of communication between the parties which puts aside the dislike, distaste or whatever you would like to say—the distrust of the other party, it is almost impossible to have joint parental responsibility. I think in this case, because of the mother's—and I am saying not unreasonable fears—she would not be able to advance the welfare of the child if there was joint parental responsibility.[168]

A similar position was taken by the Full Court (Bryant CJ, Faulks DCJ & May J) in *Parkin & Sykes*,[169] which upheld the first instance decision of Johnston J to award sole parental responsibility to the mother. Johnston held that 'shared parental responsibility requires a level of communication and cooperation between parents' that was not present in the case. The parents had a very poor relationship, did not speak with one another, and had been 'locked in conflict since separation.'[170] Justice Johnston also held that two previous sets of final orders, which attempted to facilitate a meaningful relationship with both parents, had exposed the child to harm. Such harm included a continuation of the litigation, causing psychological harm to the child due to 'the very complex dynamics involved in this family

166 *Dundas & Blake* [2013] FamCAFC 133.
167 *Duncan & Dylan* [2012] FamCA 430.
168 ibid., [27].
169 *Parkin & Sykes* [2013] FamCAFC 87.
170 ibid., [185], [183]. See also *Hardie & Capris* [2010] FamCA 1046, [155] where the Court followed *Chappell & Chappell* on similar grounds. Murphy J held that the 'level of dysfunction in the parental relationship, the nature and longevity of the conflict between the parents' and that fact his Honour found it difficult to discern any evidence that would persuade him of optimism for the future combined to 'inform a conclusion that these parents have little if any prospect of engaging in the nature and level of communication required of people who are to share parental responsibility.'

endeavouring to implement the [previous] orders.'[171] Upholding Johnston J's conclusion that the presumption of ESPR was rebutted, the Full Court held that 'there was no utility in adopting orders which provided the parties with a further chance to attempt shared parenting arrangements. Indeed if the child's best interests were to remain paramount, on the expert evidence there was no choice for the trial judge but to make the kind of orders he did.'[172]

These cases suggest that greater judicial caution is being exercised in high-conflict cases compared to immediately after the 2006 amendments, perhaps due to the post-2006 research and the 2012 amendments (Chapters 6 and 9). However, in the absence of systematic research on whether this is in fact the case, it is not possible to draw any conclusions.

This is particularly the case given that the position, as set out in *Goode*, remains that even where the presumption in favour of ESPR is not applicable because of family violence or abuse, it is still possible to order ESPR if it is in the child's best interests.[173] That this was occurring was confirmed in 2009 by the AIFS evaluation finding that 'while there is some relationship between an allegation of family violence or child abuse being made in proceedings and an outcome other than shared parental responsibility, even in cases with allegations of family violence or child abuse, in the majority of cases there is a shared parental responsibility outcome.'[174] The 2012 decision of *Hutley & Hutley*, which applied the pre-2012 amendment law,[175] demonstrates how it occurs. In *Hutley & Hutley*, Austin J held that the presumption of ESPR was not applicable due to the father's past family violence towards the mother (for which he was convicted). Nevertheless, an order of ESPR was made on the basis of the child's best interests.[176] The judge's reasoning was that while the couple continued to have conflict (the violence had ceased), 'when minded to do so' they had been able to communicate constructively.[177] By contrast, if the mother was given sole parental responsibility, it was the judge's view that there was little chance she would consult with the father about major long-term issues.

It is also possible than where a court concludes that the presumption is rebutted under section 61DA(4) on the grounds of family violence, the parents can still agree to ESPR and the court will not interfere with the agreement. In *North v North*,[178] the father had perpetrated extensive and corroborated family violence against the mother, much of

171 *Parkin & Sykes* [2012] FamCA 187, [166]. A similar conclusion was reached by the Full Court in *Marvel v Marvel (No 2)* [2010] FamCAFC 101. In *Marvel*, the court held that an order for equal shared parental responsibility in circumstances of high parental conflict 'would inevitably lead to further conflict and perhaps contravention applications', which could be adverse to the children's best interests.

172 *Parkin & Sykes* [2013] FamCAFC 87, [84].

173 *Goode* [2006] FamCA 1346, [46]–[48].

174 Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3, p 189. The evaluation found that, in cases with no family violence or abuse allegations, 90% have a shared parental responsibility outcome, compared to 76% of cases where both family violence and child abuse are alleged, 80% of cases where family violence alone is alleged, and 72% of cases where child abuse alone is alleged.

175 This is because it was commenced prior to the amendments coming into effect.

176 *Hutley & Hutley* [2012] FamCA 679, [105]–[116].

177 ibid., [112].

178 *North & North* [2010] FamCA 306.

which was witnessed by the child, who was aged 11 at the time of the trial. The father also frequently threatened to kill himself if the mother left him. On one occasion he made such a threat while holding a knife in the presence of the child, after having picked up and thrown the table at which the child sat. The parents sought orders with regard to how much time the child should spend with each parent, with the father requesting equal shared time. However, the parents agreed to share parental responsibility. In making his orders, Cronin J noted that the presumption of ESPR does not apply if there are reasonable grounds to believe that a parent of the child has engaged in family violence. Based on the extensive evidence, Cronin J was satisfied that the father had been a perpetrator of family violence and, as such, the presumption of ESPR did not apply (though Cronin J, while referring to section 61DA(2), stated that the presumption was 'rebutted').[179] However, the judge went on to hold that this 'does not mean that the parents cannot still agree on equal shared parental responsibility.'[180] As he explained:

> Section 61DA(4) is a discretionary provision. It provides that the presumption may be rebutted by evidence that satisfies the Court that it would not be in the best interests of the child for the parents to have equal shared responsibility. To some extent, it would be illogical for the parties to jointly ask the Court as here, for an order for equal shared parental responsibility yet for the Court to then find that it is not in the best interests of a child for that order to be made.[181]

Justice Cronin's statement seems to suggest that, in a case where the presumption of ESPR does not apply because of family violence but the parents request ESPR, the court will not engage in its own best interests analysis. This appears contrary to the principle that the child's best interests must, at all times, remain paramount, as well as the statement in *U v U* that the court 'is not, on any view, bound by the proposals of the parties'.[182] Rather, all proposals must be thoroughly considered to properly determine what is in the child's best interests. Justice Cronin's decision also appeared unworkable in reality, given his conclusion that 'at the moment [the parents] cannot agree on anything'[183] and that consultation had occurred on only 'rare occasions' in the past.[184]

8.4.2.3.2 ESPR and non-parents

Applications for parenting orders by non-parents are discussed in detail in Chapter 9. However, given our focus in this chapter on legislative pathways, we now briefly discuss the legislative pathway for non-parents given the conclusion in *Aldridge & Keaton*[185] that the presumption of ESPR does not apply to non-parents.

As discussed earlier, it is clear that parenting orders, including orders for ESPR, can be made in favour of non-parents and that a natural parent with parental responsibility will

179 This blurring in day-to-day practice of the distinction between non-application and rebuttal was also identified in the AIFS Evaluation. Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3, p 351.
180 *North & North* [2010] FamCA 306, [197].
181 ibid., [198].
182 *U v U* [2002] HCA 36, [80] (Gummow and Callinan JJ).
183 *North & North* [2010] FamCA 306, [195].
184 ibid., [201].
185 *Aldridge & Keaton* [2009] FamCAFC 229.

not be afforded any automatic priority.[186] However, the Full Court held in *Aldridge* held that the *presumption* of ESPR does not apply to non-parents. The Full Court endorsed the comments of Moore J in *Potts & Bims*, in which she took the view that 'the presumption of equal shared parental responsibility imposed by section 61DA [and the application of section 65DAA that may follow] ... are not prescribed pathways in the reasoning process towards a best interests conclusion in proceedings between a parent and non-parent. Nonetheless, the particular applications may make it necessary to address those outcomes in any event.'[187] Thus, an application involving a non-parent is determined on the basis of what is in the best interests of the child, which may include the making of an order for parental responsibility in favour of a non-parent.

The legislative pathway to be followed may also vary depending on whether both parents are available. While non-parents may apply for orders granting them parental responsibility, it was held by Murphy J in the FCoA case of *Dunstan and Jarrod*[188] that the presumption of ESPR *as between the parents* needs to be displaced (by reference to section 61DA(2) or (4)) before an order allocating parental responsibility to a non-parent could be made. In *Dunstan*, which involved a dispute between the child's foster parents and her biological father, the presumption was easily rebutted as the mother had given the child up for adoption and had shown little, if any, interest in her since. It was therefore open to the foster parents, with whom the child had resided since shortly after birth, to seek orders allocating parental responsibility.

8.4.3 STEP 3: (SHARED) TIME ARRANGEMENTS UNDER SECTION 65DAA

The final stage of the three step process enunciated in *Goode* is the determination of the time the child will spend with each party. Disputes about parenting time most commonly centre around disagreement over where the child will live, although overnight stays, visitation and other forms of interaction (for example, telephone, letters and internet communication) may also be in issue.

While the three stages of analysis required by *Goode* are distinct, the terms of section 65DAA link stages two and three. In *Goode*, the *Full Court* held that where the presumption of ESPR applies, the court must consider making an order that the child spend equal or substantial and significant time with both parents (section 65DAA). This conclusion was clarified by the Full Court in *Marvel & Marvel*,[189] which held that section 65DAA is triggered only when an *order* for ESPR has been made (or will be made).[190]

Marvel is more clearly consistent with section 65DAA, which states that where an order for ESPR is made or is proposed to be made, the court must consider whether the child spending equal time with each of the parents would be in the best interests of the child and reasonably practicable (section 65DAA(1)(a) and (b)). If it is, the court is directed to

186 *Valentine & Lacerra & Anor* [2013] FamCAFC 53, [41].
187 *Aldridge & Keaton* [2009] FamCAFC 229, [115] (Bryant CJ, Boland and Crisford JJ).
188 *Dunstan & Jarrod* [2009] FamCA 480.
189 *Marvel* [2010] FamCAFC 101(Faulks DCJ, Boland and Stevenson JJ).
190 For a discussion of this distinction see Richard Chisholm, 'From *Goode* to *Marvel*-ous' (2011) 25 *Australian Journal of Family Law* 153.

consider making an order that the child spend equal time with each of the parents (section 65DAA(1)(c)). Where a parenting order is made or is proposed to be made for ESPR but the court does *not* make an order for the child to spend equal time with each of the parents, it must consider ordering that the child spend 'substantial and significant' time with each of the parents, again after considering whether it is in the best interests of the child and reasonably practicable (section 65DAA(2)).

Goode, however, also indicates that equal time or substantial and significant time must be considered even if the presumption of ESPR does not apply if either parent seeks such an arrangement, and may also be considered if they do not (for example, if the issue in dispute relates to telephone or internet communication).[191] Ultimately, the decision is based on the child's best interests and what is reasonably practicable. In *Goode*, the Full Court further held that the juxtaposition of section 65DAA(1)(a), (b) and (c) suggested that 'consider' will involve 'the need to consider positively the making of an order'.[192] Strong encouragement was thus given to the making of orders for shared time.

