

Bond University

Bond Law Review

Volume 34

Issue 1

2022

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Domestic and Family Violence and Private Family Report Writing Practice in the Australian Family Law System: A Study

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Abstract

In Australia, family reports are an influential expert assessment of a family usually undertaken in contentious family law parenting matters by social workers or psychologists, known as family report writers. This article presents findings from in-depth interviews with 10 private family report writers about their experience of undertaking assessments, particularly in cases where domestic and family violence is alleged. The study reveals a number of concerns that mirror the findings of previous Australian and international research in this area. For example, concerns were raised about the quality and efficacy of training and access to other resources, professional isolation, the efficacy of the family report assessment process, and divergence in understandings of domestic and family violence. A critical issue raised in the study relates to the pro-contact and co-parenting culture of the Australian family law system, which can significantly impact the family report writing process and may have repercussions for the safety of victims of domestic and family violence and their children. Responding to and drawing from the family report writers' lived experiences, we offer suggestions for reform that aim to improve the efficacy of the family report assessment process and therefore the justice and safety of outcomes in matters where a family report is deemed necessary.

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I Introduction

Matters involving families where there are allegations of domestic and family violence (DFV)¹ constitute a significant part of family court caseloads in Australia. A Media Release by the Federal Circuit and Family Court of Australia in November 2021 indicated that:²

In addition to court data showing approximately 80% of family law cases allege at least one major risk factor (including family violence), we now know that around 50% of high risk matters screened as part of the Court's Lighthouse Project, contain four or more major risk factors. This is significantly higher than previously reported. Initial court data at the point of filing reveals that: 54% of parties allege a child has been abused or is at risk of abuse, 64% of parties allege they have experienced family violence, 57% of parties allege a child has experienced family violence, 39% of parties allege that drug, alcohol or substance misuse has caused harm or poses a risk of harm to a child, and 40% of parties allege that the mental ill-health of a party has caused harm or poses a risk of harm to a child.³

In Australia, as is the case in other countries, the negative impacts, particularly on children, of living with DFV are now explicitly recognised in family law, and these impacts are seen as important for determining what will be in a child's best interests when resolving post-separation parenting disputes.⁴ The determination of the best interests of children occurs, however, in the context of the legislative emphasis on a child's right to maintain a relationship with both parents.⁵ In practice, domestically violent fathers are often not considered any differently from non-abusive men in family law proceedings, with resultant parenting orders in DFV and non-DFV cases being similar.⁶

A crucial piece of forensic evidence in contentious parenting matters, many of which involve DFV, is a family report (FR). FRs may be the

¹ We have used the terminology of 'domestic and family violence' in this article, although family law legislation in Australia uses the term 'family violence'. See *Family Law Act 1975* (Cth) (FLA) s 4.

² Since September 2021 the Federal Circuit and Family Court of Australia have been combined and are generally referred to in this article as the 'family courts'.

³ Federal Court and Family Court of Australia (FCFCOA), 'Media Release: New Court Initiatives Help Uncover Higher Prevalence of Family Violence and Other Risks' Webpage <<https://www.fcfoa.gov.au/news-and-media-centre/media-releases/mr101121>>.

The previously reported data indicated in 2017 that 50% of cases in the Family Court of Australia and 70% of cases in the Federal Circuit Court of Australia involved allegations of violence: House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Parliament of Australia, 2017).

⁴ Many sections of the FLA render domestic and family violence relevant to children's cases including s 60B(1)(b), s 60CC(2)(b) and (2A) and s 60CG. In Australia, cases regarding arrangements for children after parental separation are referred to as 'parenting' matters.

⁵ FLA s 60B(2)(a).

⁶ Samantha Jeffries, 'In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the 'Expert' Assessments that Guide Judicial Determinations' (2016) 5(1) *LAWS* (Special Issue: Justice Connections) (Online).

only independent or expert evidence to assist a family court's determination of parenting matters when DFV has been raised as an issue. Therefore, it is important to understand how family report writers (FRWs) think about DFV and how they conduct their assessments in matters where DFV allegations have been made.

This article presents a study of the views of 10 FRWs in private practice on issues relating to FR writing in the Australian Family Law system in contexts where there are allegations of DFV. This is the fourth and final component of a multi-study research project which began in 2015 with a review of the extant international literature on FR writing.⁷ That literature review highlighted a number of concerns about the FR writing process across Western liberal democratic countries.⁸ These concerns related to issues of training, professional supervision and support for FRWs; the processes associated with making FR assessments; FRWs' perceptions and understandings of DFV; and the nature of the expert recommendations made in FRs in cases where DFV is alleged. To test the findings of the literature review the research team designed three empirical research projects. The first sought to explore the concerns identified internationally in the context of the Australian family law system and involved focus groups with professionals providing legal and social support to DFV victims engaged with the system.⁹ The second empirical study explored victim mothers' experiences of FRW assessment practices.¹⁰ These studies and their findings are discussed in more detail below, however essentially each affirmed the extant literature and a saturation point in relation to common themes and concerns was reached quickly.

⁷ Rachael Field et al, 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25(4) *Journal of Judicial Administration* 212.

⁸ Other recent Australian reports have also made a series of recommendations about improving the skills, competencies and accountability mechanisms of FR writers. See, for example, Senate Finance and Public Administration References Committee, *Domestic Violence in Australia, Report* (Parliament of Australia, August 2015) recommendation 17; House of Representatives Standing Committee on Social Policy and Legal Affairs (n 3) recommendations 22, 30; Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System, Report No 135* (ALRC, March 2019) recommendation 53; Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings: Second Interim Report* (Parliament of Australia, March 2021) recommendation 9. A consultation of the Federal Attorney-General's Department entitled *Improving the Competency and Accountability of Family Report Writers* took place in 2021. See (Web Page) <<https://consultations.ag.gov.au/families-and-marriage/family-report-writers/>>. The authors made a submission to the consultation. The final report is pending.

⁹ Samantha Jeffries et al, 'Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic and Family Violence? Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System' (2016) 39(4) *UNSW Law Journal* 1355.

¹⁰ Zoe Rathus et al, 'It's Like Standing on a Beach, Holding Your Children's Hands, and Having a Tsunami Just Coming Towards You': Intimate Partner Violence and 'Expert' Assessments in Australian Family Law (2019) 14(4) *Victims & Offenders* 408.

The third empirical study is the subject of the present article and involved interviews with FRWs themselves. The article begins with a background discussion of DFV and its impact on mothers and their children, particularly in the context of post-separation parenting disputes. The role of FRs in parenting cases is also discussed, and the writing of FRs is situated in the broader context of the Australian family law system. Next, we briefly explain the previous FR studies conducted by the research team on which this research builds. We then describe the methodology of the FRW study and discuss the research findings. The article concludes with ideas for reform of the FR writing process, many suggested by the FRWs who were interviewed, as to ways in which the quality of FRs for matters involving DFV might be improved.

II Background to Understanding the Importance of FRs in the Australian Family Law System

Before briefly discussing the previous studies in this research project, and introducing the methodology and results of our study with FRWs, it is first important to provide a contextual framework for this work. This section therefore discusses important issues relevant to understanding the place of FRs in the Australian family law system. To begin we discuss DFV and its impact on victims of DFV and their children, particularly in the context of post-separation parenting disputes. Next, the role of FRs in parenting cases is discussed, and the writing of FRs is situated in the broader context of the Australian family law system.

A DFV, Children and Parenting

In this article, the term DFV is used to refer to acts of abuse that occur between people who have, or have had, an intimate relationship.¹¹ It has long been well understood that DFV is a gendered form of violence, with women more likely to be victims and men to be perpetrators.¹² There has also been wide acknowledgement for decades that DFV extends beyond physical abuse and includes ‘sexual, emotional and psychological abuse’,¹³ as well as a diverse variety of ongoing non-

¹¹ See further FLA s 4AB which defines ‘family violence’ for the purposes of the Act.

¹² Molly Dragiewicz and Yvonne Lindgren, ‘The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis’ (2009) 17(2) *American University Journal of Gender Social Policy and Law* 229; Marianne Hester, *Who Does What to Whom?: Gender and Domestic Violence Perpetrators* (University of Bristol and Northern Rock Foundation, 2009); Andy Myhill, ‘Measuring Domestic Violence: Context is Everything’ (2017) 1(1) *Journal of Gender-Based Violence* 33; Charlotte Bishop and Vanessa Bettinson, ‘Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence of “Controlling or Coercive Behaviour”’ (2018) 22(1) *The International Journal of Evidence & Proof* 3.

¹³ Council of Australian Governments (COAG), *National Plan to Reduce Violence against Women and their Children 2010-2022* (Commonwealth of Australia, 2010). See also Ellen

physical behaviours that facilitate a perpetrator's maintenance of power and control over their victim.¹⁴ Indeed, the central element of DFV is understood to be 'an ongoing pattern of behaviour aimed at controlling a partner through fear, for example by using behaviour which is violent and threatening'.¹⁵

Coercively controlling DFV can have devastating impacts, and studies have clearly established that it frequently continues after the parties have separated, and often in fact intensifies and diversifies post-separation.¹⁶ Indeed, for victims of DFV and their children, parental separation rarely provides protection from the perpetration of DFV.¹⁷ For example, in the post-separation context, perpetrator fathers are commonly known to use and engage children to control, harass, intimidate, frighten, punish, and harm victim mothers.¹⁸ Thus, children

Katz, 'Beyond the Physical Incident Model: How Children Living with Domestic and Family Violence are Harmed By and Resist Regimes of Coercive Control' (2016) 25(1) *Child Abuse Review* 46; Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control - Family Violence and the Criminal Law* (Springer, 2020).

