

10

Family violence and child abuse: Parents' pathways and professionals' perspectives

This chapter focuses on how the family law system deals with families where there are concerns about family violence or child safety. The incidence of these issues among separated families was described in Chapter 2, and systemic responses have been discussed in various ways in Chapters 4 and 5. The issues examined in this chapter are:

- Where child safety concerns are relevant, what progress has been made towards sorting out parenting arrangements? What parenting arrangements have been made in such instances?
- How prevalent are issues concerning family violence and child safety in professional practice according to relationship sector professionals and lawyers?
- What practices are applied in identifying families where these issues are relevant?
- How are these issues dealt with in legal and practice frameworks?

The material in this chapter is relevant to assessing the extent to which policy objective 2, “protecting children from violence and abuse”, has been met (2007 Evaluation Framework, Appendix B). Links between reports of family violence, child safety concerns and child wellbeing are examined in Chapter 11. The main legislative mechanisms for supporting the objective concerning protection from family violence and child abuse are:

- greater emphasis on the need to protect children from harm from exposure to family violence and child abuse in the *SPR Act* (s60B(1)(b), s60CC(2)(b));
- making matters where there are reasonable grounds to believe there has been or is a risk of family violence exceptions to the requirement to attend family dispute resolution (FDR) (s60I(9)(b)(i),(ii),(iii),(iv)); and
- making matters where there are reasonable grounds to believe a parent has engaged in family violence or child abuse grounds for the non-application of the presumption of equal shared parental responsibility (s61DA(2)).

Data from the following studies are drawn on to inform this discussion:

- Longitudinal Study of Separated Families Wave 1 (LSSF W1) 2008;
- Family Lawyers Survey (FLS) 2006, 2008;
- Qualitative Study of Legal System Professionals (QLSP) 2008;
- Qualitative Study of Family Relationship Services Program (FRSP) Staff 2007–08, 2009;
- Online Survey of FRSP Staff 2009; and
- Survey of FRSP Clients 2009.

The “In Focus” section (page 232–233) demonstrates that safety concerns correlate with a wide range of problematic processes and outcomes. Concerns about their own safety and the safety of their children are clearly linked to the experience of family violence for some, though not all, separating parents.

The remainder of this chapter examines how the family law system deals with family violence and the abuse of children. The first section looks at professionals' estimates of the prevalence of family violence, followed by a discussion of the tension between maintaining “meaningful involvement” and protecting children from harm. Section 10.2 focuses on identification and screening for family violence and abuse, and Section 10.3 discusses service provision sector professionals' views of the adequacy of the system's response and identifies challenges and problems. The chapter closes with an examination of family law professionals' views of the adequacy of the legal system's responses to these issues.

In focus

Parenting arrangements where there are safety concerns: Progress, pathways and patterns

As noted in Chapter 2, about one in five parents (17% of fathers and 21% of mothers) reported safety concerns associated with ongoing contact with their child's other parent.

Data from the LSSF W1 2008 indicate that parents with such safety concerns, either for themselves or for the focus child, were taking longer to sort out their parenting arrangements than parents without such concerns. Parents with safety concerns were considerably less likely than parents without such concerns to indicate that they had sorted out their parenting arrangements (fathers: 43% cf. 77%; mothers: 52% cf. 79%) and more likely to indicate that they were in the process of doing so (fathers: 35% cf. 16%; mothers: 33% cf. 12%) or that nothing had been sorted out (fathers: 21% cf. 7%; mothers: 15% cf. 9%).¹

Although most parents said that they had contacted a service during or after their separation to help sort out their parenting arrangements, those with safety concerns were considerably more likely to have done so (fathers: 87% cf. 62%; mothers: 92% cf. 64%). In total, 48% of fathers and 55% of mothers with safety concerns had contacted at least three services, compared with only 16% of fathers and 20% of mothers who indicated that they were not concerned about their own or their child's safety.

Among parents who believed that their parenting arrangements had been sorted out, those with safety concerns were less likely than other parents to indicate that they had mainly reached agreement through discussions with the child's other parent. Nevertheless, the proportion of parents with safety concerns who indicated this was quite high considering that they held such concerns (indicated by 41–42% of fathers and mothers with safety concerns, compared with 69–74% of those without such concerns).

Among parents who had sorted out arrangements, those with safety concerns were more likely to use pathways involving formal assistance than those without safety concerns. For example, 13–17% of fathers and mothers with safety concerns indicated that they had mainly arrived at their arrangements with the assistance of counselling, mediation or family dispute resolution services, compared with only 6–7% of those who did not have safety concerns. Lawyers were seen as the main means of sorting out arrangements by 15–18% of fathers and mothers with safety concerns and by 4–5% without such concerns, while the courts were mentioned by 15% of fathers and 8% of mothers with such concerns, but by only 2% of both fathers and mothers without such concerns. Similarly, among those who were still in the process of sorting out their parenting arrangements, those with safety concerns were more likely to indicate that they were using a lawyer or the courts.²

Compared with parents who had sorted out their arrangements, lower proportions of those with safety concerns who were in the process of doing so indicated that they were mainly achieving this through discussion with the other parent. Nevertheless, a substantial minority of parents with safety concerns said that they were mainly relying on such discussions (28% of both fathers and mothers), which could indicate that help is not being sought where it is needed. It should be kept in mind, however, that nominating "discussions" as the main pathway did not mean that services were not also used (see Chapter 4).

At the same time, parents' perceptions of the flexibility and workability of arrangements were linked quite strongly with safety concerns. Those with safety concerns were more likely than those without such concerns to see their arrangements as being somewhat or very inflexible (fathers: 57% cf. 22%; mothers: 45% cf. 17%) and as working "not so well" or "badly" for themselves.

The socio-demographic profiles of parents with and without safety concerns (e.g., country of birth, pre-separation and current marital status) were generally similar. The exceptions were economic ones: parents

1 Numbers omit the "don't know" responses.

2 However, 11% of fathers with safety concerns and 15% of those without such concerns said that they were mainly sorting out their arrangements with the use of counselling, mediation or family dispute resolution services.

with safety concerns were more likely than other parents to indicate that they were under financial stress.³ Specifically, parents with safety concerns were more likely than those without such concerns to indicate that:

- they had experienced at least three financial difficulties since separation (fathers: 49% cf. 26%; mothers: 53% cf. 35%);⁴ and
- they and their family were "poor" or "very poor" (fathers: 18% cf. 8%; mothers: 17% cf. 7%).

In addition, fathers with safety concerns were less likely than fathers without such concerns to have paid work (78% cf. 86%). The difference for mothers was not as strong (51% cf. 55%).

Parental involvement: Current care-time arrangements

Parents with safety concerns were no less likely than other parents to indicate that they had shared care-time arrangements (fathers: 22–23%; mothers 11–12%).⁵ In other words, around one in four fathers and one in ten mothers with shared care-time arrangements indicated that they held safety concerns as a result of ongoing contact. Parents with safety concerns were also more likely than those without such concerns to report that the father never saw the child: 18% of fathers with safety concerns resulting from ongoing contact with the child's mother never saw their child, compared with 6% of other fathers. The difference for mothers was smaller (18% cf. 12%).⁶

Inter-parental communication

While most parents without safety concerns reported that they communicated with their child's other parent about the child once a week or more often, 43% of fathers and mothers with safety concerns made such a claim. In fact, 15–18% of fathers and mothers with safety concerns indicated that they never communicated with their child's other parent.