In addition, advisors, defined as 'legal practitioners, family counsellors and consultants, and family dispute resolution practitioner' (section 60D(2)) are obliged to inform clients who they are advising in relation to entry into a parenting plan (7.5.1.5) that, if equal time would be in the child's best interests and reasonably practicable, they could consider the child spending equal time with each parent. If equal time is not in the child's best interests or not reasonably practicable, then parents must be advised to consider the child spending substantial and significant time with each parent, if this would be in the child's best interests and reasonably practicable (section 62DA(2)).

8.4.3.1 MEANING OF 'SUBSTANTIAL AND SIGNIFICANT' TIME

'Substantial and significant time' is defined for the purpose of Part VII, but 'equal time' is not. While definitions of 'equal time' in other contexts vary, the AIFS evaluation defined it as 'circumstances in which children spend a similar number of nights with each parent.'[193] For the purposes of the evaluation analysis of court files, 'shared care time' was defined as involving a 35–65 per cent division of nights between parents;[194] this suggests that 'substantial and significant time' would translate to one parent having about 35 per cent time. Consistent with this, in the child support context, DHS-CS now classifies 35–65 per cent of nights with each parent as reflecting 'shared care time' (11.4). However, it is not uncommon for 'shared time' definitions to adopt a 30 per cent threshold.[195]

To be 'substantial and significant time' for the *FLA*, the time the parent spends with the child must include days that fall on weekends and holidays as well as days that do not, and must allow the parent to be involved in the child's daily routine and in occasions and events that are of particular significance to the child as well as those that are of special significance

191 *Goode* [2006] FamCA 1346, [47]–[48]. In coming to this conclusion, the Court applied the High Court decision of *U v U* (2002) 211 CLR 238; [2002] HCA 36.

192 *Goode* [2006] FamCA 1346, [64]. See also *McCall v Clark* [2009] FamCAFC 92.

193 Kaspiew et al., *Evaluation of the 2006 Family Law Reforms*, above n 3, p 111.

194 ibid., 168.

195 For example, Bruce Smyth, Richard Chisholm, Bryan Rodgers and Vu Son, (forthcoming), 'Legislating for Shared-Time Parenting: Insights from Australia?' (2014) 77 *Journal of Law and Contemporary Problems*.

to the parent (section 65DAA(3)). However, where substantial or significant time is appropriate, the court is required to formulate an order that complies with the definition in both form and substance. For example, in *Eddington & Eddington (No 2)*,[196] the father appealed the decision of Rose J, on the basis that while the orders technically complied with section 65DAA(3), due to extended periods of no contact, including gaps of up to two weeks, they could not be said to provide the children with 'substantial and significant' time with their father. The Full Court of FCoA (Finn, Coleman and Collier JJ) agreed, holding that the overall amount of time the children spent with their father was substantial, but the significance of the time spent together was, in essence, undermined by the long absences.[197] Thus, 'substantial and significant' time with a parent is not simply a matter of quantum. How it is structured is also important. The Court was careful to stress, however, that the case turned 'on its own particular facts and circumstances', including the unusual nature of the father's work schedule.[198]

8.4.3.2 REASONABLY PRACTICABLE

Where a court concludes that equal or substantial time is in a child's best interests, it must then assess the reasonable practicability of such arrangements. Assessing reasonable practicability, section 65DAA(5) requires a court to have regard to:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.

Prior to the High Court decision in *MRR* in 2010, the requirement of reasonable practicability was given minimal consideration. In *MRR*, Federal Magistrate Coker (as he then was) considered that equal time would be in the best interests of a five-year-old child and ordered a week about arrangement that required the mother to live in Mt Isa where the father worked and the parties had briefly lived, rather than in her home town of Sydney. The Full Court upheld the finding. On appeal, however, the HCoA held that the federal magistrate had erred in not considering and making findings regarding the child's best interests *and* reasonable practicability. The Court held:

> Section 65DAA(1) is expressed in imperative terms. It obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c),

196 *Eddington & Eddington* [2007] FamCA 1299.
197 ibid., [54].
198 ibid., [66].

> to the making of an order. The words with which par (c) commences ('if it is') refer back to the two preceding questions and make plain that the making of an order can only be considered if the findings mentioned are made. A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind.[199]

The HCoA further stated that 'reasonable practicality' is concerned with the 'reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent'.[200] Thus, the federal magistrate had erred in treating evidence regarding the child's best interests as determinative of the question of reasonable practicality. Had an assessment of reasonable practicality been undertaken based on the evidence before him, the federal magistrate could not have made an order for equal time. The mother was living in a caravan park in Mt Isa, could not access appropriate rental accommodation, had limited opportunities for employment (in contrast to a full-time opportunity available to her in Sydney), was isolated from her family in Sydney, and had been described by the Family Consultant as 'despondent' and 'depressed'.[201]

Following the decision in *MRR*, concern was expressed by Richard Chisholm and Patrick Parkinson[202] regarding the impact of *MRR* on existing orders. They pointed out that the HCoA's ruling requiring courts to make a specific finding that a child spending equal time or substantial and significant time with the parents is reasonably practicable before making such orders raised questions about the validity of pre-*MRR* consent orders where no reasons were delivered, with the effect that it was impossible to demonstrate that the section 65DAA factors had been addressed as *MRR* requires. In response to this concern, the *Family Law Act Amendment (Validation of Certain Parenting Orders and Other Measures) Act 2010* (Cth) was passed in December 2010. The Act retrospectively validated any orders that may have been rendered invalid by the HCoA's decision in *MRR*. It also amended the *FLA* to make clear that the court may, but is not required to, consider each of the statutory criteria in section 65DAA(1) and (2) when considering an application that it make a parenting order by consent where parents have, or are to have, equal shared parental responsibility for the children.