- ¹⁴ Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2009); Kristin L Anderson, 'Gendering Coercive Control' (2009) 15(12) *Violence Against Women* 1444; Andy Myhill and Katrin Hohl, 'The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence' (2019) 34(21-22) *Journal of Interpersonal Violence* 4477. See also Emma Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16(12) *Violence Against Women* 1412; Sylvia Walby and Jude Towers, 'Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime' (2018) 18(1) *Criminology & Criminal Justice* 7; Molly Dragiewicz et al, 'Technology Facilitated Coercive Control: Domestic Violence and the Competing Roles of Digital Media Platforms' (2018) 18(4) *Feminist Media Studies* 609. It is important to note that the law on domestic and family violence is developing in terms of the criminalisation of non-physical forms of violence such as economic abuse and emotional abuse or intimidation. See, eg, the *Family Violence Act 2004* (Tas), ss 8 and 9; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11(1)(c). In Queensland, in November 2021 the criminalisation of coercive control was recommended by the Women's Safety and Justice Taskforce in its first report: *Hear Her Voice*, Webpage <<https://www.womenstaskforce.qld.gov.au/>>. The report made 89 recommendations for domestic violence and justice system reform, which were all supported or supported in principle by the Queensland Government. Legislation to make coercive control a criminal offence is currently being drafted in Queensland.
- ¹⁵ COAG (n 13). Advocates working with women who have experienced DFV, feminist activists, scholars and others have been striving for many years to ensure that coercive control is better understood. However, as we suggest later when discussing the legal definitions of DFV, transposing broad social science or policy definitions of coercive control into the legal sphere may create unintended and sometimes insurmountable challenges for women who live with DFV, for example, because of the legislative requirement to prove that their partner controlled them or caused them to feel fear. See, eg, Zoe Rathus, 'Shifting Language and Meanings Between Social Science and the Law: Defining Family Violence' (2013) 36(2) *UNSW Law Journal* 359. See also Women's Safety and Justice Taskforce, *Hear Her Voice Report 1 and 2: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Queensland Government, 2021).
- ¹⁶ Emma Katz, Anna Nikupeteri and Merja Laitinen, 'When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic and Family Violence' (2020) 29(4) *Child Abuse Review* 310.
- ¹⁷ Peter G Jaffe, Nancy Lemon and Samantha Poisson, *Child Custody and IPV: A Call for Safety and Accountability* (Sage, 2003) 29.
- ¹⁸ Marisa L Beeble, Deborah Bybee and Cris M Sullivan, 'Abusive Men's Use of Children to Control Their Partners and Ex-Partners' (2007) 12(1) *European Psychologist* 54; Stark (n 14).

and mothers may continue to live in fear and danger post-separation where ongoing contact between a perpetrator father and his children provides significant opportunities for the continuation of abuse.¹⁹

Children who live with DFV exhibit negative short- and long-term impacts on their well-being.²⁰ This includes trauma symptoms, as well as other emotional and mental health problems; behavioural, cognitive, developmental, social, learning, physical and physiological issues, similar to children who are directly abused.²¹ Additionally, studies show that living with DFV is a strong predictor of other adverse childhood experiences (such as parental substance abuse and household

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- ¹⁹ Cathy Humphreys, *Domestic and Family Violence and Child Protection* (Australian Domestic and Family Violence Clearing House, 2007); Katz et al (n 16). See also, Susan Heward-Belle, 'Exploiting the 'Good Mother' as a Tactic of Coercive Control: Domestically Violent Men's Assaults on Women as Mothers' (2017) 32(3) *Affilia* 374. We note that the narratives of abusive fathers about their own parenting are often in stark contrast to what is known to be the realities of that parenting. For example, abusive fathers often present themselves publicly, in popular and social media as misrepresented and wrongly maligned, and they present the family law system as unfair and biased against them. See for example, the Fathers' Right Australia Webpage < <https://fathersrightsaustralia.com/>>. For analysis of fathers' rights discourses see, eg, Carl Bertoia and Janice Drakich, 'The Fathers' Rights Movement: Contradictions in Rhetoric and Practice' (1993) 14(4) *Journal of Family Issues* 592; Miranda Kaye and Julia Tolmie, 'Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22(1) *Melbourne University Law Review* 162; Susan B Boyd, 'Robbed of Their Families? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes' in Richard Collier and Sally Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Bloomsbury, 2006) 27-51; Jocelyn E Crowley, 'Taking Custody of Motherhood: Fathers' Rights Activists and the Politics of Parenting' (2009) 37(3/4) *Women's Studies Quarterly* 223; Michael Flood, "'Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328; Jonathan Alschech and Michael Saini, "'Fathers' Rights" Activism, Discourse, Groups and Impacts: Findings from a Scoping Review of the Literature' (2019) 60(5) *Journal of Divorce & Remarriage* 362.
- ²⁰ Nicky Stanley, *Children Experiencing Domestic and Family Violence: A Research Review* (University of Sheffield, 2011); Ellen Pence et al, *Mind the Gap: Accounting for IPV in Child Custody Evaluations* (The Battered Women's Justice Project, 2012); Katz et al (n 16). See also Monica Campo, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses* (Child Family Community Australia Paper No 36, Australian Institute of Family Studies, 2015).
- ²¹ Marianne Hester, Chris Pearson and Nicola Harwin, with Hilary Abrahams, *Making an Impact: Children and Domestic Violence: A Reader* (Jessica Kingsley Publishers, 2nd ed, 2007). See also Lesley Laing, *Children, Young People and Domestic Violence* (Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2000); Stephanie Holt, Helen Buckley and Sadhbh Whelan, 'The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature' (2008) 32(8) *Child Abuse and Neglect* 797; Mariny Abdul Ghani, 'The Impacts of Domestic Violence on Children' (2018) 96(3) *Child Welfare* 103; Michele Lloyd, 'Domestic Violence and Education: Examining the Impact of Domestic Violence on Young Children, Children and Young People and the Potential Role of Schools' (2018) *Frontiers in Psychology* 2094; Katie Lamb, Cathy Humphreys and Kelsey Hegarty, "'Your Behaviour has Consequences": Children and Young People's Perspectives on Reparation with Their Fathers after Domestic Violence' (2018) 88 *Children and Youth Services Review* 164; Ben Donagh, 'From Unnoticed to Invisible: The Impact of COVID-19 on Children and Young People Experiencing Domestic Violence and Abuse' (2020) 29(4) *Child Abuse Review* 387; Lisa Arai et al, 'Hope, Agency, and the Lived Experience of Violence: A Qualitative Systematic Review of Children's Perspectives on Domestic Violence and Abuse' (2021) 22(3) *Trauma, Violence and Abuse* 427; Woi Hon Boo, 'Exposure to Domestic Violence During the COVID-19 Pandemic: A Potent Threat to the Mental Well-Being of Children' (2021) 28(3) *Malaysian Journal of Medical Sciences* 158.

mental illness) which can develop into indicators of distress across the life course.²² For these reasons, DFV is highly relevant to the best interests of children in parenting matters, and the protection of children from harm is a significant component of the provisions in the FLA relating to determination of the children's best interests.²³ Further, DFV, even if not perpetrated directly against children, nevertheless constitutes both violence against women and child abuse.²⁴

DFV is highly relevant to any determination of a child's best interests in family law matters.²⁵ When a parent perpetrates DFV against the other parent, this calls into question the perpetrator's capacity to parent with a focus on the best interests of the children. Studies highlight, for example, that perpetrator fathers have numerous parenting deficits.²⁶ These stem from a perpetrator's sense of entitlement, self-centeredness, superiority and amplified need for control.²⁷ Compared with non-abusive fathers, domestically violent men are less likely to show interest in the parenting role, even if they maintain a physical presence in the children's lives. They often lack understanding of child developmental needs; see children as property

²² Stanley (n 20).

²³ DFV features prominently in the provisions relating to the determination of the best interests of children in Part VII of the FLA. One of the objects of the Part under s 60B(1)(b) is 'protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'. In terms of determining the best interests of children it is a primary consideration under s 60CC(2)(b) to protect 'children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' and this consideration is to be given greater weight than the other primary consideration under s 60CC(2)(a), which concerns 'the benefit to the child of having a meaningful relationship with both of the child's parents'. In addition, under s 60CC(3)(f), the capacity of the parents 'to provide for the needs of the child, including emotional and intellectual needs' is an additional consideration in determining the best interests of a child. Further, s 60CC(3)(j) provides that 'any family violence involving the child or a member of the child's family' should be considered in determining the child's best interests and s 60CC(3)(k) provides for the consideration of any applicable family violence orders.

²⁴ It should be noted that the definition of 'family violence' in the FLA contains a sub-section regarding child exposure to DFV (s 4AB(3)) and provides examples (s 4AB(4)). See also Ann Buchanan, *Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service* (The Policy Press, 2001); Katz et al (n 16).

²⁵ See FLA s 60CC(2)(b) and s 60CC(3)(i)-(k).

²⁶ Stephanie Holt, 'Post-Separation Fathering and Domestic Abuse: Challenges and Contradictions: Post-Separation Fathering and Domestic and Family Violence' (2015) 24(3) *Child Abuse Review* 210; Katz (n 13); Katz et al (n 16); Einat Peled, 'Parenting by Men who Abuse Women: Issues and Dilemmas' (2000) 30(1) *The British Journal of Social Work* 25; Guy Perel and Einat Peled, 'The Fathering of Violent Men: Constriction and Yearning' (2008) 14(4) *Violence Against Women* 457-482; Carla S Stover and Andrea Spink, 'Affective Awareness in Parenting of Fathers with Co-Occurring Substance Abuse and Intimate Partner Violence' (2012) 5(2) *Advances in Dual Diagnosis* 74. See also Lundy Bancroft, Jay G Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic and Family Violence on Family Dynamics* (Sage Publications, 2012); Stephanie Holt, 'Focusing on Fathering in the Context of Domestic Abuse' in Joanne Westwood et al, *Domestic Violence and Protecting Children: New Thinking and Approaches* (Jessica Kingsley Publishers, 2015) 166-181.

²⁷ Cathy Humphreys et al, 'More Present than Absent: Men Who Use Domestic and Family Violence and Their Fathering' (2019) 24(2) *Child & Family Social Work* 321, 322; Bancroft, Silverman and Ritchie (n 26).

items; model violent, abusive and patriarchal norms; and are overly rigid, authoritarian and coercive with a predisposition toward physical forms of discipline.²⁸ Perpetrator fathers are frequently verbally abusive, manipulative, neglectful and irresponsible, lacking in empathy, warmth and respect for their children.²⁹ These parenting traits of perpetrator fathers are of particular concern in post-separation environments when fathers are more likely to be left alone with children over extended periods.³⁰

DFV can also negatively impact the parenting capacity of victim mothers.³¹ However, it is important to be aware that the challenges created by the dynamics of DFV for victim mothers often dissipate when the abuse stops.³² Additionally, mothering and mother-child relationships in contexts of DFV should not be typecast within frameworks of deficiency.³³ Mothers and children possess agency and the capacity to resist attempts by abusers to splinter their relationships, which can remain close, undivided, and positive despite DFV.³⁴ Further, women frequently take active steps to compensate for DFV, exhibiting

²⁸ Holt 'Post-Separation Fathering and Domestic Abuse' (n 26); Katz (n 13); Katz et al (n 16); Peled (n 26); Perel and Peled (n 26); Stover and Spink (n 26). See also Bancroft, Silverman and Ritchie (n 26).

²⁹ Holt 'Post-Separation Fathering and Domestic Abuse' (n 26); Katz (n 13); Katz et al (n 16); Peled (n 26); Perel and Peled (n 26); Stover and Spink (n 26).

³⁰ Humphreys et al (n 27); Stephanie Holt, 'A Voice or a Choice? Children's Views on Participating in Decisions About Post-Separation Contact with Domestically Abusive Fathers' (2018) 40(4) *Journal of Social Welfare and Family Law* 459.