Contributing to decisions affecting the child in the longer term

As discussed in Chapter 8, a substantial number of parents (especially fathers) with safety concerns indicated that decision-making was shared equally between the parents. For instance, regarding the child's education, equally shared decision-making was reported by 30% of fathers and 16% of mothers with safety concerns, and by 50% of fathers and 31% of mothers who did not hold such concerns.

³ However, no causal connection can be assumed from this.

⁴ Eight indicators of financial difficulties were measured and parents were asked to indicate whether they had experienced any of them.

⁵ The difference in the percentages of fathers and mothers arises from the fact that a higher proportion of fathers than mothers reported that they had shared care-time arrangements. Of all those with shared care-time arrangements, 17% of fathers and 18% of mothers reported safety concerns.

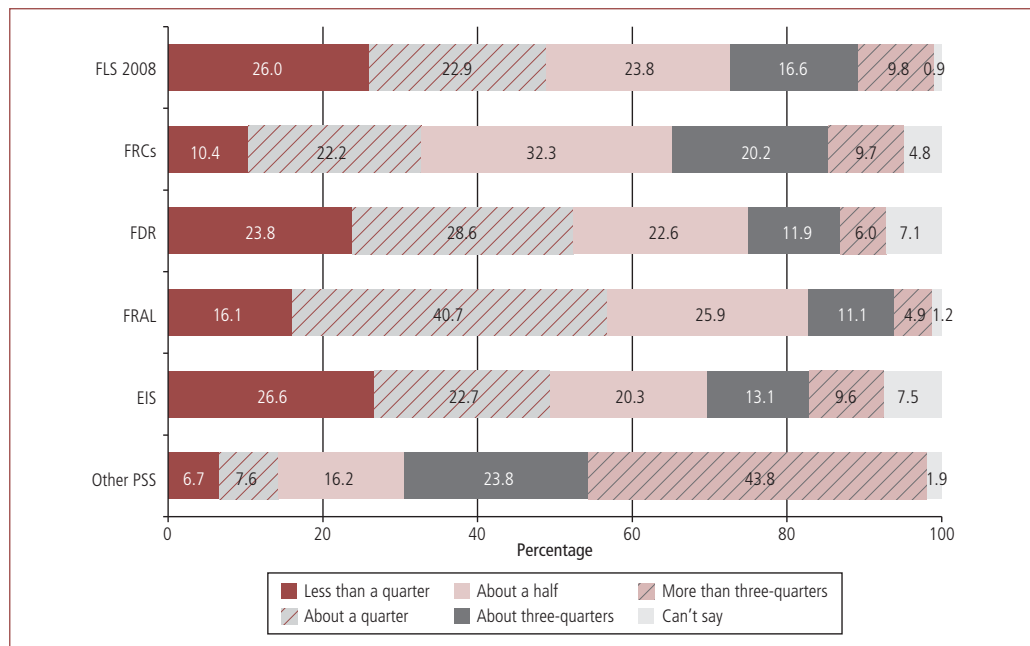
⁶ As noted in Chapter 2, most parents whose child never saw one parent answered the question on safety concerns. (This seems reasonable, given that contact can occur through telecommunications and other indirect means.)

10.1 Professionals' estimates of family violence and views of the family law system response

10.1.1 Professionals' estimates of family violence and abuse

Consistent with the high rates of violence reported by parents using family relationship services, lawyers or family law courts (see Chapter 4), lawyers and service provision sector professionals frequently described a high number of matters involving concerns about family violence, and to a lesser extent, child abuse, in their practices.

Service provision sector professionals were asked to "estimate the proportion of *families with children* you have dealt with over the past 12 months where family violence or abuse has been an issue". Similarly, lawyers were asked to "estimate the proportion of *children's matters* you have dealt with in the past 12 months where family violence or child abuse has been an issue". Figure 10.1 summarises the results.



Notes: Percentages exclude “not applicable”, “none” and “all” responses and missing data. Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2008 and Online Survey of FRSP Staff 2009

Figure 10.1 Estimates of proportion of families where family violence or abuse has been an issue, lawyers and service provision sector professionals, 2008 and 2009

Among lawyers who participated in the FLS 2008, half indicated that about half or more of their clients/matters involved family violence or abuse. A much larger proportion of Family Relationship Centre (FRC) service professionals compared to FDR professionals responded that half or more of the families they saw experienced violence or abuse (62% compared to 41%). The disparity in reports between professionals in FRCs and those in FDR probably reflects their different practice contexts. FRCs play an important gateway and screening role involving substantial numbers of family law system clients who, prior to the 2006 reforms, would have been less likely to have been directed to family dispute resolution. FDR service providers outside FRCs are somewhat more likely to have a client base that may already have been through an initial screening process and/or may have self-nominated for FDR.

Around 40% of the Family Relationship Advice Line (FRAL) and early intervention services (EIS) professionals indicated that half or more of the families that contacted or saw them experienced violence or abuse. Other post-separation services (PSS) professionals indicated much higher rates, with 84% indicating that half or more of the families they saw experienced violence or abuse. This is probably because the service types within this group—the Parenting Orders Program (POP) and Children’s Contact Services (CCS)—specifically cater to families experiencing high levels of conflict and safety concerns. Hence it is likely that a high proportion of families attending these services would have experienced violence or abuse.

Pre-reform data based on lawyers’ estimates are available from the FLS 2006. These show that the identification of violence as an issue in children’s matters has been more common post-reform than pre-reform. In 2008, 26% of the sample identified family violence as an issue in three-quarters or more of their caseload, compared with 15% pre-reform. A similar shift was evident in the pattern of lawyers nominating the “less than a quarter” category, with 38% doing so in 2006 compared with 26% in 2008. The significance of these shifts is difficult to gauge. They may, on the one hand, indicate heightened awareness of family violence and child abuse or, on the other hand, indicate shifts in the make-up of the client base of lawyers, due to the operation of family dispute resolution with exceptions. A view expressed by many legal system professionals was that the general profile of disputes that came into the legal sector and particu-

lary the court sector had become more complex since the reforms because, they believed, less complex cases were being sifted out by the family relationships service sector.⁷