The question of what is reasonably practicable also requires judges to consider whether the order will be practicable when it takes effect. In *Wainder and Wainder*,[203] the mother and father first sought orders when their daughter was two years old. The parents lived in Sydney, but a considerable distance apart. Both parents sought ESPR. The father sought equal time, while the mother sought orders that the child live primarily with her. At trial, Austin J made orders for ESPR and that the child spend increasing time with her father, culminating in equal time (week about) when she was five years old. The mother appealed the decision on the basis that Austin J erred in making 'open ended' equal time orders

199 *MRR v GR* (2010) 240 CLR 461; [2010] HCA 4, [13].
200 ibid., [15].
201 ibid., [18].
202 Richard Chisholm and Patrick Parkinson, 'Reasonable Practicability as a Requirement: The High Court's Decision in *MRR v GR*' (2010) 24 *Australian Journal of Family Law* 55.
203 *Wainder & Wainder* [2011] FamCAFC 181 (Finn, Thackray and Ainslie - Wallace).

with regard to a two-year-old child, without any consideration of whether those orders would be 'reasonably practicable' when the child started school. In allowing the appeal, the Full Court held that though Austin J did determine a number of issues to which section 65DAA(5) (reasonable practicality) refers, he 'did not either expressly or inferentially consider the impact on the child of the distances necessary to be travelled to school ... in light of the parties' residences and their expressed reluctance to move.'[204] The Full Court concluded that:

> where the court proposes to make orders stretching into the future, the consideration of whether a proposed order is reasonably practicable should focus on the date of enlivenment of the order. The trial Judge is required to make a prediction at the date of trial on the evidence then before him or her as to whether at the date on which the order takes effect, it will be practicable or 'feasible'.[205]

8.5 AFTER COURT ORDERS ARE MADE

The Australian family law system has been largely predicated on 'once-and-for-all' decision making about parenting orders, and yet in family life nothing stands still. In this section we outline the substantive law regarding appeals, variation and enforcement.

The following passages from the 2001 report of the Family Law Pathways Advisory Group introduce some of the issues facing parents and children after decisions are made about parenting following separation:

> Many people told us that they were unhappy with the decisions made at the point of separation, when emotional and, often, financial pressures made it difficult to focus ... Often the circumstances under which a court order is made have not facilitated a workable solution which has fully considered the best interests of the child, because of pressure applied by one party on the other, lack of time, exhaustion, cost or lack of appropriate help ... Many people also told us that they couldn't see how they could improve the situation. Returning to court appeared to be the only option. Continued disputation over residence and, particularly, contact is high for a relatively small, but significant, group of people. Even where disputation is not high, maintaining parenting arrangements over time, whether after agreement or order, often needs extra support. Children are inevitably caught in the middle, particularly if parents do not know where to get help.[206]

A small number of people never manage to entirely work through the process for legal or emotional reasons. They become dependent on external decision makers such as the courts or government administrators, and return again and again, either with quite trivial issues or with serious issues that they are incapable of resolving. Considerable resources are

204 ibid., [27] (Finn, Thackray and Ainslie-Wallace JJ).

205 ibid., [31].

206 Family Law Pathways Advisory Group Report, *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, Commonwealth of Australia, Canberra, 2001, p 60. See also Bruce Smyth, Ruth Weston, Lawrie Moloney, Nick Richardson and Jeromey Temple, 'Changes in Patterns of Post-Separation Parenting over Time: Recent Australian Data' (2008) 14 *Journal of Family Studies* 23.

absorbed by this group and this can deny timely service to others. Children are very often caught in this cycle.[207]

While our discussion in this chapter has focused on fully litigated matters, consent orders may also be agreed to in circumstances where there are high levels of ongoing conflict between the parties (Chapter 7).[208] As also discussed in Chapter 7, 'agreement' may not necessarily reflect a desired choice or even an acceptable compromise. Research has shown that women are particularly likely to agree to arrangements that they do not consider to be in their children's best interests as a result of a range of pressures, including lack of resources to instigate or maintain legal action.[209]

While it is clear that ongoing litigation and conflict are also not in a child's best interests,[210] children's matters can always be reopened on the combined basis of the child's best interests and changes in family circumstances. Specifically, the rule in *Rice and Asplund* requires that a threshold test of a 'material change in circumstances' be demonstrated (8.5.2).[211] Being able to reopen matters on the basis of the child's best interests is important, but nonetheless opens the door open to the use of litigation as tactic of harassment. As noted earlier (8.4.1.3.4) in extreme cases the court has the ability to declare an applicant vexatious and prevent further application without leave (section 102QB).[212]

8.5.1 APPEALS

In the aftermath of an unfavourable decision, a party may consider appealing. The cost of appealing will often be a factor in their decision,[213] as will advice about the prospects of success. However, given that parties in *FLA* proceedings are often self-represented—38 per cent of all FCoA trials in 2012–13 included at least one self-represented litigant—the cost of proceedings is not necessarily discouraging.[214] Most family law appeals are made to the Full Court of the FCoA. An appeal to the High Court requires special leave (section 95), which is rarely granted. During 2012–13, 14 applications for special leave to appeal from decisions of the Full Court were filed in the HCoA. Of these, seven applications for special leave were determined by the Court, seven were not heard, and none were granted.[215] One appeal was heard and allowed where leave had been granted in the previous calendar year.

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207 Family Law Pathways Advisory Group Report, above n 207, p 20.

208 Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) 14 *Journal of Family Studies 37*, 38.

209 Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156.