³¹ Emma Katz, 'Recovery-Promoters: Ways that Mothers and Children Support One Another's Recoveries from Domestic and Family Violence' (2015) 45(Supp 1) *British Journal of Social Work* online i153-i169; Katz (n 13); Emma Katz, 'Coercive Control, Domestic and Family Violence, and a Five-Factor Framework: Five Factors that Influence Closeness, Distance, and Strain in Mother-Child Relationships' (2019) 25(15) *Violence Against Women* 1829; Karin Pernebo and Kjerstin Almqvist, 'Young Children Exposed to Intimate Partner Violence Describe Their Abused Parent: A Qualitative Study' (2017) 32(2) *Journal of Family Violence* 169; Lorraine Radford and Marianne Hester, *Mothering Through Domestic and Family Violence* (Jessica Kingsley Publishers, 2006); Ravi K Thiara and Cathy Humphreys, 'Absent Presence: The Ongoing Impact of Men's Violence on the Mother-Child Relationship' (2017) 22(1) *Child & Family Social Work* 137.

³² Katz, 'Recovery-Promoters' (n 31). See also Lorraine Radford and Marianne Hester, 'Overcoming Mother Blaming? Future Directions for Research on Mothering and Domestic Violence' in Sandra A Graham-Bermann and Jeffrey L Edleson, *Domestic Violence in the Lives of Children: The Future of Research, Intervention and Social Policy* (American Psychological Association, 2001) 135-155; Radford and Hester (n 32).

³³ Thiara and Humphreys (n 31); Katz, 'Recovery-Promoters' (n 31); Katz, 'Coercive Control, Domestic and Family Violence, and a Five-Factor Framework' (n 31).

³⁴ Bancroft, Silverman and Ritchie (n 26); Amy Chanmugam, 'Got One Another's Backs: Mother-Teen Relationships in Families Escaping Intimate Partner Violence' (2014) 24(7) *Journal of Human Behavior in the Social Environment* 811; Katz, 'Recovery-Promoters' (n 31); Katz, 'Coercive Control, Domestic and Family Violence, and a Five-Factor Framework' (n 31). See also, Nicole L Letourneau, Cara B Fedick and J Douglas Willms, 'Mothering and Domestic Violence: A Longitudinal Analysis' (2007) 22(8) *Journal of Family Violence* 649; Sarah Wendt, Fiona Buchanan and Nicole Moulding, 'Mothering and Domestic Violence: Situating Maternal Protectiveness in Gender' (2015) 30(4) *Affilia* 533; Cathy Humphreys et al, 'Supporting the Relationship Between Mothers and Children in the Aftermath of Domestic Violence' in Joanne Westwood et al, *Domestic Violence and Protecting Children: New Thinking and Approaches* (Jessica Kingsley Publishers, 2015) 130-147.

parenting behaviours comparable to, and at times more positive than, mothers who are not living with DFV.³⁵

The complex nature of DFV and its impact on victims and children mean that it is critical that professionals who work in the family law system understand the dynamics of post-separation DFV because, as noted above, it is a central feature of their caseload.³⁶ These issues inform our analysis of the research

B *FRs in the Australian Family Law System*

The Australian family law system requires judicial officers to make decisions based on the evidence presented by the parties. Compiled by FRWs, FRs³⁷ are a critical piece of evidence in many parenting matters. FRs can be ordered by a judge in complex parenting matters, arranged by an independent children's lawyer (ICL),³⁸ or organised by the parties (the parents) themselves.³⁹ FRWs are generally qualified in social work and/or psychology and commonly have at least five years' experience in a related field of practice.⁴⁰ Section 62G(1) of the Australian *Family Law Act 1975* (Cth) (FLA) provides that FRs are ordered in proceedings in which 'the care, welfare and development of a child who is under 18 is relevant'. According to section 62G(4) an FR can include any 'matters that relate to the care, welfare or development of the child'. For this reason, FRs are often called for in circumstances where there is past or present perpetration of DFV, as the presence of DFV in a family context is directly relevant to a child's needs, best interests and safety.

It is important to appreciate that there are several distinct, but overlapping, groups of professionals who prepare documents called

³⁵ Cecilia Casanueva, 'Quality of Maternal Parenting Among Intimate-Partner Violence Victims Involved with the Child Welfare System' (2008) 23(6) *Journal of Family Violence* 413.

³⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs (n 3).

³⁷ FRs are referred to as custody evaluations in the United States. In the United Kingdom, these reports are undertaken by social workers from the Children, Family Court Advisory and Support Service.

³⁸ ICLs are appointed to complex cases by judges under s 68L of the FLA to represent and promote the best interests of the children in family law proceedings. An ICL is obliged to consider the view of the child, but ultimately provide their own, independent perspective about what arrangements or decisions are in the child's best interests.

³⁹ At the time this research was conducted, short early family reports were also undertaken under s 11F of the FLA. However, these are only conducted by in-house family report writers employed at the family courts, so were not discussed by our participants. Since the research, on 1 September 2021, the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* became operative. These introduced, without legislative amendment, three new types of family reports: child impact reports, child impact addendum reports and specific issues reports. These reports are also not discussed in our research as they did not exist at the time.

⁴⁰ There are currently no legislative or regulatory requirements specifying the qualifications or accreditation requirements of family report writers. *The Australian Standards of Practice for Family Assessments and Reporting* (FCoA, FCC and FCWA, February 2015) provide that FR writers and assessors should: generally, either be eligible for membership or a member of the AASW or be registered as a psychologist with AHPRA; meet the CPD recommendations of these bodies; and have professional clinical experience working with children and families.

FRs. Some FRWs are employees of the Federal Circuit and Family Court of Australia (FCFCOA),⁴¹ some are employed at Legal Aid offices,⁴² and others operate from private practice. FRWs based in the FCFCOA are referred to as ‘family consultants’.⁴³ Appropriately qualified professionals in private practice can be appointed under regulation 7 of the *Family Law Regulations 1984* (Cth) to write FRs. These FRWs are known as ‘reg 7 family consultants’. There are also other reports prepared by experts that might be called ‘family reports’, or might fulfil a similar purpose to a FR,⁴⁴ that are more correctly known as ‘single expert’ reports. A consultation paper, *Improving the Competency and Accountability of Family Report Writers*, published by the Attorney-General’s Department in November, 2021, reports that in August of that year there were 103 FRWs employed at the family courts, 101 ‘reg 7’ FRWs and an unknown number of single expert witnesses.⁴⁵ Our participants were drawn from FRWs in private practice – some held a ‘reg 7’ appointment and some did not. It should be noted that when the court has ordered that an FR be prepared, then a family consultant (internal or ‘reg 7’) must be engaged.⁴⁶ As data on the number of FRWs who regularly contribute to family law proceedings but are neither internal nor ‘reg 7’ are not available, it is not possible to know the overall size of the cohort of private FRWs in Australia.

FRs are a professional forensic and independent assessment that assists the court and/or the parties to make informed child-centred decisions about parenting arrangements by providing an appraisal of the family after separation from a social science perspective. FRWs make recommendations about a range of issues relevant to determining the best interests of the children including parenting roles and

⁴¹ As noted above, the Federal Circuit Court of Australia and the Family Court of Australia were merged on 1 September 2021 into the Federal Circuit and Family Court of Australia (FCFCOA). In this article, we generally refer to these courts (both pre-merger and post-merger) as the family courts.

⁴² Legal Aid in Australia refers to legal assistance provided by the government-funded bodies. Each state and territory has its own Legal Aid Commission, which is responsible for administering Legal Aid. There are Legal Aid offices in cities, suburbs and towns across Australia.

⁴³ S 11B of the FLA defines a ‘family consultant’ as ‘a person who is: (a) appointed as a family consultant under section 18ZH of the *Federal Court of Australia Act 1976*; or (c) appointed as a family consultant under the regulations; or (d) appointed under a law of a State as a family consultant in relation to a Family Court of that State’. (Note there is no subsection (b) of section 11B).

⁴⁴ Field et al (n 7) 215.

⁴⁵ Attorney-General’s Department, *Improving the Competency and Accountability of Family Report Writers: Consultation Paper* (Commonwealth of Australia, 2021) 6.

⁴⁶ While the Family Court of Australia (as it then was) provided us with general information pertaining to family consultant training and practices, unfortunately we were unable to successfully engage with the family consultants employed at the court for this research.

responsibilities, the time children spend with each parent, communication patterns, safety issues and support services.⁴⁷

FRWs are expert witnesses who are frequently used to assist in contested parenting cases and they attract a level of respect borne out of their independent position.⁴⁸ A Parliamentary Committee in 2017 noted that it had received evidence about the powerful influence of FRs in court, as well as in out-of-court negotiations, and also in decisions regarding merit for grants of government-funded legal aid. Given this significant influence, the Committee expressed concern about numerous submissions they had received about the poor quality of FRs and the failure of many actors in the family law system, including FRWs, to deal appropriately with women and children who had experienced DFV.⁴⁹ Subsequent government reports have also recommended reform of the family report writing system.⁵⁰

C The Australian Family Law System: Parenting Matters, Understanding DFV and a Pro-Contact and Co-Parenting Culture

The FLA guides the work of all professionals in the family law system and has several sections that require the courts to protect children from harm and to heavily weigh the evidence of DFV in parenting matters. Nevertheless, the family law system can be described as operating with a pro-contact and co-parenting culture.⁵¹ A now extensive research literature shows that the family courts often deem the maintenance of father-child relationships to be in the best interests of children, regardless of a history or the presence of DFV.⁵² This pro-contact and co-parenting culture has resulted in court orders for equivalent, substantial, or significant, unsupervised time being made in favour of DFV perpetrators and equal shared parental responsibility (ESPR) orders, which provide a court-sanctioned channel for perpetrators to be

⁴⁷ Field et al (n 7).

⁴⁸ Ibid.

⁴⁹ House of Representatives Standing Committee on Social Policy and Legal Affairs (n 3) para 6.81

⁵⁰ See Field et al (n 7).

⁵¹ 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, Brisbane, 2002); Amanda Shea Hart and Dale Bagshaw, 'The Idealised Post-Separation Family in Australian Family Law: A Dangerous Paradigm in Cases of Domestic and Family Violence' (2008) 14(2-3) *Journal of Family Studies* 291; Christine Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic and Family Violence' (2008) 14(4) *Violence Against Women* 381; Ravi Thiara and Christine Harrison, *Safe Not Sorry: Supporting the Campaign for Safer Child Contact: Key Issues Raised by Research on Child Contact and Domestic and Family Violence* (University of Warwick/Women's Aid, 2016); Cathy Humphreys and Monica Campo, *Fathers Who Use Violence: Options for Safe Practice Where There is Ongoing Contact with Children* (CFCA Paper, No 43) (Australian Institute of Family Studies, 2017).