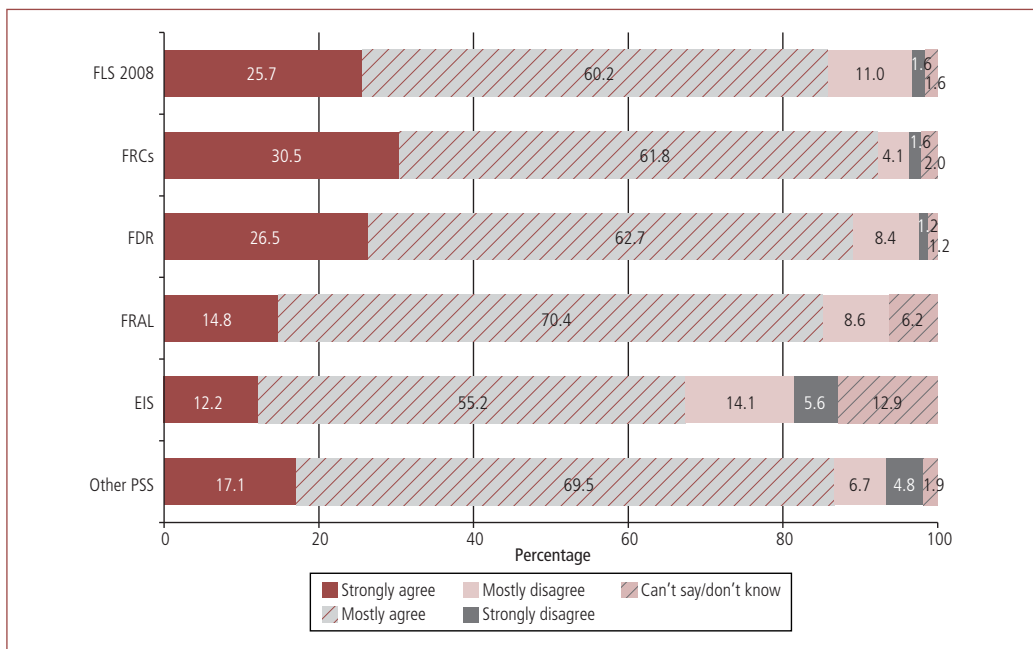
10.1.2 Meaningful involvement and protection from harm

Chisholm (2007) and Parkinson (2007) are among those who have commented on the tension that exists between the aim for children to have “meaningful involvement” with each parent and to be protected from exposure to harm from violence, abuse and neglect. Concerns were raised in interviews and focus groups conducted with legal system professionals that “meaningful involvement” was at times being emphasised at the expense of protection for family members and the children.

As a result, questions concerning these issues were included in the FLS 2008 and the Online Survey of FRSP Staff 2009. In these surveys, professionals were asked to indicate the extent of their agreement with two propositions:

- “The child’s right to meaningful involvement with both parents is given adequate priority in the system.”
- “The need to protect children and other family members from harm from family violence and abuse is given adequate priority in the system.”

Figure 10.2 shows that in relation to meaningful involvement, 92% of FRC and 89% of FDR service professionals mostly or strongly agreed that this was given adequate priority in the family law system (31% and 27% respectively strongly agreed). A similar proportion of lawyers (86%) gave an affirmative response to this question (26% strongly agreed).



Notes: Percentages exclude “not applicable” responses and missing data. Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2008 and Online Survey of FRSP Staff 2009

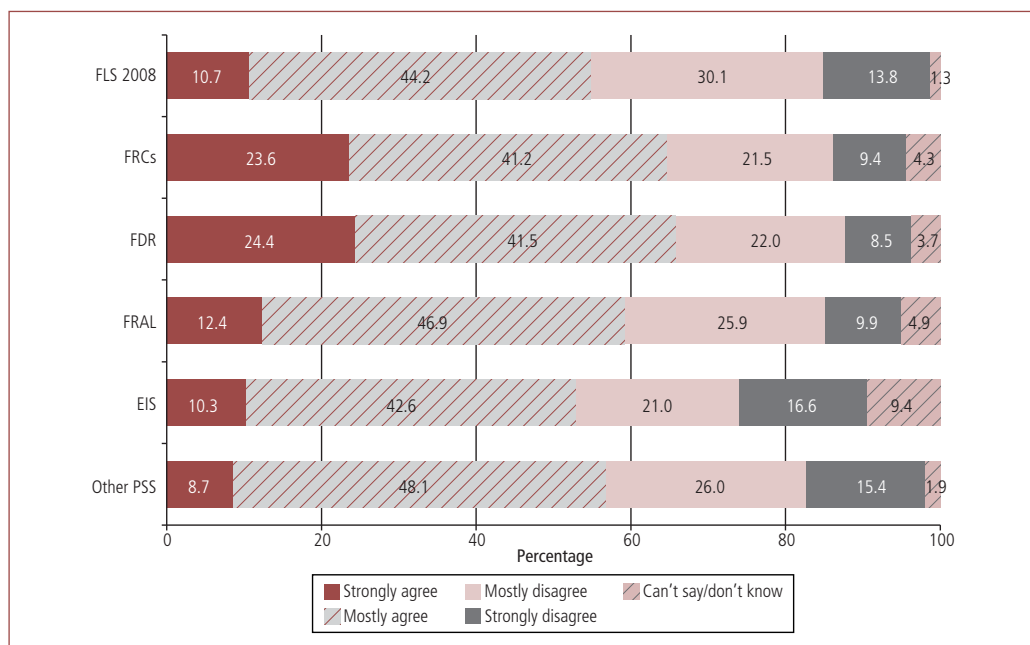
Figure 10.2 Agreement with the statement: “The child’s right to meaningful involvement with both parents is given adequate priority in the family law system”, lawyers and service provision professionals, 2008 and 2009

EIS professionals were the mostly likely to say that the child’s right to meaningful involvement with both parents was not given adequate priority (20%), followed by lawyers (13%), other PSS professionals (12%), FDR service professionals (10%), FRAL staff (9%), and FRC professionals (6%).

⁷ QSLSP 2008.

EIS professionals were also most likely to provide a response of “can’t say/don’t know” (13% compared to between 0% and 6% for the other groups). This makes sense, given that they are less likely to be directly involved in assisting families with decisions about the care of children post-separation.

In relation to the statement that the system gives adequate priority to protecting children from harm from abuse, neglect or family violence, much lower proportions of professionals indicated agreement. Figure 10.3 shows that affirmative responses (i.e., agreeing or mostly agreeing) were made by 55% of lawyers, 65% of FRC and 66% of FDR service professionals, 59% of FRAL staff, 57% of other PSS professionals and 53% of EIS professionals. Negative responses were made by 31% of FRC and FDR service professionals, 44% of lawyers, 36% of FRAL staff, and 38% of EIS professionals. Other PSS professionals were most likely to indicate their disagreement, with 41% doing so. Again, the nature of the other PSS services (that is, CCS and POP) may be driving this higher level of disagreement. Further, in the qualitative study, participants from CCS, in particular, frequently cited examples of concerns about arrangements that courts had made for children attending their service.



Notes: Percentages exclude “not applicable” responses and missing data. Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2008 and Online Survey of FRSP Staff 2009

Figure 10.3 Agreement with the statement: “The need to protect children and other family members from harm from family violence and child abuse is given adequate priority in the family law system”, lawyers and service provision professionals, 2008 and 2009

The above results point to a broad range of responses by both sectors, perhaps suggesting that the question may have quite different meanings for individual practitioners and/or reflect a wide range of experiences of the way in which the “family law system” impacts on families for whom violence or abuse is an issue. It is clear, nonetheless, that in the eyes of a substantial minority of professionals across the legal sector and the service delivery system, there are concerns about the way that family violence and child abuse are dealt with.

The FLS 2008 also asked participants to indicate the extent of their agreement with the following proposition in the context of their post-reform experience: “The legal system has been able to deal adequately with cases involving allegations of family violence and child abuse”. A higher proportion disagreed that the legal system adequately deals with family violence (aggregate of disagree and strongly disagree: 51%) compared to those who agreed with this statement (aggregate: 43%). This response pattern is more strongly negative than those concerning the questions regarding “meaningful involvement and protection from harm” being given adequate priority.