210 Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9 *Journal of Family Studies* 63; Nina Lucas, Jan Nicholson and Bircan Erbas, 'Child Mental Health after Parental Separation: The Impact of Resident/Non-Resident Parenting, Parent Mental Health, Conflict and Socioeconomics' (2013) 19 *Journal of Family Studies* 53.

211 The rule in *Rice and Asplund* survived the 2006 amendments. See, e.g., *Sandler & Kerrington* [2007] FamCA 479; *Moose & Moose* [2008] FamCAFC 108.

212 See *Cannon & Acres* [2014] FamCA 104.

213 Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156.

214 Family Court of Australia, *Annual Report 2012–2013*, Family Court of Australia, Canberra, 2013, p 56.

215 ibid., p 74.

Appeals from decisions about parenting orders are essentially appeals from the exercise of discretion, with all the difficulties that involves. As Parkinson and Behrens have noted, 'the High Court has emphasised that the function of the Full Court is to correct errors rather than to substitute its own judgment'.[216] The two main *FLA* cases setting down the principles for appellate decision making are *Gronow v Gronow*[217] and *CDJ v VAJ*.[218]

In *Gronow v Gronow*[219] (a 1979 appeal from a decision of the Full Court on a custody matter), the HCoA quoted *House v The King*,[220] where Dixon, Evatt and McTiernan JJ said (in the gendered language that was more accepted at that time) that what is required is an error of law, a material error of fact, or that the decision is so clearly unreasonable or unjust that it can be inferred that discretion has miscarried:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[221]

The HCoA has also cautioned that, given that the *FLA* jurisdiction to make parenting (and financial) orders is a discretionary jurisdiction, it is not enough that the appeal court would have reached a different decision, and that caution should be exercised in disrupting first instances decisions made on the basis of direct and detailed engagement with the evidence. In *CDJ v VAJ* (McHugh, Gummow and Callinan JJ), it was stated:

> Given the nature of applications for parenting orders, there must often be a real chance that the order under appeal is not in the best interests of the child. Such applications necessarily involve predictions and assumptions about the future which are not susceptible of scientific demonstration or proof. Perceptions, predictions and even intuition and guesswork can all play a part in the making of an order. The views of appellate judges about the proper order to be made will not infrequently conflict with those of the primary judge. Yet absent legal error or a plainly unjust result, the

216 Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials*, 3rd edn, Lawbook Company, Sydney, 2004, p 885. For additional commentary see Juliet Behrens, 'Family Law', in Tony Blackshield, Michael Coper, and George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, Melbourne, 2001, pp 269, 271.

217 *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513.

218 *CDJ v VAJ* [1998] HCA 67; (1998) 197 CLR 172.

219 *Gronow v Gronow*, above n 217.

220 *House v The King* [1936] HCA 40; (1936) 55 CLR 499.

221 ibid., 504–5 (Dixon, Evatt and McTiernan JJ; Starke J agreeing).

> order of the primary judge must stand, irrespective of any views that the appellate judges have about the conclusions of the primary judge.
>
> The evidence in residency cases is often such that the same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. It is a mistake to think that there is always only one right answer to the question of what the best interests of a child require. Each judge is duty bound to make the order which he or she thinks is in the best interests of the child. But the fact that other judges think that the best interests of that child require a different order does not necessarily prove that the first order was not in the best interests of the child. Best interests are values, not facts. They involve a discretionary judgment in respect of which judges can come to opposite but reasonable conclusions.[222]

This point was emphasised again in *U v U*.[223]

The move post-2006 to more firmly bound judicial discretion in decision making about parenting orders has provided more opportunities for argument that a judge has made an error of law and thus for appeals to be made. However, in numerous recent cases the Full Court has stated that the failure to expressly follow the prescribed 'legislative pathway' will not lead to an appealable error unless there was a failure to give adequate reasons or to have regard to matters that must be considered under the legislation.[224]

8.5.2 VARIATION

Child support is reassessed each year to reflect changes in the financial circumstances of parties (see Chapter 11). Property orders, on the other hand, are much harder to change (see 13.9). The law on variation of parenting orders reflects an intermediate approach, which recognises that circumstances change, and that orders may need to be varied in the best interests of the child.

Courts exercising *FLA* jurisdiction have power to 'discharge, vary, suspend or revive some or all of an earlier parenting order' (section 65D(2)). There are no particular legislative provisions in relation to variation (contrast section 79A, which details the narrow range of circumstances in which property orders may be varied or set aside: 13.9). The court is simply required to apply the legislative provisions in relation to parenting orders generally. This absence of legislative limitations on the varying of parenting orders raises the prospect that a party might apply for a variation of a parenting order as an alternative to a formal appeal.

The case law on variation of parenting orders clearly indicates that when making a determination about whether or not to vary an order, a court must make an assessment about whether there are changed circumstances or whether it has been shown that, at the time of the prior hearing, some material factor was not disclosed to the court (the so-called '*Rice and Asplund* test').[225] The *Rice and Asplund* requirements survived a challenge based

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222 *CDJ v VAJ* [1998] HCA 67, [140]; (1998) 197 CLR 172, 218–19 (McHugh, Gummow and Callinan JJ).
223 *U v U* [2002] HCA 36; 211 CLR 238.
224 See, e.g., *Taylor v Barker* [2007] FamCA 1246, [62]–[63]; *Starr v Duggan* [2009] FamCA 115.
225 *In the Marriage of Rice and Asplund* (1978) 6 Fam LR 570. For a detailed consideration of the rule, see Sarah Middleton, 'Time for a Change? Shared Parenting, Variation of Orders and the Rule in *Rice and Asplund*' (2006) 34 *Federal Law Review* 397.