⁵² Rendell et al (n 51); Hart and Bagshaw (n 51) 292; Humphreys and Campo (n 51).

facilitated to continue their abuse against their former partner and children through the requirement to co-parent.⁵³

Promoting the best interests of children in family law matters involving DFV challenges the propriety of the maintenance of a child's relationship with a perpetrator. However, the FLA arguably reinforces this tension rather than addresses it. FLA reforms in the mid-1990s began the trend towards a culture of pro-contact and co-parenting. This culture was strengthened in 2006 with the introduction of a legislative presumption that the best interests of children are served if parents have ESPR.⁵⁴ Although the presumption does not apply if there are reasonable grounds to believe that there has been 'family violence' (including child abuse and DV), an evaluation of the 2006 amendments in 2009 revealed the limited extent to which allegations of this type in fact impacted orders for ESPR.⁵⁵ That evaluation found that in 75% of cases where DFV had been alleged, orders for ESPR were made by a judge or by consent, suggesting that the exceptions to the presumption may not operate as the legislature intended. Importantly, when an order for ESPR is made, judges must also consider making an order for the child to spend equal time with both parents, or at least 'substantial and significant'⁵⁶ time with the non-resident parent.⁵⁷

The 2006 amendments to the FLA also included two 'primary considerations' relevant to determining the best interests of children. The first relates to the benefit to the child of having a 'meaningful relationship' with each parent,⁵⁸ and the second relates to the protection of children from physical or psychological harm and from being subjected to or exposed to, abuse, neglect or family violence.⁵⁹ These duelling ideals have led to much judicial consideration of the meaning of this subsection, which is beyond the scope of this article to explore in detail.⁶⁰

The Australian Federal Government introduced more amendments in 2012, specifically designed to bring about 'better protection for

⁵³ Harrison (n 51); Zoe Rathus, Social Science or 'Lego Science'? Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) *QUT Law Review* 164; Jeffries et al (n 9). ESPR orders require parents to consult with each other and make joint decisions about major long-term issues pertaining to the child.

⁵⁴ FLA s 61DA(1).

⁵⁵ Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

⁵⁶ FLA s 65DAA(3).

⁵⁷ FLA s 65DAA.

⁵⁸ FLA s 60CC(2)(a).

⁵⁹ FLA s 60CC(2)(b).

⁶⁰ Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, 2009); Donna Cooper, 'Continuing the Critical Analysis of 'Meaningful Relationships' in the Context of the "Twin Pillars"' (2011) 25(1) *Australian Journal of Family Law* 33.

children and families at risk of violence and abuse'.⁶¹ Although these amendments gave greater weight to the second 'protective' consideration over the first 'meaningful relationship' consideration,⁶² the contradiction between ongoing meaningful relationships with DFV perpetrators and the protection of children from harm has not been resolved.⁶³

In 2012, section 4AB of the amended FLA also introduced a new definition of DFV – called 'family violence' (FV) – as follows: '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' (our emphasis). This definition picks up on the idea of coercive control referred to above.⁶⁴ However, rather than being guided by this definition, professionals in the Australian family law system seem, to some extent, to be more strongly influenced by the broader DFV typology literature developed by Kelly and Johnson in the US, and coercive control is perceived within that context.⁶⁵ Kelly and Johnson's 2008 framework categorises DFV into four different types: 1) coercive controlling violence; 2) violent resistance; 3) situational couple violence; and 4) separation-instigated violence. In earlier work, Johnson used the terms patriarchal and intimate terrorism instead of coercive control, and distinguished these forms of violence from situational couple violence, which, in the context of the typology, does not have its basis in the dynamic of power and control.⁶⁶ The typology indicates that violent resistance is committed by victims in response to coercive control or intimate terrorism. Separation-instigated violence is said to constitute abuse that appears to arise in response to the trigger of separation or even the threat of separation. The problem with the separation-instigated violence category is that what appears to be separation violence may in fact be a continuation of unrecognised DFV. The problematic conceptualisation represented by the typology is set out in the *Family Violence Best Practice Principles* and is used by judges, lawyers, other actors in the family law system and litigants themselves.⁶⁷

⁶¹ House of Representatives, *Explanatory Memorandum Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Parliament of the Commonwealth of Australia, 2010-2011) 1.

⁶² FLA s 60CC(2A).

⁶³ Rathus (n 15); Steven Strickland and Kristen Murray, 'A Judicial Perspective on the Australian Family Violence Reforms 12 Months On' (2014) 28(1) *Australian Journal of Family Law* 47.

⁶⁴ Stark (n 14).

⁶⁵ Joan Kelly and Michael P Johnson, 'Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476; Rathus (n 15).

⁶⁶ Kelly and Johnson (n 65) 479.

⁶⁷ Rathus (n 15); Family Court of Australia & Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (Commonwealth of Australia, 4th ed, 2016); Jane

Although the statutory definition of family violence (FV) in the FLA contains a second sub-section with a long list of examples of FV which describe broad-ranging forms of physical and non-physical abuse, the rules of statutory interpretation mean that whatever conduct is under consideration, only conduct that can be proven to coerce or control the victim, or cause them fear, will fall within the definition of FV. While the language of coercive control in Australian policy discussions and legislation may well have had an educative effect,⁶⁸ the concern expressed by several scholars is that translation of the DFV typologies into the legal arena may have exclusionary, and harmful consequences – that is, DFV may be categorised by a judge or FRW as situational couple violence or separation-instigated violence and therefore dismissed, or its relevance to the safety of victims and children minimised.⁶⁹ Another concern that some scholars hold relates to shifting these porous typologies intended for a therapeutic understanding of the complex dynamics of DFV into the legal system. The typology list implies a hierarchy of seriousness, with separation violence in the lowest position. However, research clearly shows that separation is an extremely dangerous time for victims of DFV.⁷⁰

III International Literature and Our Prior Research with Family Law System Professionals and Victim Mothers

Our multi-study project on FR writing in Australia in contexts of DFV began in 2016 with a review of the Australian and international peer-reviewed literature analysing perceptions and practices in FR writing in matters involving DFV.⁷¹ Overall, the literature indicated a tendency in FRWs toward gender bias and gender stereotyping as well as misunderstandings of the nature of DFV and its impacts in the assessment process.⁷² Analyses of these issues attributed these

Wangmann, 'Different Types of Intimate Partner Violence - What do Family Law Decisions Reveal?' (2016) 30(2) *Australian Journal of Family Law* 77.

⁶⁸ Coercive control is certainly a term now used on DFV Help sites and in the general news. See, for example, Hayley Gleeson, *Coercive Control: The 'Worst Part' of Domestic Abuse is Not a Crime in Australia. But Should It Be?* ABC News, 19 November, 2019 (Web Page) <<https://www.abc.net.au/news/2019-11-19/coercive-control-domestic-abuse-australia-criminalise/11703442>>.

⁶⁹ Rathus (n 15); Wangmann (n 67).

⁷⁰ Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia: Trends and Issues in Crime and Criminal Justice No 255* (Australian Institute of Criminology, 2003) 3.

⁷¹ This literature review was reported in Field et al (n 7).

⁷² TK Logan et al, 'Child Custody Evaluations and Domestic and Family Violence: Case Comparisons' (2002) 17(6) *Violence and Victims* 719; Jason D Hans et al, 'The Effects of Domestic and Family Violence Allegations on Custody Evaluators' Recommendations' (2014) 28(6) *Journal of Family Psychology* 957; Megan L Haselschwerdt, Jennifer L Hardesty and Jason D Hans, 'Custody Evaluators' Beliefs about Domestic and Family Violence Allegations During Divorce: Feminist and Family Violence Perspectives' (2011) 26(8) *Journal of Interpersonal Violence* 1694; Daniel G Saunders, Richard M Tolman and Kathleen C Faller, 'Factors Associated with Child Custody Evaluators' Recommendations in Cases of Intimate Partner Violence' (2013) 27(3) *Journal of Family Psychology* 473.

problems to a lack of specialised DFV training for FRWs and pro forma approaches to FR assessment methods, including approaches to gathering information.⁷³

There have been very few Australian studies specifically on FRWs and their treatment of DFV. However, important Australian work was published in 2011 by Amanda Shea Hart.⁷⁴ Shea Hart conducted a study of judgments made in the family courts of Australia, examining the role of FRs in judicial considerations of children's best interests in cases where DFV was alleged. She found that the 'context of violence within the family was not central to FRW assessments'.⁷⁵ DFV was frequently reframed as mutual parental conflict, and it was this, rather than exposure to what were often extreme acts of DFV, that was treated as impacting adversely on the children. Judicial reference to FRs tended to construct victim mothers within stereotypically gendered frameworks, calling into question their credibility. Further, FRWs and, in turn, judges, demonstrated limited (or sometimes no) understanding of DFV and its impacts. It was also found that parenting orders resulting from the recommendations of FRWs based on inadequate assessments of DFV potentially re-exposed children, and victim mothers, to further abuse. Rather than prioritising the safety of children and acknowledging the detrimental impact of abuse and the limited parenting capacities of abusive men, the FRs referred to in the judgments evidenced a tendency to construct the child's best interests in terms of maintaining perpetrator-child relationships.

The first empirical research for our study was published in 2016.⁷⁶ That study involved focus groups with legal and social support professionals in the family law system, exploring perceptions of FR writing practices from their perspective of providing support to DFV victims involved in the FR writing process. Research participants overwhelmingly expressed the view that FRWs tend to invalidate and minimise DFV and that they prioritise the maintenance of perpetrators' relationships with their children. This approach was seen as commonly resulting in FRW recommendations for ESPR and recommendations for children to spend significant unsupervised time with perpetrator fathers. The invalidation or minimisation of DFV by FRWs was seen to derive from a lack of adequate training and thus expertise in DFV, along with

⁷³ For example, Bow and Boxer found that 'robust, specialized [DFV] instruments, tests, and questionnaires were underutilized': James N Bow and Paul Boxer, 'Assessing Allegations of Domestic and Family Violence in Child Custody Evaluations' (2003) 18(12) *Journal of Interpersonal Violence* 1394, 1400. See also Jennifer L Hardesty, Megan L Haselschwerdt and Michael P Johnson, *Domestic and Family Violence and Child Custody* (University of Illinois at Urbana-Champaign, 2011).

⁷⁴ Amanda Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic and Family Violence Cases' (2011) 46(1) *Australian Psychologist* 31

⁷⁵ *Ibid* 35.

⁷⁶ Jeffries et al (n 9).

judicial pressure for the maintenance of perpetrator-child relationships and co-parenting arrangements (that is, affirming the pro-contact and co-parenting culture in the family courts discussed earlier). Participants in the study questioned how FRWs could make thorough and accurate assessments in the artificial and sterile environment of the FRW's office, with so little time spent with families (assessments taking place over only a few hours), and limited use of other information, such as relevant court documents, or inclusion of the perspectives of others such as extended family, teachers and psychologists. The study also found variance in FRW expertise and the efficacy of their assessments. It was noted that a minority of FRWs went 'above and beyond' what they are funded to do to ensure thoroughness in assessment practice',⁷⁷ and some had high-level DFV expertise. However, achieving access to this small group of FRWs depended on 'luck, financial resources, legal representation, locale or the good-will' of FRWs.⁷⁸ Overall, accessing an FRW with expertise in DFV was reported as becoming more difficult due to increased caseloads in the family courts.