This points to a stronger level of concern about the legal system, as opposed to the “family law system” more generally.

10.2 Screening for and identifying abuse and family violence

Reports by family law professionals suggest that screening for family violence, child abuse and other safety-related issues is undertaken systematically in the family relationship service sector and less systematically in the legal sector. In both the qualitative interviews and surveys, service provision professionals reported that screening is routine practice within their services..

Service provision professionals were asked to indicate their level of agreement with statements that “screening for child abuse and neglect” and “screening for family violence” “is a core part of our business at this service”.

10.2.1 Child abuse and neglect

Almost all FRC and FDR professionals indicated agreement (96% and 95% respectively) (with 65% and 60% respectively strongly agreeing) that screening for child abuse and neglect was a core part of their business at the service (Table 10.1). A similar proportion of FRAL respondents agreed (94%), although the proportion strongly agreeing was lower (47%) than for FRC and FDR professionals. Professionals working in other services indicated slightly lower levels of agreement. This included other PSS (82%; 47% strongly agreeing) and EIS (87%; 45% strongly agreeing) professionals.

10.2.2 Family violence

The pattern of responses in relation to family violence was similar to that for child abuse. Almost all FRC and FDR professionals (98% and 99% respectively) agreed or strongly agreed that family violence was a core part of the business at their services with 81% and 77% respectively strongly agreeing (Table 10.1). Professionals working in other services indicated slightly lower levels of agreement, with FRAL respondents indicating 95% agreement (47% strongly agreeing), other PSS 94% (47% strongly agreeing) and EIS 90% (45% strongly agreeing).

Table 10.1 Agreement that screening for child abuse and neglect or family violence is a core part of the service, service provision professionals, 2009

| | EIS | PSS | | | Other PSS |
|---|------------|-----------|------------|-----------|------------|
| | | FRAL | FRC | FDR | |
| | % | | % | | |
| Screening for child abuse and neglect is a core part of our business at this service | 86.5 | 93.8 | 95.6 | 95.2 | 81.6 |
| Screening and assessment for family violence is a core part of our business at this service | 90.0 | 95.1 | 98.0 | 98.8 | 94.2 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Source: Online Survey of FRSP Staff 2009

Service provision professionals were asked to rate their ability to: (a) identify issues of child abuse and/or neglect, and (b) identify issues of family violence in their work for the service they were responding about. In each of these areas, more than 90% of professionals in each service rated their abilities positively (“excellent” or “good”) in each area (Table 10.2).

Qualitative data from the service provision sector strongly suggest that screening for violence, abuse and neglect has been an increasingly important part of service delivery since the mid-1990s. In the first wave of the Qualitative Study of FRSP Staff, respondents indicated a high level of awareness of concerns about these issues. Many organisations indicated that the screening tools developed and recommended by the Attorney-General’s Department (AGD) were very good (if somewhat lengthy) but that they also engaged in more focused, ongoing and at times more extensive screening. They emphasised that screening occurred from the first contact with

clients (frequently a phone call) and continued throughout the time the client attended the services. They recognised that disclosures could occur at any time and were more likely to occur in an atmosphere of developing trust and support.

While some legal services (for example legal aid commissions) and practitioners screen routinely, no uniform approach or protocol appears to be applied. The Family Law Section of the Law Council of Australia has issued best practice guidelines that deal with family violence (Family Law Council 2004); the Family Court of Australia has had a Family Violence Strategy in place since 2004 (Family Court of Australia [FCoA], 2004) and has recently published its *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (FCoA, 2009a).

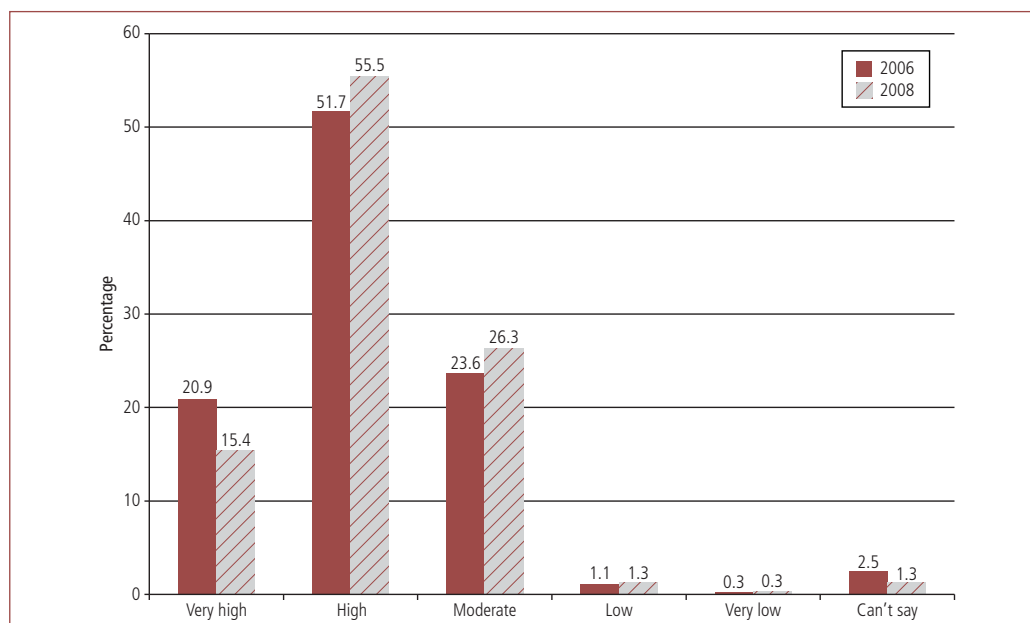
As discussed in more depth in Chapter 13, screening occurs in Family Court of Australia processes as part of the Child Responsive Model and in the FCoWA as part of its Child Related Proceedings model. At the time this research was being undertaken, there was no routine screening process (apart from basic opportunities for the client to raise safety concerns in the process of filing documents) in the Federal Magistrates Court (FMC); the responsibility to identify and disclose the presence of concerns about family violence or child abuse, and allegations of such a history, lies with individuals and their lawyers.