on the 1996 amendments to Part VII in *King and Finneran*,[226] although Collier J (hearing an appeal from then FMCoA) clarified:

> It is not the case that an application of the *Rice v Asplund* test divides or compartmentalises a matter into a threshold component and a merit component. It is clear that a trial judge has a discretion as to whether or not to deal with the matter at a threshold level or to embark upon a full hearing.[227]

Collier J also indicated that while a change in circumstances is still required, the change may be made up of a number of 'component parts', suggesting that it will be now be easier to achieve a variation:

> The law at present requires that there be a change such as to require re-litigation. That change can be made up of component parts or could rely on one single but major change. However, a cumulative basis for change in circumstances cannot be made simply by weight of the number of changes alleged to have occurred.[228]

Since the 2006 amendments, the case law has emphasised that, at whatever stage *Rice & Asplund* is applied, the Court is also bound to take into account the best interests considerations. The emphasis on the best interests of the child, particularly in an environment in which shared time is encouraged, also suggests that a variation may now be easier to achieve. The Full Court (Bryant CJ, Finn & Cronin JJ) explained the application of the rule in the context of the 2006 amendments in *Marsden & Winch*:

> There are significant changes that occur and which do require a court to reconsider decisions previously made. Whether in a particular case a court should be willing to embark upon another hearing concerning the child and parent, or whether to do so would itself be demonstrably contrary to the best interests of the child, is a decision to be made in each particular case. How is that decision to be made? The court must look at:
>
> (1) The past circumstances, including the reasons for the decision and the evidence upon which it was based.
>
> (2) Whether there is a likelihood of orders being varied in a significant way, as a result of a new hearing.
>
> (3) If there is such a likelihood, the nature of the likely changes must be weighed against the potential detriment to the child or children caused by the litigation itself. Thus, for example, small changes may not have sufficient benefit to compensate for the disruption caused by significant re-litigation.[229]

In *Prewett & Mann*, the Full Court cited *Marsden & Winch* with approval, noting that the approach is a manifestation of the best interests principle, founded on the notion that 'continuous litigation over a child or children is generally not in their interests'[230] and

226 *King and Finneran* [2001] FamCA 344 (Collier 5).
227 ibid., [43].
228 ibid., [62]. See also *KB & TC* [2005] FamCA 458 (Bryant CJ, May, and Boland JJ) (in which a change in children's wishes was regarded as a sufficient change in circumstances) and *R & BH* [2006] FamCA 919 (Kay, Warnick and May JJ).
229 *Marsden & Winch* [2009] FamCAFC 152, [50] (Bryant CJ, Finn and Cronin JJ).
230 *Prewett & Mann* [2013] FamCAFC 130, [9]–[10] (Ainslie-Wallace, Ryan and Le Poer Trench JJ).

that the application of the rule is influenced by the nature and degree of change sought to the earlier order.[231]

8.5.3 ENFORCEMENT

While it might seem obvious at first glance that parenting orders should be enforced, enforcement is a highly controversial issue because of its serious consequences for parents and children. In this section we focus on enforcement issues within a domestic context. However, parenting orders often have a foreign element (for example, cases of international relocation or where a child is wrongfully removed from Australia), giving rise to different kinds of enforcement issues, which are discussed at 9.7.

The enforcement of *FLA* parenting orders has proven to be a perennial problem. Fathers have perceived the system as enforcing their child support obligations to a greater extent than their parenting orders, regarding this as evidence of a biased system.[232] By contrast, mothers often point to the problem of fathers failing to turn up for contact. As the 2000 Family Law Pathways report noted:

> Resident parents, usually mothers, also have concerns with the enforcement of contact orders as they see that children suffer if their non-resident parents do not turn up for contact ... If the resident parent wants to vary the order in response to the enforcement application, or commence enforcement proceedings themselves, legal aid is rarely available.[233]

While gender politics play a significant role in the debate about the enforcement of parenting orders, the focus has tended to be on fathers' complaints, rather than on mothers', when the reality seems more complicated. Although the case law certainly indicates that there are mothers who make it difficult for fathers to spend time with their children, there is also research highlighting the significant efforts that mothers often go to in order to facilitate father–child relationships, even in circumstances where fathers frequently fail to turn up.[234] Indeed, as noted below, the contravention provisions have not provided a basis for arguing that this constitutes non-compliance.

In 2001, after the 1996 amendments, Helen Rhoades described the discourse surrounding enforcement of parenting orders as reflecting the stereotype of the 'no-contact mother': 'a woman who is "selfishly determined to put her own interests ahead of those of her children" by denying them contact with their father'.[235] She argues that this construction had become:

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231 See *SPS & PLS* [2008] FamCAFC 16 (Warnick J, on appeal from the FMCoA). See also *Bretton & Bondai* [2013] FamCAFC 168, where the Full Court (Finn and Strickland JJ, May J dissenting) confirmed the trial judge's finding that the failure to reintroduce contact (which was assumed in existing consent orders) constituted a change in circumstances.

232 Family Law Pathways Advisory Group Report, above n 207, p 61.

233 ibid., p 61.

234 Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-Separation Parenting in 2009: An Empirical Snapshot' (2009) 23 *Australian Journal of Family Law* 247; Belinda Fehlberg, Christine Millward, Monica Campo and Rachel Carson, 'Post-Separation Parenting and Financial Settlements: Exploring Changes over Time' (2013) 27 *International Journal of Law, Policy and the Family* 359.

235 Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71, 74.