In 2019 our study exploring victim mothers' experiences of FRW assessment practices was published.⁷⁹ The women interviewed described a system that discounted, ignored and invalidated their lived experiences of DFV. Assessment environments and methods were perceived as problematic, being characterised as time-poor, clinical, and at times re-traumatising. Victim mothers viewed the assessment process as lacking efficacy and questioned how accurately the parenting capacity of themselves and perpetrator fathers, and any ongoing risk of harm, could be gauged through it. There was a general sense that FRWs lacked adequate awareness of and expertise in DFV, suggesting that FRW training in DFV is inadequate and in need of improvement. Finally, victim mothers indicated that in their matters, FRW's generally recommended ESPR and children spending significant unsupervised time with perpetrator fathers, recommendations which were then borne out in the mothers' reports of parenting orders that were consequently made by the court.

Finally, one of the co-authors of this article undertook a separate analysis of the interviews considered in the article and how the law and the family law system impacted on the work of these FRWs.⁸⁰ She found that the participants were acculturated to the law and legal practice – a conscious part of the culture of practice. They were also affected by the adversarialism of the system, the pro-contact culture created by

⁷⁷ Ibid 1388.

⁷⁸ Ibid.

⁷⁹ Rathus et al (n 10).

⁸⁰ Zoe Rathus, 'Social Scientists Operating in the Law: A Case Study of Family Assessment Experts in the Australian Family Law System' (2021) 35(1) *International Journal of Law, Policy and the Family*, <https://doi-org.libraryproxy.griffith.edu.au/10.1093/lawfam/ebab051>.

the legislation and their perceptions that this culture extended to the attitudes of the judges they give evidence before. She asked this question:

If family report writers perceive that they must present options which are aligned to the law's preference, does the legal system understand the extent to which the law is being reflected back to it when it receives their reports – or does it see pure social science?⁸¹

She argues that this may contribute to the sense of minimisation or dismissal of DFV by FRWs reported by victims of DFV in the family law system and those who work with them.⁸²

Taken together, the literature and our prior research with family law system professionals and victim mothers reflect consistent themes of concern. These themes provide the conceptual framework for the current research. They suggest that in Australia, consideration of DFV by FRWs does not result in adequate or reliable FRs as a form of expert evidence on which the family courts can base decisions in the best interests of children. This component of the study therefore sought to test the themes of concern about the FR writing process in the context of DFV discussed above from the perspectives of FRWs themselves.

IV Methods

The research presented in this article extends Australian knowledge of the FR writing process by directly engaging with FRWs about their work. Semi-structured in-depth interviews were conducted in late-2019 with $n=10$ FRWs operating in private practice.⁸³

The research team adopted a phenomenographical conceptual framework as the methodology for data gathering and analysis. Phenomenography is a qualitative, interpretivist research methodology that enables the exploration of different ways in which people understand the same concept or phenomenon.⁸⁴ It is a methodology that supports researchers in building a deep and rich understanding of a particular issue. As with other similar methodologies, such as ethnography, this methodology does not result in any generalisable claims of proof-of-concept, or the identification of a single essence. Originating in the late 1970s in education research,⁸⁵

⁸¹ Ibid 23.

⁸² Rathus et al (n 10) and Jeffries et al (n 9).

⁸³ The Family Court of Australia did not grant the authors permission to interview FRWs employed by the court.

⁸⁴ Ference Marton, 'Phenomenography: Describing Conceptions of the World Around Us' (1981) 10(2) *Instructional Science* 177; Ference Marton, 'Phenomenography: A Research Approach Investigating Different Understandings of Reality' (1986) 21(2) *Journal of Thought* 28; Lennart Svensson, 'Theoretical Foundations of Phenomenography' (1997) 16(2) *Higher Education Research & Development* 159.

⁸⁵ Michael Prosser and Keith Trigwell, 'Using Phenomenography in the Design of Programs for Teachers in Higher Education' (1997) 16(1) *Higher Education Research & Development* 41.

phenomenography is now used extensively across a wide range of diverse disciplines.⁸⁶ Phenomenography was chosen as the most appropriate methodology for achieving the research aims of this project because it allowed us to explore the phenomenon of FR writing, and how that phenomenon is experienced by FRWs.

Upon gaining ethics approval from the researchers' institutions, a recruitment process commenced. Emails of invitation to participate in the research were sent to several FRWs in private practice through a range of professional networks and contacts of the researchers, and those people were invited to pass on the email to others who may be interested in participating. FRWs who responded were sent an official information sheet and consent form, and a time was arranged for an interview. According to ethical protocols, the FRWs have been de-identified and code-named to ensure anonymity and confidentiality and all potentially identifying information, such as their geographical location, has been removed.⁸⁷

Interviews were conducted face-to-face, by phone or Zoom, recorded, and lasted from one to two hours. As per the research aim and previous existing research, the following topic areas structured the interviews, and discussion occurred in the context of matters involving DFV: 1) demographic and background information; 2) training, supervision, and support; 3) FR assessment processes; 4) perceptions and understandings of DFV; 5) FRW recommendations made in FR reports concerning DFV; and 6) FRW's suggestions for reform of the FR writing process.

Interviews were transcribed verbatim, cross-checked and thematic analysis was conducted using NVivo. Thematic analysis offers flexibility, and it is a widely used analytical tool in phenomenographical research and when aiming to answer qualitative research questions.⁸⁸ The thematic analysis was guided by the topics covered in the interviews and produced several general practice themes, for example, concerning training and FR assessment processes, in addition to themes specific to DFV in the FR writing process. The themes discussed in the results section affirm and reinforce the concerns in the literature and our previous studies about understandings of and responses to DFV in the

⁸⁶ Jaana Kettunen and Päivi Tynjälä, 'Applying Phenomenography in Guidance and Counselling Research' (2018) 46(1) *British Journal of Guidance & Counselling* 1; Alan Barnard, Heather McCosker and Rod Gerber, 'Phenomenography: A Qualitative Research Approach for Exploring Understanding in Health Care' (1999) 9(2) *Qualitative Health Research* 212; Eleanor Walsh et al, 'Physics Students' Understanding of Relative Speed: A Phenomenographic Study' (1993) 30(9) *Journal of Research in Science Teaching* 1133.

⁸⁷ Ethical approval for this research was obtained from the Griffith University's Human Research Ethics Committee, GU ref no: 2018/887.

⁸⁸ Virginia Braun et al, 'Thematic Analysis' in Pranee Liamputtong (ed), *Handbook of Research Methods in Health Social Sciences* (Springer, 2019) 843-860. See also Virginia Braun and Victoria Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589.

FR writing context. However, the general themes are directly relevant to DFV related FR writing processes because they are an inherent part of all FR writing, including those processes relating to DFV.

A *Participants*

Participant FRWs were aged in their forties and older, with an almost even split between female ($n=6$) and male ($n=4$). None were Indigenous nor from a non-English speaking background, although at least two were not born in Australia. They were highly experienced, with between 8-30 years of experience writing FRs and having compiled ‘hundreds’ to ‘thousands’ of FRs, throughout their careers. The number of FRs written in the preceding year ranged from 6-90. Half identified as psychologists, four as social workers and one had a different relevant tertiary qualification. Participants’ work histories tended to include experience in forensic mental health services, family dispute resolution services/family mediation, employment with the family courts or legal aid, and practice as social assessment report writers for child protection services. In addition to FR writing, some participants indicated they continue to conduct mediations, undertake therapeutic or counselling work or prepare reports for child protection cases as part of their practice. At the time of the interviews, all participants were working in private practice. Half were appointed under Regulation 7 of the *Family Law Regulations 1984* (Cth), writing reports commissioned directly by the family courts. Whether or not they held a formal appointment, all FRWs prepared private reports commissioned directly by the parties and some wrote reports for ICLs – arranged through Legal Aid at a fixed rate.

B *Study Limitations*

This research has some limitations which we acknowledge. The data is a snap-shot of narratives from a small sample size of a specific group of FRWs – private practitioners. Therefore, we do not claim the data to be a statistically representative sample, and we acknowledge that the findings presented in this article may not necessarily apply to family consultants who work in the court system. As our sample size consisted of 10 FRWs, we also acknowledge that some of the conclusions may not apply to all the FRWs in private practice across Australia. Nevertheless, while the findings cannot be generalised and are specific to the context in which the research was conducted, the narratives deriving from the in-depth interviews constitute a rich and indicative data set, affirming many of the concerns reflected in the literature and the previous Australian research.

V Results

This section discusses the FRWs' interview responses to questions focusing on the themes arising in the previous Australian research and the international literature relating to the writing of FRs in DFV contexts. First, we discuss the experiences of FRWs in terms of training opportunities, supervision and professional support. Next, we discuss FRWs' perspectives on the process for conducting assessments both in general terms and specifically concerning DFV. We then provide an overview of FRWs' perceptions and understandings of DFV, and the challenges of making recommendations about parenting in the best interests of children in matters involving DFV. We conclude with a discussion of recommendations for reform of the FR writing process made by the FRWs we interviewed.

A *Training, Supervision and Support*

All interviewees reported involvement in specialised DFV training in some form or another. For many, training occurred in 2012 when the family violence amendments to the FLA became operative, and organisations offered training for professionals in the family law system. However, this training was aimed at understanding the specific legal amendments rather than offering general training on DFV itself. 'Reg 7' FRWs recounted more recent DFV training provided to them by the courts, but this presented as nominal. Participation in DFV training and professional development was impacted by the realities of working in private practice, particularly the time and financial constraints encountered.

Those who had previously been employed as FRWs in the family courts reflected that training and resourcing at the courts, along with supervision and support, was 'a big advantage' (FRW10). As articulated by FRW10 'they're the ones with the resources at their fingertips. They get ongoing training. It is a wonderfully rich environment for learning and understanding. You have access to a phenomenal amount of library information; they bring in speakers all the time'. In terms of supervision and support, it was noted that 'at the court, you've got a whole floor of people who all do the same work as you and understand' (FRW10). In contrast, the FRWs we interviewed, working in private practice, felt they did so in 'isolation' and reported receiving 'very little in terms of the system offering us the sort of support we need and guidance' (FRW10). FRW10 did note that 'reg 7' FRWs are now (in the last couple of years) theoretically subject to a supervision process implemented by the courts. However, in practice, such supervision appears to be only rarely available.