Examination of professionals' views on the efficacy of screening revealed high self-assessment ratings by both lawyers and service provision professionals. The majority of family lawyers surveyed were very confident of their ability to screen for family violence, abuse and neglect (Figure 10.4). Over 70% rated this ability as high or very high, while most of the other

Table 10.2 Positive assessments of own ability to identify issues of child abuse and neglect or family violence in their work, service provision professionals, 2009

| | EIS % | PSS | | | |
|---|----------|------|------|------|-----------|
| | | FRAL | FRC | FDR | Other PSS |
| Identify issues of child abuse and/or neglect | 92.1 | 92.3 | 94.1 | 96.3 | 91.2 |
| Identify issues of family violence | 95.3 | 93.7 | 97.5 | 93.9 | 93.2 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Source: Online Survey of FRSP Staff 2009



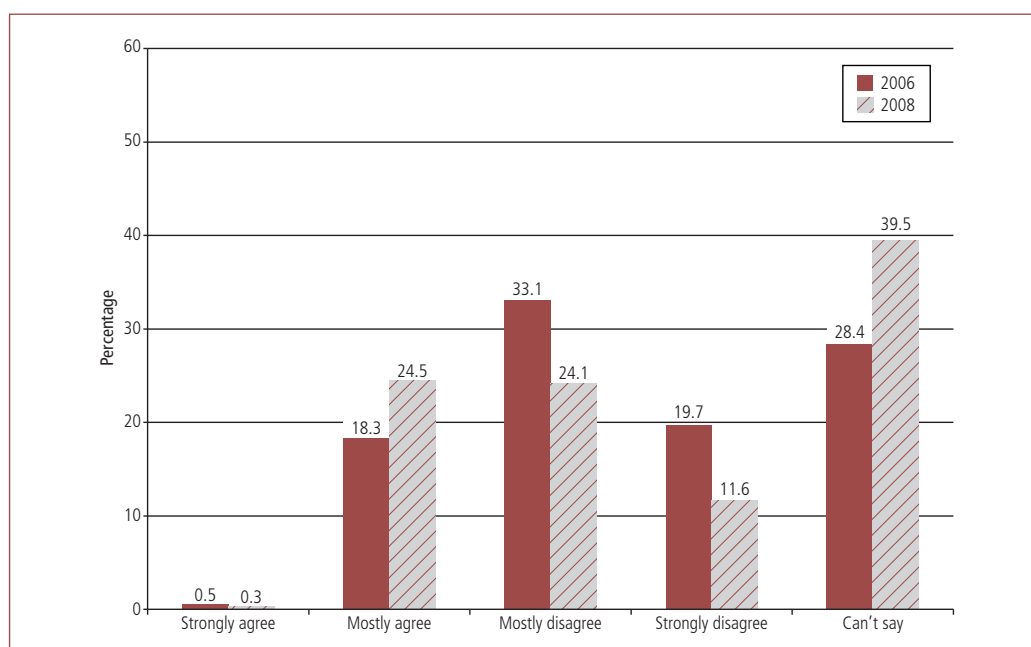
Note: Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2006 and 2008

Figure 10.4 Assessment of own ability to screen for the presence of family violence and abuse, lawyers, 2006 and 2008

respondents (26%) reported a moderate capacity to screen for family violence. Self-assessed ability to screen for family violence, abuse and neglect did not vary greatly between the 2006 and 2008 surveys.

Contrasting with lawyers' confidence in their own capacity to screen for family violence and child abuse, was their relatively low confidence in the ability of Family Relationship Centres⁸ and the legal system's ability to screen for similar issues. In the FLS 2006, however, 28% said they could not answer what was at that time an anticipatory question regarding the operation of FRCs, while in the FLS 2008 (by which time most FRCs were operational), 40% gave a "don't know" response (Figure 10.5). Responses to this question did show a reduction in lawyers' negative assessments of the capacity of FRCs to screen adequately (aggregate of mostly disagree and strongly disagree: 53% in 2006 compared with 36% in 2008). This is mirrored to a less significant extent by an increase in the positive categories between 2006 (aggregate of 19%) and 2008 (aggregate of 25%), although as Figure 10.5 also shows, almost no one from either survey gave strong endorsements. As discussed in Chapter 10, these response patterns are likely to reflect a lack of familiarity on the part of the lawyers with the operations of FRCs and also may reflect experiences that lawyers have heard about from their clients. There is evidence to support this view, both from the data from the Survey of FRSP Clients 2009 and the open-ended responses from lawyers in the FLS 2008.



Source: FLS 2006 and 2008

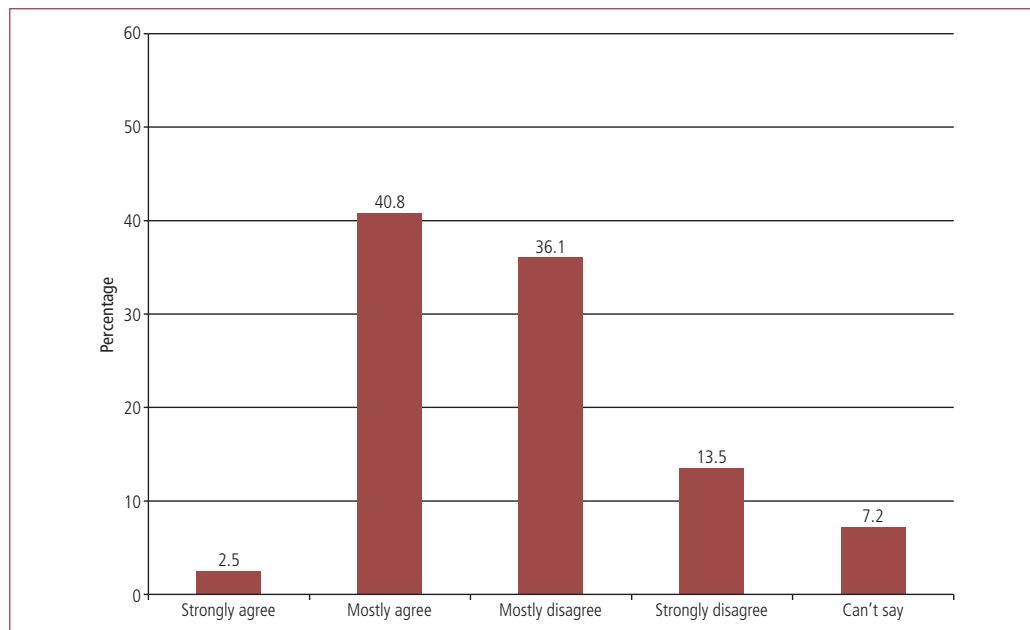
Figure 10.5 Agreement with the statement that FRCs have been able to screen adequately for family violence and child abuse, lawyers, 2006 and 2008

Fewer than half of the lawyers participating in the FLS 2008 agreed with the statement that the legal system has been able to adequately screen for family violence and child abuse (Figure 10.6).⁹ This is a much higher level of agreement than that given by lawyer survey participants in regard to FRCs (Figure 10.5).

On the question of screening, it could be said in summary that the family relationships sector and the legal sector are very confident about their respective capacities. However, as noted in Chapter 4, there was a large percentage of "don't knows" with respect to assessing other services' and courts' capacities. This suggests that there remains a significant way to go in achieving a sense of confidence in the screening capacity of other parts of the family law system.

⁸ FRCs were the only services dealt with in this question.

⁹ This question was not asked in the FLS 2006.



Note: Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2008

Figure 10.6 Agreement with the statement: "The legal system has been able to screen adequately for family violence and child abuse", lawyers, 2008

The following section examines how concerns about family violence, child abuse and neglect and other dysfunctional behaviours are dealt with substantively in the family relationship services and legal sectors.

10.3 Service provision sector responses: Insights from clients and service provision professionals

It probably wouldn't have happened a few generations ago, but it is not uncommon now for the parents that we see for *their* parents to have separated or their parents to have had highly conflicted relationships or alcohol and drug issues or mental health issues. So there is an opportunity to engage even the most hardened characters who come in demanding 50–50 because it is their right and they own the children—to turn it around a bit. (FRC manager, 2009)

This section combines insights from data from the Survey of FRSP Clients 2009 with data obtained from the Qualitative Study of FRSP Staff and Online Survey of FRSP Staff to consider the evidence on the question of the efficacy of service provision sector responses to family violence, child abuse and child safety concerns. A key point is that while service provision professionals demonstrate general confidence in their abilities, client data suggest there is room for improvement.