> a regularly used discursive strategy employed on behalf of non-resident parents in family law litigation, even when the caregiver is not seeking to have contact suspended altogether. At its extreme end, the argument is couched in terms of 'parental alienation syndrome', a classification which (purportedly) draws on psychiatric discourses of deviance.[236]

Rhoades's empirical study (which drew on 100 FCoA files 'in which an enforcement application was listed for hearing in 1999')[237] suggested that 'the reasons for the breakdown of contact orders are far more complex than has been presumed by recent policy directions and by the stock stories of selfish mothers'.[238] The most common reason for denial of contact was 'the resident parent's concerns about the contact parent's parenting capacity'.[239] Most commonly in these cases the court found that the resident parent had not breached the orders, often resulting in a variation of the contact arrangements to provide safer or more appropriate arrangements for contact.[240] Triggers for applications for enforcement orders were often factors unrelated to the contact itself, including child support claims, a parent re-partnering, or unresolved feelings about the relationship breakdown.

The orders that the court can make when dealing with contraventions depend on whether 'a contravention is alleged to have occurred but is not established'; or 'the court finds that a contravention has occurred but there is a reasonable excuse for the contravention'; or 'the court finds that there was a contravention and there is no reasonable excuse for the contravention' (section 70NAA) and allow for more flexible range of remedies, including variation of the original orders, repayment of money expended or 'make-up' time. Sanctions may also be imposed (8.5.3.3).

8.5.3.1 WHAT IS A CONTRAVENTION?

A contravention of an order occurs when a person has intentionally failed to comply with the order, made no reasonable attempt to comply with the order, intentionally prevented compliance with the order by a person bound by it, or aided and abetted a contravention of the order by a person bound by it (section 70NAC).

Relevant to interpreting and applying these provisions are sections 65M–P, which outline the general obligations created by parenting orders. For example, section 65M, which deals with the general obligations created by a parenting order that deals with whom a child lives, states that a person must not remove the child from the care of the person, refuse or fail to deliver or return the child to the person, or interfere with the exercise or

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236 ibid.

237 ibid., 75.

238 ibid., 87–8. In a later study, Rhoades identified the diverse factors behind contraventions: 'factors as diverse as a parent feeling betrayed because the other parent "walked out" of the relationship, the costs of travelling to visit children who live on the other side of town or the other side of the country, a parent who feels hurt because their former spouse has found a new partner or given birth to a new baby, a child who has reached adolescence and refuses to stick to the old routines or is simply bored during contact visits, a parent missing out on being with their child on a special occasion because it is not (or because it is) a contact weekend, a history of domestic violence in the parents' relationship, fears that a child is being abused, and anxieties because a parent or their new partner has an alcohol or drug abuse problem': Helen Rhoades, 'Contact Enforcement and Parenting Programmes: Policy Aims in Confusion?' (2004) 16 *Child and Family Quarterly* 1, 15.

239 Rhoades, above n 235, p 75.

240 ibid.

performance of any of the powers, duties or responsibilities that the person has under the order.[241]

The case law has long established that a parent has an obligation to take reasonable steps to facilitate, and encourage a child to avail him- or herself of, contact that has been ordered by the court.[242] In *Stevenson v Hughes*, Fogarty J stated that a parent must take '[a]n active role with an obligation to positively encourage access.'[243] In *D & C* the Full Court allowed the wife's appeal regarding contravention, but expressed no disagreement with the trial judge's view that compliance 'is not merely to be "a token effort" disguised to convey the burden of compliance.'[244] Consistent with this, the general obligations created by a parenting order that deals with those with whom a child spends time are that '[a] person must not: (a) hinder or prevent a person and the child from spending time together in accordance with the order; or (b) interfere with a person and the child benefiting from spending time with each other under the order' (section 65N(2)), in addition to the obligations on a resident parent identified above.

In contrast, an issue around contravention that has given rise to more debate is whether, when an order has been made for a person to spend time with the child, it is a contravention of that order for the person in whose favour it is made to fail to do so. In *B & B*,[245] the Full Court said that it would be highly unlikely to enforce a contact order against a non-resident parent because 'it would be most unlikely that the children's best interests would be served by requiring the contact parent to have contact which he or she did not wish to have'.[246]

8.5.3.2 REASONABLE EXCUSE

A person may have a reasonable excuse for contravention of an order. The legislation does not, however, provide an exhaustive list of what will constitute a reasonable excuse.

A reasonable excuse can include the respondent's lack of understanding of the order, provided the court is satisfied that the respondent ought to be excused (section 70NAE(2)). In *D & C*,[247] the mother took a seven-year-old child to a contact centre and, upon arrival, said 'off you go'. The evidence at trial was that the mother expected that contact centre workers would take care of the physical changeover and that her obligation did not go beyond presenting the child at the centre. While the child went into the centre and was engaged by a worker, she refused to go into the room where her father was waiting. The trial judge, Dawe J, held that simply encouraging a child to attend a contact centre was insufficient to meet a parent's obligation to facilitate contact. He stated:

> I am not satisfied that the mother made a genuine attempt to encourage [the child] to attend contact and I am certainly not satisfied that the mother made a genuine effort

241 See *Rutherford & Marshall of the Family Court of Australia* [1999] FamCA 1299 (*Rutherford*).
242 *In the Marriage of Stavros* (1984) Fam LR 1025; *Rutherford* [1999] FamCA 1299; *Matthews v Millar* (1988) 12 Fam LR 205.
243 *Between: Robyn Ann Stevenson Appellant/Wife and Kenneth Alan Hughes Respondent/Husband Appeal* [1993] FamCA 14, [3] (Fogarty J).
244 *D & C* [2005] FamCA 1046, [22] (Kay, Warnick and Boland JJ).
245 *B & B: Family Law Reform Act* 1995 [1997] FamCA 33.
246 ibid., [10.64].
247 *D & C* [2005] FamCA 1046.