FRWs expressed that in private practice and as 'reg 7s', accessing training, supervision and support can be challenging, piecemeal and ad

hoc. They reported feeling somewhat unsupported by the family courts and that they felt ‘pretty much out there flapping in the breeze’ (FRW10). For example, FRWs identified having to take responsibility for establishing their informal networks of supervision and support, having to make the time (and find the money) to attend training, and they were disappointed that they do not have access to the library in the family courts. These issues align with findings from prior studies expressing concern around a lack of training, supervision and support which inevitably negatively impacts expertise levels, particularly around DFV.⁸⁹

B *FR Assessment Process*

Participants reported that the FR assessment process usually takes place in their offices. However, in some instances, where DFV had been alleged and FRWs had safety concerns, they reported hiring rooms in the Registry building of the family courts or another safer location. FRW5 explained, ‘I have rooms [office space] of my own’ but if ‘there’s family violence at all, then I use the Registry’. FRW2 reported undertaking assessments in ‘every setting, from the office to the home visit to the contact centre’.⁹⁰

The interviewees told us that their FR assessment process usually occurs over one working day (seven to eight hours) and includes interviews with parents and/or caregivers (of between 30 minutes and two hours), alongside observations of parent/caregiver interactions with children, and/or interviews with children (depending on their age and stage of development). Some FRWs reported speaking with additional people who play a central role in the child/ren’s lives (such as grandparents or step-parents) and noted the use of additional materials such as subpoenaed documents, for example, police reports, child welfare department files, affidavits, notices of risk and any accompanying DFV protection orders (also known as restraining orders) – although FRWs also noted that the volume of such documents could be overwhelming. Overall, interviewees reported that their experience of the FR assessment process is that it is somewhat restrictive. That is, it takes place in an unnatural setting (usually the FRW’s office) with some participants describing it as a ‘snapshot’ and FRW8 adding that it is a context where ‘parents are typically on their best behaviour’.

Interviewees also identified a two-tier system in which they juxtaposed the efficacy of private assessments against those

⁸⁹ Hardesty, Haselschwerdt and Johnson (n 73); Jeffries et al (n 9); Rathus et al (n 10).

⁹⁰ A 2019 Family Court Fact-Sheet stated that children’s contact centres provide ‘safe, neutral and child-focussed venues for supervised visits and changeovers to occur between children and their parents and other significant persons in the child’s life’: Family Court of Australia, 2019 (Web page) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/getting-help/childrens-contact-centres-services/>>.

commissioned by Legal Aid and the family courts. Regarding the latter, FRWs reported being paid around \$2,000 and were allocated 20 hours to complete their assessments. However, as FRW7 explained, ‘they say [it] is a 20-hour process, they lie’ because producing a thorough FR especially in complex cases including where there are allegations of DFV, usually takes longer. This means that FRWs could be working for little more than ‘30 bucks an hour’ (FRW7). For privately commissioned reports, FRWs said they were usually paid between \$4,800 and \$6,000. This fee provided more time and scope to undertake assessments, speak with more people, access additional materials, possibly visit families in their homes and thus, arguably, increased the efficacy of the resultant FR. FRW4 explained that:

In a private matter, you can afford to spend more time because you charge more, those people are buying more of my time [but for Legal Aid] I’m now down to trying to keep it to three days. I’m not working according to my values. I would like more time to think, and I’d like to interview more people. But because I’m paid a certain amount, I can’t afford to do that. I must provide the best I can for that amount of money but for that amount of money, you cannot provide a really comprehensive report.

FRW2 noted that privately funded reports are ‘well paid’ so ‘where I can, I do home visits ... ideally I’d do that every time’.

All interviewees identified adapting the assessment process to ensure safety where allegations of DFV had been made. FRW9 said that ‘keeping everybody safe’ was a significant challenge. Safety planning was undertaken to ensure that ‘parents don’t come into contact with one another’ (FRW9). For safety, interviews are scheduled at different times and days, and, as noted above, take place in locales that offer more security (for example, the family courts’ registry building). While safety planning was universally acknowledged as important, only two FRWs reported utilising DFV risk assessment/screening tools as a matter of course in their assessment process. The other FRWs utilised the parties’ court documentation or information gleaned during their assessment process to ascertain whether DFV was present.

The FRWs identified assessment processes as being complex and often impeded by issues beyond their control. Compared to the higher-paying private reports, a lack of funding for FRs commissioned by the courts (under regulation 7) and Legal Aid was impacting negatively on how long FRWs could spend with families, how much additional information they could assess, and where the assessments could take place. Thus, in line with prior research in this area, the efficacy of the assessment process, especially regarding regulation 7- and Legal Aid-ordered reports can be questioned.⁹¹

⁹¹ Jeffries et al (n 9); Ratus et al (n 10).

C Perceptions and Understandings of DFV

Unsurprisingly, given what is known about the high proportion of DFV cases in family court caseloads,⁹² DFV was identified as core business for FRWs. FRW1 said that ‘probably 75%’ of their cases involved allegations of DFV. FRW4 stated that in ‘99% of my work there are allegations of family violence’. For FRW5 it was ‘80%’. However, in contrast to privately commissioned reports, FRW1 noted that Legal Aid cases were more likely to include DFV allegations. They said DFV was an issue in ‘probably about 10 to 20% with private stuff’ and ‘50% or more’ for Legal Aid. FRW1’s comments are particularly concerning given findings outlined above around the underfunding of Legal Aid reports (and ‘reg 7’ commissioned reports) and subsequent negative flow-on effects for FR assessment efficacy.

Every FRW in our study acknowledged that DFV involves more than just physical violence, thus expressing an understanding of coercive control. DFV was described as encompassing emotional, financial, verbal, sexual and spiritual abuse, as well as threatening and other behaviours aimed at restricting victims’ freedom and social connectedness. However, some FRWs perceived physical violence as more serious. FRW3 stated that ‘physical violence is much more [serious]’ particularly if it is ‘alcohol, and now drug-fuelled, violence mostly because those behaviours seem to be the hardest for people to change’. Similarly, FRW5 articulated ‘physical violence’ as more concerning because ‘the subtler’ DFV behaviours ‘can be changed by the person with good therapy’, and FRW6 said, ‘I think when you lay hands on somebody, it’s a greater violation’. In contrast, FRW7 stated, ‘I think the worst family violence *is not* the broken arms and legs, but that constant level of emotional control is far more damaging, far more insidious’. FRW8 explained that all forms of DFV are serious and related a concern that the family courts are unable to recognise that ‘emotional abuse’ can be ‘horrendous, just awful’.

In addition to these varying overall understandings and opinions about DFV, several specific themes emerged from the interviews including FRW views about the gendered nature of DFV, use of the typology frameworks, opinions about false allegations of abuse and how FRWs saw the impact of DFV on the parenting capacity of victims and perpetrators. We discuss these in turn in the following sections.

D Gender and DFV

In Australia, as is the case worldwide, DFV is overwhelmingly gendered with men more likely than women to perpetrate these abuses

⁹² See House of Representatives Standing Committee on Social Policy and Legal Affairs, (n 3). See also FCFCoA (n 3).

and women (and their children) more likely to be victims.⁹³ However, somewhat concerningly, the FRWs we interviewed held divergent views about the gendered nature of DFV. Some did express the view that men are more likely to perpetrate DFV and women are more likely to be the victims. FRW3 stated, 'I think more often men are the perpetrators [of DFV]. I think that's without a doubt'. FRW6 noted, 'we can be confident that it's more common for mothers to be the victims'. However, another FRW was less clear about the gendered nature of DFV. FRW4 said, 'I don't think I could put it into gender'.

E *The Use of the DFV Typologies*

The discussions during the interviews suggested that DFV is frequently understood through the lens of Kelly and Johnson's typology framework (discussed above) and subsequently construed within a hierarchy of seriousness. In contrast to other types of DFV, coercive control was perceived as most concerning. FRW3 noted, 'where I see a patterned power differential, I'm more concerned'. For FRW6, this type of violence impacted on their parenting recommendations: 'If it's looking like coercive and controlling violence - and we understand that that behaviour doesn't typically end because the relationship ends - the risks are much more significant [and] I'm very conservative about future parenting arrangements'.

There was also understating of violent resistance by women who were victims of coercive control. FRW6 described 'female retaliatory violence' as 'situations where women who are victims of the coercive and controlling violence eventually get to the point where they'll react [to protect themselves and/or their children]. These women are at significant risk of physical harm, and sometimes lethal harm'. FRW9 explained that in '10-15%' of cases, allegations of violence made by men were 'as simple as the woman defending herself or her children'. FRW7 said, 'mothers often do it in retaliation against the fathers; defending herself or her children'.

Although the recognition of coercive control and violent resistance is important, the tendency to categorise DFV hierarchically could lead to exclusionary and harmful consequences if coercive control is categorised as something else and then rendered irrelevant, or not very relevant, to parenting recommendations. For example, FRW1 stated that: 'separation instigated violence, that's not as concerning because it's perhaps not as likely to occur in terms of putting the children at risk'.

⁹³ Samantha Jeffries and Sharon Hayes, 'Domestic and Family Violence, Violence in Close Relationships, and Violence Against Women' in Antje Deckert and Rick Sarre (eds), *The Australian and New Zealand Handbook of Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 191-204.

FRWs also discussed DFV within the typology category of situational couple violence. FRW7 said, ‘sometimes they’re the perpetrator and sometimes they’re the victim ... in that family unit it’s not always one person who is in the black hat. That dynamic has evolved in their relationship. [Sometimes] it doesn’t matter what gender you are’. FRW2 stated that mutual DFV within contexts of toxic intimate relationships constitutes a ‘small but significant proportion’ of their caseloads.

The FRWs’ positioning of DFV within Kelly and Johnson’s typology framework illustrates, in line with the findings of previous research in Australia and internationally, how DFV can be misunderstood, ignored, discounted, invalidated, minimised and reconstituted as mutual parental conflict.⁹⁴ Further, it is important to consider how these attitudes around separation violence and situational violence may be sensed by women during the report writing process, leaving them feeling disbelieved. This may impact their engagement with the FRW and could alter how they are perceived and the recommendations which may ultimately emerge in the FR.⁹⁵

F *False Allegations of DFV*

The idea that some women make false allegations of abuse to bolster their cases in the family law system has had much exposure in Australia and other similar jurisdictions – largely led by fathers’ rights groups.⁹⁶ However, for some FRWs, it was men’s allegations of DFV which were considered more questionable. FRW6 explained that while they accepted that:

Fathers can be victims, sometimes what they have to say strikes me as a bit of posturing or justification of their [own perpetration of violence] because they’re saying, well, she did this, so it’s sort of like saying, well, yes, she states that, but I was provoked. I’m a little circumspect when I hear accusations made by the father, and particularly in situations where the [father] might weigh 50 kilos more than the alleged perpetrator [mother].