Table 10.3 shows the pattern of responses to a range of questions asked of parents who participated in the Survey of FRSP Clients 2009. Close to a quarter of parents reported that they felt afraid of the other person involved in the matter they attended the service about and that they experienced threats and abuse outside of the sessions while attending the service.¹⁰ Just over a quarter expressed fear of the person they attended the service about and nearly half said their ability to resolve issues over parenting or children was affected by their concerns or fears. In

¹⁰ This is likely to under-represent the proportion of clients who experienced safety concerns. As part of the sampling process for the client survey, services were provided with an opportunity to exclude clients from the sample who had experienced violence or would potentially be at risk of further violence through their participation. Twenty per cent of those sampled for the survey were excluded by services, although family violence was only one possible reason for their exclusion. Other reasons included mental health, disability, substance misuse and no record of an address.

relation to the effectiveness of service responses to concerns or fears, just over 65% of the sample who indicated holding such fears said these were adequately addressed. In 35% of cases, the participant indicated their fears weren't adequately addressed. Parents whose comments related to FRCs and FDRPs were less likely to say their concerns or fears were addressed than those using other post-separation or early intervention services.

Table 10.3 Parents' reports of safety concerns while attending a service, 2009

| | EIS | PSS | | | Total | Number of respondents |
|---|-------|------|------|-----------|-------|-----------------------|
| | | FRC | FDR | Other PPS | | |
| | | % | % | % | | |
| Respondent expressed some fear of person they attended the service about | 19.0 | 30.6 | 28.9 | 53.4 | 28.7 | 2,335 |
| Respondent sometimes felt afraid of the person they attended the service about during the sessions at the service | 15.7 | 24.8 | 25.7 | 38.1 | 23.2 | 2,335 |
| Respondent experienced threats or abuse outside the sessions, while attending the service | 16.3 | 25.8 | 29.2 | 33.5 | 23.8 | 2,335 |
| Concerns or fears about the person they attended the service about were addressed at the time of attending the service ^a | 71.1 | 61.7 | 59.1 | 69.3 | 65.2 | 670 |
| Respondent's ability to negotiate a parenting agreement/plan ^b was affected by concerns or fears ^c | n. a. | 48.4 | 50.5 | 36.8 | 48.1 | 620 |

Notes: Includes respondents who went to the service about their current partner, ex-partner and/or grandchildren's parents. For each item, response categories were "yes", "no" and "prefer not to say". Responses of "prefer not to say" represented only a small number of responses (< 5%) and are included in totals for calculating the "yes" responses above.

^a This item asked only of those who expressed fear about being with the person they attended the service about.

^b Grandparents were asked about their ability to make arrangements to spend time with their grandchildren.

^c This item asked only of those who expressed concerns about their safety, and are FRC, FDR and POP clients.

Source: Survey of FRSP Clients 2009

Parents who participated in the Survey of FRSP Clients 2009 had the opportunity to make comments in response to an open-ended question inviting them to: "add anything else about their experience of attending the service". A small proportion of these responses raised issues relating to family violence and child abuse and these provide some insight into the experiences underlying the response patterns in Table 10.3. In women's responses, there were three main threads. One thread concerned the experience of being empowered when dealing with the relevant service to recognise and deal with a history of family violence. In relation to counselling, for example, one woman said:

[It] made me realise that there is help out there. Made me see the extent of the violence. They woke me up to a lot of things. They gave me advice. Helped me put safety plans in action.

The second thread reflects perceptions on the part of some participants that family violence had not been taken into account adequately in the context of the service provided. Such comments indicated that family violence had been "brushed aside" or not dealt with effectively by the professional providing the service. For example, one participant said:

She [an FRC professional] forgot that I didn't want to be around my ex-partner and I had to see him. I feel like they didn't listen to me about my concerns about the children's safety.

The third thread concerns a perception expressed by some participants that FDR practitioners in particular treated family violence as "being in the past" and of little relevance in making ongoing parenting arrangements. For example, this parent said:

I strongly believe my fear, and the fear for my child's safety, was not met during the mediation. The mediator seemed to see it "as in the past", when the incident only happened a week or so before. I asked for shuttle mediation and that did make the experience bearable ... but now my ex-partner and I are in court proceedings. I was very let down and felt hopeless during the mediation process.

Men's comments raised concerns about family violence and child abuse less frequently than women. Where concerns were raised, there were again three main threads. One less common thread was similar to the theme about inadequate recognition in women's comments, but concerned a perception that where women were violent, this wasn't taken into account adequately. For example, one participant said:

My ex-partner took no notice at all of the agreements reached until eventually I was issued with a certificate allowing me to go to court. It seemed to me that domestic violence was treated as a women's issue and there was little or no recognition that women can be perpetrators as well as victims.

A more common thread concerned experiences where the participant said their partner made false allegations about family violence and child abuse, but the services they were dealing with were unable to see through them. Referring to an FRC, one man described his experience in this way:

I feel the whole experience was horrible, it disempowered me completely—it was shuttle meeting; no trust with the service provider. The current system is flawed because one person can lie about issues, there is no checks and balance in my case ... I felt it was two women against me.

A still smaller group of comments endorsed the assistance the participants had received in dealing with issues concerning anger and violence. For example, one man said a counselling service had helped get to the cause of his "bad behaviour problems" and, while irreconcilable differences remained with his partner, he had come away with "greater awareness and tools to deal with my own behaviour problems".

Service provision professionals were asked whether their organisations had procedures and protocols in place to deal with disclosures of family violence and for child abuse and/or neglect that safeguarded the families. Among FRC and FDR service professionals, 99% of respondents reported that their service had protocols in place to deal with family violence, and 98% and 100% respectively for child abuse and neglect (Table 10.4). Among FRAL service professionals, 88% reported their services had protocols regarding family violence and 96% for dealing with disclosures of child abuse and/or neglect. For EIS and other PSS service professionals, 98% and 97% respectively responded yes to having protocols and procedures relating to child abuse and neglect and 93% and 90% respectively responded positively in regard to having procedures relating to family violence. FRAL, EIS and Other PSS respondents had the highest rate of "can't say/don't know" responses in regard to family violence (9% for FRAL, and 5% for EIS and Other PSS). FRAL respondents had the highest rate of "can't say/don't know" responses in regard to child abuse and/or neglect (4%). For other groups, this response was given between 0% and 2% of the time.

Table 10.4 Services with procedures/protocols to deal with family violence or child abuse and/or neglect disclosures, service provision professionals' reports, 2009

| | EIS % | PSS | | | |
|---|------------|-----------|------------|-----------|------------|
| | | FRAL | FRC | FDR | Other PSS |
| The service has protocols and procedures for dealing with disclosures of family violence | 93.3 | 87.5 | 98.8 | 98.8 | 89.6 |
| The service has protocols and procedures for dealing with disclosures of child abuse and/or neglect | 97.6 | 96.3 | 98.0 | 96.4 | 97.2 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Note: "Can't say/don't know" responses were included in the analyses.