> to insist to [the child] that she [the child] attend contact or positively encouraged contact. The mother has not used her position of authority over [the child] to ensure that [the child] does as she is told.[248]

However, on appeal the Full Court of FCoA (Kay, Warnick & Boland JJ) found that because the mother mistakenly thought that she was fulfilling her obligations under the orders, this constituted a reasonable excuse. In an earlier contravention application, the mother was sentenced to 30 days' imprisonment, of which she served part, before the decision was overturned.[249]

A reasonable excuse can also be established if 'the respondent believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child)' and the period was 'not longer than was necessary to protect the health or safety of the person' (section 70NAE(4)–(7)).[250]

8.5.3.3 SANCTIONS

If a contravention is alleged but not established,[251] the court may order 'that the person who brought the proceedings ... pay some or all of the costs of another party, or other parties, to the proceedings' (section 70NCB(1)). The court must consider any previous proceedings alleging contravention in deciding what order to make under this section (section 70NCB(2)).

If a contravention is established, but there is a reasonable excuse for the contravention, the court may make an order compensating the person for time lost with the child (section 70NDB). It must not do so if it would not be in the best interests of the child (section 70NDB(2)). If it does not do so, it may make an order for costs against the person who brought the proceedings (section 70NDC). This is likely to create a disincentive to the bringing of spurious contravention proceedings.

If a contravention is established and there is *no* reasonable excuse for the contravention, then the powers of the court depend upon whether this is regarded as a more or less serious contravention (section 70NAA(3)(c)). It will be a less serious contravention if there is no previous order imposing a sanction or taking an action in respect of a contravention, unless the court dealing with the current contravention 'is satisfied that the person who contravened the primary order has behaved in a way that shows a serious disregard for his or her obligations under the primary order' (section 70NEA(2) and (4)) or if, despite the making of a previous order, a court dealing with the current contravention thinks it is more appropriate for the contravention to be dealt with as a less serious contravention (section 70NEA(3)).

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248 ibid., [22].

249 *C & D* [2004] FMCAfam 253 (Lindsay FM).

250 *Childers & Leslie* [2008] FamCAFC 5. On appeal, Warnick J overturned a dismissal of a contravention application. The child was ill and a doctor had ordered the child rest and not undertake much activity and as a result the mother for one weekend. The Court held this was not a reasonable excuse within the meaning of s 70NAE(5). By the time orders were finalised, over a year had passed and consequently the Court did not order compensatory time.

251 The standard of proof is on the balance of probabilities (s 70NAF(1)).

In these less serious cases the court may make an order directing attendance at a post-separation parenting program(section 65LA)[252] (7.7); make a compensatory parenting order; adjourn the proceedings to allow an application for a new order; make an order requiring the person who committed the contravention to enter into a bond; make orders for compensation for expenses incurred as a result of the contravention; and/or make an order for costs (section 70NEB). In relation to the power to order attendance at a parenting program, it has been pointed out that:

> this power will only apply once court proceedings have been initiated, and the majority of litigants who find themselves involved in enforcement disputes have made their arrangements by consent. Some researchers have also suggested that there may be a very small period of time following separation before people 'close off the opportunity' for self-analysis that might forestall such conflicts, particularly for men. Thus if we are to assist separated parents who are struggling with post-separation animosity outside of the court system, therapeutic services should be offered regardless of a person's litigation status, and this should be accompanied by a government-sponsored community education campaign.[253]

In more serious cases there are additional powers to make a community service order; fine a person; or impose a sentence of imprisonment (section 70NFB). Sentences of imprisonment cannot be for more than 12 months, and must not be imposed unless the court is satisfied that it would not be appropriate to deal with the contravention in one of the other possible ways (section 70NFG). As just noted, a court may also make an order directing a party to the proceedings to attend a 'post-separation parenting program'.

8.6 CONCLUSION

Our consideration in this chapter of the legal framework for determining parenting disputes highlights the ways in which ESPR and shared time outcomes are encouraged by the legislation and case law. The legislative pathway described in *Goode* makes clear links between the presumption of ESPR and shared time, even in circumstances where the presumption of ESPR does not apply or has been rebutted. Thus, while there is no presumption in favour of shared time in the *FLA*, the effect of the decision-making pathway prescribed by *Goode* is that shared time is potentially under consideration in the majority of cases. Together with the research on court orders for shared parental responsibility discussed in Chapter 6[254] the case law demonstrates the strength of emphasis on shared parental responsibility evident before the 2006 amendments and even more strongly after them.

A paradox highlighted by this discussion arises from a divergence between the legislature's concern to distinguish cases involving family violence and child abuse concerns through the non-applicability of the ESPR presumption and the common approach in agreement and decision making that holds that shared parental responsibility is in a child's

252 A 'post-separation parenting program' is defined in s 4. Conditions for providers of post-separation parenting programs are set out in s 65LB.

253 Helen Rhoades, 'Contact Enforcement and Parenting Programmes: Policy Aims in Confusion?' (2004) 16 *Child and Family Quarterly* 1, 15–16.

254 Kaspiew et al., 2009, above n 3.

best interests except in the most severe circumstances. Though the 2012 amendments may signal a new direction in cases where violence or abuse is alleged, and some evidence of this is emerging, the extent to which change occurs will dependent on a range of factors. These include judicial interpretation of the new definition of 'family violence' (Chapter 6) and the extent to which sufficient resources are available at a systemic and individual level to apply the amount of forensic scrutiny required to establish these issues to the level of certainty required by the courts. The decision in *Amador* suggests the emergence of a realistic approach to this question in the context of research evidence establishing family violence is significantly underreported.