When asked if fathers make up false allegations of DFV being perpetrated against them by mothers FRW9 said, ‘F... yes, all the time. Oh my god. Yes!’

It was noted that men’s spurious allegations of victimisation by women appear to occur for several reasons. First, as indicated above by FRW6, it can be a strategy used by fathers to ‘shut down’ any suggestion

⁹⁴ Hans et al (n 72); Haselschwerdt et al (n 72); Jeffries et al (n 9); Logan et al (n 72); Rathus et al (n 10); Saunders, Tolman and Faller (n 72); Shea Hart (n 74).

⁹⁵ Jaffe, Lemon and Poisson, (n 17); Peter G Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic and Family Violence: Toward a Differentiated Approach to Parenting Plans’ (2008) 46(3) *Family Court Review* 500, 503-504; Rathus et al (n 10).

⁹⁶ Molly Dragiewicz, *Equality with a Vengeance: Men’s Rights Groups, Battered Women, and Antifeminist Backlash* (Northeastern University Press, 2011).

of their perpetration of DFV. As FRW10 said, ‘men as a general rule will minimise [their violence]’. The FRWs indicated that men’s accusations of DFV against mothers are rarely ‘stand-alone’. Rather, they constitute counter-allegations made in ‘response to initial allegations by the mother’, a ‘defensive’, ‘retaliatory/tit for tat’ and/or ‘somehow explanatory strategy’ to legitimatise their perpetration of DFV.

In contrast, to counter allegations, initial allegations of DFV were noted by the FRWs as being more frequent amongst women and rarely false. FRW2 explained, ‘initial allegations - so the first allegations made in the matter - I would say there’s a pretty small percentage that are false. The tit for tat ones, I would say there’s a significant proportion’. Nevertheless, the FRWs did not see women as incapable of making false allegations or what FRW4 described as ‘amplified’ accusations. Here, it was argued that women who believe that DFV has taken place may have misunderstood or exaggerated men’s actions as abusive. FRW4 explained, ‘so [he might have] slammed the door of my car but that’s because [he] was really worried about blah. But [she] will perceive it as it’s all about me’. FRW10 linked such misunderstandings and amplifications to mental health problems, stating, ‘the mother’s claiming [DFV], she’s got anxiety, so she actually interprets things as aggressive. I suspect she’s into overinterpreting things because she’s got significant anxiety and she interprets everything as a threat’.

Unlike the other FRWs, FRW10 was particularly adamant that women are more likely to make up false allegations than men, commenting, ‘I have a bias towards that (because) I’ve seen them do it; I specifically assess for it; and it concerns me that there are certain DFV theorists who hold firm to women don’t lie. This whole idea that a woman wouldn’t lie gets under my skin’. As previously noted, our research with victim mothers in Australia highlighted that women often feel as though FRWs discount, ignore and invalidate their experiences of living with DFV.⁹⁷ That research clearly indicated that it is deeply distressing for women to realise, while undergoing an assessment process, that their assessor does not believe them.⁹⁸ Further, as FRW10 identified, many of these women suffer from ‘significant anxiety’, quite possibly resulting from the abuse they have experienced – whether or not they have described it accurately, and this would exacerbate any distress and sense of futility of engagement with the process.

G Parenting Capacity

In line with extant research, the FRWs narrated the numerous ways in which the parenting capacity of victims can be compromised because

⁹⁷ Rathus et al (n 10).

⁹⁸ Ibid.

of living with DFV, including emotional unavailability, not being attuned to their children's needs, a tendency toward anxiousness, a lack of confidence, disorderly and aggressive behaviour in their parenting, along with an inability to co-parent.⁹⁹ FRW6 noted that victims have a 'poor self-concept', can become 'highly anxious', and 'lose their self-confidence', which has the 'potential to impact on their parenting'. Victim parents were identified as being 'preoccupied with trying to be safe all the time [which] doesn't give that much time to be accurately attuned to the children' (FRW10). There was particular 'concern for victims of coercive control' (FRW10) where 'the evidence is that this [DFV] continues into the post-separation period' (FRW9). In these cases, the capacity of victim parents to be 'attuned to their child' could be especially impaired, 'which is very sad because it's not any fault of their own' (FRW1). Victims who have 'developed disordered personalities because of what they had been through' are seen as particularly problematic because 'they probably don't have the capacity to parent [with] love, discipline, consistency and lack of aggression' (FRW9). FRW10 expressed concern that a victim's preoccupation with safety could negatively impact their 'capacity to cooperate and co-parent'.

Some FRWs were more tentative about constructing victim parenting within a deficiency framework. FRW9 explained that 'sometimes they are able to parent adequately - and what they are talking about now is good enough parenting. Are they ideal parents? No, but they may be [with time]'. FRW8 said, 'you know, it never ceases to amaze me, a mother's ability to, in the face of all that [victimisation], still be a capable enough parent'. However, none expressed that victim mothers' parenting challenges were likely to dispel once women were free of abuse and provided the space to heal.¹⁰⁰ Further, constructing victims as 'good enough' parents fails to acknowledge the ability of women to parent comparably, and at times more positively, than mothers not living with DFV.¹⁰¹

Compared to concerns relayed around victim mothering, the FRWs narrations of perpetrator parenting capacity were mostly conjectural. FRW9 stated that 'a violent partner is not necessarily a violent parent. It doesn't necessarily flow on. How they parent may be very different to how they partner'. Others explained that the question of perpetrator parenting capacity is contingent on 'how pervasive and recent' the DFV perpetrated against the mother was and whether the children had directly witnessed it and/or been 'directly' abused themselves. These

⁹⁹ Katz, 'Recovery-Promoters' (n 31); Katz (n 13); Katz, 'Coercive Control, Domestic and Family Violence, and a Five-Factor Framework' (n 31); Pernebo and Almqvist (n 31); Radford and Hester (n 32); Thiara and Humphreys (n 31).

¹⁰⁰ Katz, 'Recovery Promoters' (n 31).

¹⁰¹ Casanueva et al (n 35).

assertions contradict prior research on the compromised parenting capacity of domestically violent men, negate the negative impacts of living with DFV on children (they do not have to ‘directly’ witness it to be affected) and fail to acknowledge how perpetrators may use children post-separation as a vehicle of coercive control.¹⁰² It is also worth noting that the Australian family court has dismissed early legal authority that a man could be a violent partner, but a good parent.¹⁰³

A small number of FRWs expressed the view that as parents, perpetrators of DFV are a concern because they may denigrate and diminish the parenting capacity of the victim parent and ‘vocalise generic statements about [women] which can reinforce or help develop negative attitudes’ (FRW1). FRW1 noted further that:

Perpetrators of violence probably have a poor understanding of the developmental needs of children, anger management difficulties generally and empathy deficits [which] will inform their parenting generally beyond the perpetration of violence and has implications for their parenting even for children who may not be consciously aware of those violent incidents.

Interestingly, and unlike the narratives around mother victims, FRWs were vocal about providing support to DFV perpetrator fathers to improve their parenting capacity. The forms of support identified included attendance at parenting programs, the completion of anger management courses and therapy.

H *FRW Recommendations in FRs in DFV Cases*

The difficulties and constraints of working within an adversarial legal system that favours shared parenting outcomes were particularly evident when the participants discussed the kinds of recommendations they make in their FRs in cases where DFV has been alleged. The FRWs identified that the adversarial nature of the system means that they often neutrally present their views so that one parent cannot suggest bias, or in order to avoid a complaint being made to the Australian Health Practitioner Regulation Agency. FRW8 said:

I hear it all the time now, about how ‘on-the-fence’ family report writers are ... If we write a report that errs on favouring this person or is seen to be believing her story of [DFV] over and above his absolute declaration of no family violence, and he’s got some arsehole barrister, you will get slaughtered.

¹⁰² Holt, ‘Post-Separation Fathering and Domestic Abuse’ (n 26); Katz (n 13); Katz et al (n 16); Peled (n 26); Perel and Peled (n 26); Stover and Spink (n 26); Stark (n 13).

¹⁰³ An early decision of *Heidt v Heidt* (1976) FLC 90-077 has been considered bad law for many years, with a 1995 decision beginning judicial discussion about the adverse impacts of living with DFV on children: *Patsalou and Patsalou* (1995) FLC 92-580.

Secondly, although FRWs are often provided with very different accounts of the relationship and its aftermath by the two parents, it is the court that is the fact-finder in Australia. Participants explained that one of their biggest challenges is forming recommendations when DFV allegations involve ‘he says, she says’ allegations without any corroborating information. FRW1 explained, ‘I think the biggest challenge is trying to differentiate fact from fiction’. As a result, FRWs write recommendations in a format that allows for different outcomes depending on the findings of the judge regarding the evidence. As FRW5 noted, ‘I report both different accounts and leave it for the judge to make the decision. So, in my recommendations, I will sometimes say ‘if this is the case then that, if that is the case then this’. Such ambiguous recommendations are an ingrained part of the family law system and a direct product of how it operates. But they are problematic considering that FRs are forms of expert evidence meant to assist the court, particularly in DFV contexts where the safety of the children should be a priority.

FRWs also reported that their recommendations are impacted by the pro-contact/co-parenting culture and philosophy of the Australian family law system and the FLA. Although their job is to use their professional knowledge and skills from the social sciences to understand the family and provide insight to the court about past, present and potential future dynamics, and how best to attend to the best interests of the children, all of the participants in this research were aware of the overarching principles of the legislation and many commented on their sense that most judicial officers support ongoing shared parental responsibility and parent-child contact whenever possible.

Recalling that the FLA contains a rebuttable presumption that it is in the best interests of a child for the parents to have equal shared parental responsibility (ESPR) after separation, making recommendations around ESPR was a source of angst for the FRWs who participated in this research. They reported feeling that ESPR was persistently seen as something that needed to be preserved regardless of DFV. FRW10 explained, ‘I couch it [ESPR in my recommendations] in terms of like I have limited confidence that blah-blah-blah ... I don’t think [the courts] actually make [orders for] sole parental responsibility. That concerns me’. This response reflects a guardedness on the issue of ESPR and demonstrated concern to keep recommendations general, because of the need to leave the court to determine the facts. FRW8 explained that ESPR could be used ‘as a weapon’ by perpetrators, saying ‘a lot of times when there’s been violence, [ESPR] is not possible - and I’m thinking of a case where the court allocated ESPR - dreadful history of violence’. Implying that they cannot, or feel uncomfortable about, recommending sole parental responsibility, FRW8 continued: ‘The report writers need

to be able to say that shared parental responsibility is not possible in this situation’.