Source: Online Survey of FRSP Staff 2009

Service provision professionals who indicated that there were protocols and procedures in place were also asked their level of agreement regarding whether these protocols and procedures safeguarded families who used the service. In relation to both child abuse and neglect and family violence, large majorities of professionals (between 89% and 100%) made affirmative responses (Table 10.5).

Table 10.5 Agreement that procedures and protocols in place for dealing with disclosures safeguarded families using the service, service provision professionals, 2009

| | EIS % | PSS | | | Other PSS |
|---|------------|-----------|------------|-----------|------------|
| | | FRAL | FRC | FDR | |
| This service has procedures and protocols in place for dealing with disclosures of family violence that safeguard the families who use this service | 98.7 | 92.8 | 98.0 | 98.8 | 99.0 |
| This service has procedures and protocols in place for dealing with disclosures of child abuse and/or neglect that safeguard the families that use this service | 98.1 | 89.3 | 98.3 | 100.0 | 99.0 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Source: Online Survey of FRSP Staff 2009

10.3.1 Assessing capacity

Data from the Qualitative Study of FRSP Staff and also the Online Survey of FRSP Staff 2009 suggest that when violence is disclosed in the context of FDR, service provision professionals respond in a variety of ways. As previously noted, in the Online Survey of FRSP Staff 2009, FDR practitioners across the different service types were more likely to agree that FDR can be undertaken in the context of family violence rather than for child abuse and neglect. About half of FRC and FDR professionals agreed that their service provided FDR at times in the context of child abuse and neglect and around 80% indicated that their service provided FDR at times in the context of family violence.

Insights about how decisions are made to proceed with the dispute resolution process come from both follow-up open-response questions and the qualitative interviews. A strong theme coming from these data is that decisions are made in the context of detailed screening and assessment that aims to deal realistically with what is presented. As one practitioner put it:

If I refused to see people where there were drug and alcohol issues I'd have no clients ... We'd say that if you came to FDR and you were drunk or stoned on the day, visibly so, that we would need to reschedule. But we wouldn't be saying you need to go and do an A or D program before you can be involved in this. People need to make arrangements for their kids right now. One of the issues they have with the other partner may well be their drug and alcohol use, but it's not something that would stop us from going ahead with that, unless we felt that either of the clients was unable to present their situation fairly. If it was creating an imbalance in the mediation room, that the mediator wasn't able to address or redress, then we'd need to say we can't go ahead with this. But otherwise ...

A children's contact centre manager also observed that a history of these issues should not preclude a parents' participation in their service—rather an assessment of how they are currently managing these issues should be made:

A lot of people might have some kind of mental health issues but it's something that they're kind of working through and managing at the moment. Whereas maybe in the past it wasn't being managed. I mean, if someone was, you know, full-blown alcoholic or drug addict or had some severe mental health stuff going on, I just don't think they would be able to go through the routine of using the [children's contact centre] because you'd have to be a little bit organised ... They probably wouldn't have the capacity to ring and make an intake and turn up to their intake and come for the visits at the scheduled time. So I think the people that we're seeing are people that have moved on a little bit from that. But there have been issues in the past, definitely.

10.3.2 Referring on

Service provision professionals were also asked about their ability to make referrals to appropriate services in cases where child abuse and neglect or family violence was disclosed in their

work for the service. Table 10.6 demonstrates that FRSP staff across services indicated a high level of confidence in their ability to make appropriate referrals, with consistent affirmative responses (ratings of “excellent” or “good”) from more than 90% of the sample.

Table 10.6 Positive rating of ability to make referrals in the context of disclosures of child abuse and neglect or family violence, service provision professionals, 2009

| | EIS % | PSS | | | |
|---|------------|-----------|------------|-----------|------------|
| | | FRAL | FRC | FDR | Other PSS |
| Able to make referrals to the appropriate services for clients in cases where child abuse and/or neglect is disclosed | 94.2 | 92.4 | 95.1 | 93.9 | 96.0 |
| Able to make referrals to the appropriate services for clients in cases where family violence is disclosed | 94.0 | 93.8 | 95.1 | 90.1 | 93.9 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Source: Online Survey of FRSP Staff 2009

10.3.3 Making arrangements

Service provision professionals were asked about their ability to work directly with families/clients who were at risk of or had experienced child abuse and neglect or family violence, or had had allegations made against them. More broadly, they were also asked about their ability to identify circumstances where clients were at risk of harming others. The proportions of service provision professionals who responded positively to these items (that is, providing a rating of “excellent” or “good”) are presented in Table 10.7. Generally, these data show that professionals’ confidence in being able to work with abused or at-risk clients, or where allegations were raised, was generally high (mostly percentages in the 70s and 80s), but not as high as the ratings professionals gave of their confidence to make appropriate referrals, with significantly fewer respondents rating their abilities/confidence as “excellent”.

Table 10.7 Positive assessments of own ability to assist families with issues of child abuse and neglect of family violence, service provision professionals, 2009

| | EIS % | PSS | | | |
|--|------------|-----------|------------|-----------|------------|
| | | FRAL | FRC | FDR | Other PSS |
| Able to work with families where children are at risk of child abuse and/or neglect or family violence | 86.4 | 77.4 | 79.7 | 78.4 | 90.6 |
| Able to work with clients who are at risk of family violence | 94.0 | 89.4 | 90.1 | 90.7 | 90.0 |
| Able to work with families where children have experienced child abuse and/or neglect | 85.5 | 78.3 | 81.2 | 79.7 | 90.9 |
| Able to work with clients who have experienced family violence | 94.7 | 87.7 | 91.0 | 89.6 | 95.1 |
| Able to work with clients who have had allegations of child abuse and/or neglect made against them | 80.1 | 70.2 | 77.0 | 73.3 | 93.2 |
| Able to work with clients who have had allegations of family violence made against them | 88.9 | 75.8 | 84.6 | 85.5 | 92.2 |
| Able to identify circumstances where clients may be at risk of harming others | 88.2 | 87.2 | 83.2 | 84.0 | 85.4 |
| Number of observations | 335 | 81 | 248 | 84 | 106 |

Source: Online Survey of FRSP Staff 2009

In summary, while there are some variations in the positive ratings of their ability to work with families/clients where family violence or child abuse and neglect is an issue, the majority of service provision professionals across the different services types were confident in their abilities to work with these clients. There was more confidence evident in relation to making referrals, and less, but still high, confidence evident in relation to working substantively with

clients in situations where concerns of, or allegations about, family violence and child abuse are relevant. However, the optimistic picture provided by professionals' own assessments is modified somewhat by the data from the Survey of FRSP Clients 2009. A significant minority of the clients (average of 29%) who expressed fears or safety concerns with respect to the other party did not agree that these were addressed at the time of attending the service.

In the context of family law issues, it was clear from the Qualitative Study of FRSP Staff, that working constructively with families may not mean undertaking FDR at the time clients first present at the service or perhaps at all. It could, for example, mean placing the emphasis on referral or dealing with other issues prior to deciding whether to proceed with FDR. A strong concern expressed by this sector, however, is anxiety about what happens when they refer families into the court system. Many provided examples of families being sent back to try again with FDR, when this did not seem appropriate.¹¹ Some spoke of cases in which, in their view, decisions made by the courts have placed family members and children at risk.