FRWs also described the challenges in terms of time arrangements and shared physical care where there is DFV in terms of the context of the pro-contact culture in the system. As discussed earlier, the FLA specifically provides that, where an order for ESPR has been made, the court *must* consider equal time or substantial time orders. All the interviewees relayed that while DFV poses a risk of harm, perpetrator-child relationships should be maintained wherever possible. FRW5 said, ‘[DFV] certainly takes the biggest priority [but] I support that the children should still be seeing [perpetrators of DFV] unless they’re in prison’. FRW6 stated that the ‘starting assumption’ is that ‘there should be a relationship’ if the benefit to the child outweighs the risk of harm, with the follow-up issue being ‘how do we construct things in a way that keeps people safe?’ The FRWs indicated that the recommendations they make for safety include ‘supervised visits’, ‘limiting contact to short periods’ and/or establishing ‘conditional contact’ arrangements.

The FRWs identified domestically violent parents as being less likely to be problematic in what was described as ‘historical cases’, and where coercively controlling behaviours were not present, or perpetrators had accepted responsibility for their actions, or were willing, and possessed capacity, for change. This suggests a possible lack of recognition of the long legacy of DFV on victims and their children.¹⁰⁴ It also indicates the potential minimisation of DFV which, on their assessment, is not coercive and controlling, but more like situational violence or triggered by the separation.

FRW participants said they would often include recommendations in their FRs for what they described as ‘protective factors’. For example, directives for perpetrators to attend counselling, and undertake parenting and anger management programs, together with ongoing monitoring of their progress. However, while FRWs considered monitoring to be important, they also identified it as being a source of ‘frustration to Legal Aid and the courts’ (FRW3) who, they say, want the matter finalised and ‘off the books’ quickly (FRW2).

Further, the participants in this research made it clear that they feel uneasy about making recommendations for orders for ‘no contact’ between DFV perpetrators and their children because of the pro-contact culture in the family law system, which results in the minimisation of DFV. FRW4 said, ‘I sometimes think you are asking for trouble to put [DFV perpetrators] with the child. But I know the court will’. FRW8 expressed that they ‘hate that the family court system minimises all forms of violence’ especially non-physical forms of coercive control, adding: ‘I feel monumentally frustrated that emotional abuse is almost

¹⁰⁴ Stanley (n 20); Pence et al (n 20); Radford and Hester (n 32); Katz et al (n 16).

completely ignored in the family court system. The court thinks that it must be extreme physical [abuse] with photos and bloody hospital records, and all the rest of it’.

FRW9 held the view that ‘[s]hared care is not always the best thing when there is violence’ but was careful not to be ‘too firm’ in their reports, having been ‘chipped’ about this a few times. ‘I’m as outspoken as I dare to be’. FRW8 explained that sometimes making a strong and directed recommendation of no contact is necessary to protect children, but they couch recommendations in alternative scenarios of fact-finding because this is what the court expects. They said, ‘I would love to write, I think the dad’s a manipulative lying arsehole, and he wants primary care of the child, which is disgusting’.

The FRWs’ lack of confidence in making sole parental responsibility, or no time, recommendations against the culture of the system, and the required ambiguity of their recommendations, given the role of judge as fact-finder, underscore potential explanations for problems highlighted in prior Australian research around the FR process in cases involving DFV and discussed earlier in this article.¹⁰⁵ As Rathus noted in her separate analysis, these features of their role may lead to the obfuscation of clear evidence about DFV and safety concerns for the children.¹⁰⁶ This is an issue requiring a wider discussion than this article can enter.¹⁰⁷

I *FRWs’ Suggestions for Reform*

The FRWs in this research made several suggestions for reform to the FR writing process in the context of DFV including increasing the time they can spend on assessments, increased remuneration and being able to adopt a more therapeutic approach to assessing families. They also suggested the introduction of an accreditation system, along with improved access to professional support, training and resources. We note that many of the FRWs’ suggestions for reform are not necessarily specific to DFV contexts, however all the suggestions made by the FRWs would certainly improve the efficacy of the FRW process in DFV matters also. The suggestions of the FRWs are discussed briefly in turn below.

A key concern, particularly in relation to regulation 7 and Legal Aid assessments, was the condensed timeframe within which they must be

¹⁰⁵ Shea Hart (n 74); Jeffries et al (n 9); Rathus et al (n 10).

¹⁰⁶ Rathus (n 80) 23-24.

¹⁰⁷ It will be interesting to see whether the new, potentially more interactive, roles for FRWs created under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* will mean that FRWs become more confident about discussing what they think has actually happened in any family they are assessing. It is intended that the Rules provide for earlier and more frequent contact with the families.

completed.¹⁰⁸ Thus, ‘one avenue’ suggested for positive reform was ‘an increase in remuneration’, which would provide FRWs with the ability to ‘spend more time’ and, in turn, ‘be able to do the job as needed’. Greater remuneration was identified as allowing more space for FRWs to ‘think’ and if need be, ‘interview more people’; undertake ‘home visits’; ‘see the parties on separate days’, and on more than one occasion. FRW4 said, ‘I think FRWs should be paid more. Probably at least double. We do it for nothing. It would be great if we had more time’.

Participants also expressed wanting to be able to adopt a more therapeutic approach to assessing families, particularly in cases of DFV. This would be better than the current approach which they described as a forensic assessment, which is simply a snapshot in time within an adversarial court process. FRW3 described the current approach to FR writing as ‘basically autopsies’, writing ‘about what’s dead or dying’ (FRW3). In calling for a more therapeutic assessment process, some FRWs articulated general concerns that the adversarial nature of the system escalates conflict and that they feel hamstrung by the pro-contract/co-parenting culture that only allows for the provision of tentative recommendations in FRs. It was suggested that ‘more of a therapeutic lens’ (FRW8) would move FR writing away from a forensic static glimpse of a family toward a more comprehensive and holistic casework approach. Interviewees envisioned a system where FRWs were employed earlier in the court process and could engage with families more than once. FRW6 stated:

There are limitations to the way we do FRs. If we were to see parents say once a month - for maybe three months - we would have more complete information. Because when you see people once, you don’t know. Are they anxious? Are they relaxed? Is somebody feeling sick? Or are the kids unwell? Or are there other pressures at that time that I might not be aware of because nobody’s told me and it’s not in the subpoenaed stuff? If I was to do that I would tend to share some observations and do some teach and preach about the developmental needs of children, and then in a follow-up visit ask them if they’ve reflected on that if it’s had any impact on their thinking or their behaviour. But then, when we start doing that, we move from assessment to a kind of pseudo casework.

FRW4 agreed it would be positive to move toward a casework approach with ongoing support and monitoring saying:

I think with FRs it would be really good if we had parenting coordinators so that after the family report was written in cases with family violence, we

¹⁰⁸ We note again that the FRWs we were able to interview were in private practice and not employed by the family courts. There may be a significant difference in the views of private FRWs and their court employed counterparts. However, as indicated above, in n 83, the author team did not receive permission from the Family Court of Australia (as it then was) to interview FRWs employed by the court. For this reason, we do not know if court-employed FRWs feel the same or differently about the issue of time constraints.

could have a family be monitored by a parenting coordinator - someone who had some training who could check in on them at home - who could perhaps supervise a parent if needed - who would meet with the parents regularly and see how they're coping - who would monitor the child's well-being - how they're going at school - just generally keep an eye on how that family's travelling.

The introduction of an FRW accreditation system was a further suggestion of reform. FRW1 said, 'it's an area that has such a massive impact on children's lives and I think we want to be confident that we have people who have the highest level of qualifications, experience, and training'. FRW6 warned that 'accreditation should be developed by people who really understand the area' and FRW8 noted that while there are a set of core skill requirements, 'the best FRWs are people with life experience, commitment and a therapeutic lens' who can 'read people' and have 'great instinct'. These types of skills are difficult to test for in an accreditation process, and FRW2 cautioned that accreditation should not be 'another exercise in being seen to be doing something'. FRW3 commented that accreditation should be 'an agent of social change' rather than 'an agent of social control'. That is, accreditation for accreditation's sake is pointless, and effective accreditation should translate into improved practice. It was suggested that a positive approach to accreditation could be as simple as requiring all FRWs to be court-approved under regulation 7 and/or to have previous experience working as an in-house family consultant in the family courts.

In terms of training and professional development, some interviewees said they would like access to the family courts' resources, particularly the library. They also wanted to receive more practice-based training around interviewing skills and scenarios in cases of DFV. Hearing from women working in the DFV sector was also put forward as a good idea because, as FRW9 said, this would help FRWs gain a broader understanding beyond the 'case-specifics'. Court feedback and supervision were also recommended.

VI Conclusion

Using a qualitative lens, this research has presented insights from FRWs working within Australia's family law system. In the context of considering the efficacy of the FR writing process in matters involving DFV, the FRWs' shared their perceptions of training, supervision and support; the nature of FR assessment processes; their understandings of DFV; and the impact of DFV allegations on the recommendations that are made in FRs to the courts. In doing so, the participant FRWs also revealed the legal context in which they operate, the culture of the family law system and its possible shaping of their work. Interviewees offered opinions on how FRW assessment practices could be improved

and what future reforms are necessary to achieve the best outcomes for children in cases where allegations of DFV have been made.

The FRWs who participated in our research were highly experienced and insightful professionals who have a profound understanding of the system in which they work. They expressed deep frustration with the constraints of limited time and poor remuneration for assessing and writing FRs, as well as inadequate levels of training and professional support. They acknowledged the pro-contact/co-parenting culture of the system and the impact this has on the nature of the recommendations they can make, on the subsequent court orders made, and on consent orders agreed between the parties regarding parental responsibility and living and parenting arrangements for children after separation.

The FRWs we interviewed held divergent views and, in some cases, potentially problematic understandings of DFV, and there was a lack of uniformity in the use of DFV risk assessment tools. Most commonly, DFV was understood utilising Kelly and Johnson's (2008) typology framework thus emphasising a concern that some scholars hold about shifting these porous social science ideas intended for therapeutic work into the legal system. Some FRWs also questioned common understandings of DFV as gendered, were concerned victim mothers may lie/exaggerate abuse and were more concerned about victim parenting capacity being compromised than the parenting capacity of perpetrators. Combined, this illuminates prior research findings of gender bias and typecasting, misunderstandings, minimisation, invalidation of DFV and subsequent FRW recommendations in FRs that appear incongruent with the reality of DFV victimisation.¹⁰⁹

This research affirms many of the concerns identified in previous Australian research and the international literature that, despite formal recognition of the relevance of DFV to parenting cases in the FLA, the reality is that the safety of women and children who have lived with or are living with violence is at risk. For this reason, the FRWs' suggestions for reform are important and should be further explored to improve the quality of FRs. The importance of improving the FR writing approach where there are allegations of DFV cannot be understated because of the high impact FRs have on the lives and safety of children and their mothers.

¹⁰⁹ Logan et al (n 72); Hans et al (n 72); Haselschwerdt et al (n 72); Saunders, Tolman and Faller (n 72); Shea Hart, (n 74); Jeffries et al (n 9); Rathus et al (n 10).