10.4 Legal system responses: Insights from family law professionals

As noted earlier, there is much less confidence among lawyers about the implementation of the principle concerning protecting children from harm than the principle of maintaining meaningful involvement with each parent. On the basis of data from various evaluation studies, especially the FLS 2008 and 2009 and the QSLSP 2008, a range of issues is relevant, and the data indicate some complex trends. Data on the filing of Form 4¹² notices, and the number of allegations concerning family violence and child abuse are discussed in Chapter 13. The following analysis combines insights from interviews and focus groups with family law system professionals and results from the FLS 2008. It includes responses to an open-ended invitation to comment on the way in which family violence and child abuse are dealt with in the family law system.¹³

In broad terms, these data suggest four relevant themes. A theme that has the broadest empirical support, in terms of the number and consistency of references to it in data from both studies, concerns cultural issues. These data suggest that the way in which the shared parenting philosophy of the *SPR Act 2006* is understood, in the context of a cultural failure to understand the impact of family violence in particular, produces pressures that mean less emphasis is placed post-reform on the protection from harm principles than pre-reform. The next most significant theme in these data suggest that concerns about and allegations of family violence and child abuse are not dealt with adequately in the system largely because systemic reasons inhibit appropriate investigation and responses. The third theme relates to particular aspects of the legislative framework that influence the decisions that are made about raising concerns about family violence and child abuse in litigation. Finally, there is still a view held by some legal sector professionals, mainly lawyers, that allegations of family violence are made to gain tactical advantage over fathers in cases where they are pursuing shared care. The above issues are considered briefly below.

10.4.1 Lack of understanding

In relation to this broad theme, the data indicate that an interplay between two issues is relevant. The first issue is the impact of the widespread misunderstanding of the introduction of "equal" shared parenting, together with an increase in expectations among fathers and a related perception of disempowerment of women. The second issue is a lack of understanding among some family law system professionals of the nature of family violence and the implications it has for

11 Of course, referrals from the courts into, or back into this sector for a service such as family dispute resolution may at times be appropriate. Sometimes, for example, the scope of a dispute may have been greatly reduced by the time a matter reaches a judicial officer, and may therefore be "mediatable". One difficulty here, however, is the lack of information flow from a service such as family dispute resolution to the courts. As they currently stand, certificates do not provide a judicial officer in a busy list with sufficient information to make an informed decision on whether litigation is the most appropriate way forward. The Note to s60I(8) provides that courts may consider the kind of certificate issued when considering whether to refer parties to FDR (s13C) and in determining whether to make a costs order against a party (s117).

12 Form 4 notices are used to notify courts where there are concerns about family violence and child abuse. Where such notices are filed and the allegation is relevant to whether an application should be refused or granted, the court is obliged to take prompt action (s60K).

13 Responses were made in relation to this issue by 134 of the 319 survey participants.

making parenting arrangements. A regular refrain in the reflections of independent children's lawyers, legal aid, community legal centre and private legal practitioners was their uncertainty about whether to raise concerns about family violence, in part because of these aforementioned cultural issues and in part because of some features of the legislative framework (see below).

A substantial proportion of practitioner participants asserted that family violence was minimised—in the sense of not being given adequate consideration—in the family law system for reasons that largely reflected a lack of understanding of the issues it raises. A variety of factors were said to be connected with this, including a failure on the part of some professionals to appreciate the nature of family violence, particularly its more subtle manifestations, such as emotional abuse and controlling behaviour. There was a range of comments that asserted a failure on the part of some professionals to understand the impact on children of exposure to family violence and the implications such exposure may have for parenting arrangements. Inconsistent approaches across different parts of the system (including among courts and judicial officers) were referred to in these comments. This concern was raised in relation to the legal system generally, and some comments also entailed the assertion that family violence was given minimal attention in FRCs. Comments pertaining to relationship services, including FRCs, suggested that women who had experienced family violence were being pressured into accepting shared parenting agreements. These quotations from responses to the open-ended question in the FLS 2008 illustrate participants' concerns:

This area still needs a lot of work at Commonwealth level. There are many judicial officers who appear not to know how to deal with allegations of family violence or how it impacts on children especially. Some training in developmental child psychology around FV issues would help.

Family violence is often not acknowledged unless there is actually a state AVO or DVO in place to “validate the violence”. Many participants in the system do not accept or acknowledge that family violence is insidious and invisible and therefore unable to be quantified unless supported by a DVO or AVO.

It has been my experience that family violence is overlooked more frequently than previously as a factor to be taken into account since the amendments. A protection order is not a magic wand and its existence does not change the nature of the relationship between parents. [It] only gives one a breathing space perhaps, for the life of the order.

In comments concerning the law on shared time, practitioner participants implied that two aspects of the new legislative framework compounded the lack of efficacy in the system's treatment of family violence and child abuse: (a) the presumption in favour of shared parental responsibility; and (b) the provisions recognising the child's right to meaningful involvement with each parent. It was suggested that these provisions strengthened the tendency for the implications of family violence in particular not to be given adequate consideration. These provisions were said to have had an impact on expectations, with fathers asserting a right to shared time even where there had been violence, placing mothers in a defensive position. It was suggested that the fear created by the possibility of the application of the presumption and the consequent application of the provisions relating to equal time or substantial and significant arrangements contributed to women agreeing at times to unsafe arrangements. Two participants suggested that women in violent relationships were choosing to stay in such relationships to protect their children from shared parenting arrangements in the event of separation. For example, one participant said:

More and more women are electing to stay with an abusive partner, because whilst in the relationship they can, to some extent, try to protect the children. Women are aware that, if they leave an abusive partner, the abusive partner is likely to get “shared care”—in which case the children will be alone with an abusive parent.

10.4.2 Systemic issues

The second most significant theme emerging from the qualitative data was that family violence and child abuse were not dealt with adequately due to systemic issues. Two main points were raised. The first one was a concern that inadequate resources—in the sense of judicial officers and forensic capacity—mean that these issues are not dealt with appropriately in the federal family law system, with delays in courts being a particular manifestation of this problem.

Inadequate time to scrutinise allegations could mean unsafe arrangements could be in place for some time. Conversely, interim arrangements that limit contact for safety reasons could unfairly impinge on the parent–child relationship negatively during the time taken to resolve the matter if the concerns prove to be unfounded.

The second systemic issue concerned the poor interface between the federal family court system and the state-based child protection and family violence systems, due to inadequate resources in the state systems. The following quotes illustrate concerns expressed by family law system professionals:

The system is amateurish and underfunded. The conflict between state and federal laws makes it next to useless. Each jurisdiction gives lip service to child protection issues but is unable to address important child abuse issues except in the most extreme cases. The present situation is atrocious.

Much family violence still goes undetected due to time and resource constraints within the system. A full investigation is not often practical because it takes too long and costs too much. On other occasions, when family violence is alleged wrongly, the allegations cannot be refuted because of the difficulty of proving the negative. The whole subject is still a mess.

Insufficient resourcing of the family law system has had an adverse impact on the time frames within which serious matters (domestic violence/child abuse) are dealt with, despite the best efforts of the current judiciary and court staff. The Magellan program¹⁴ works very well, but the model and the resourcing of the Magellan program could be expanded. There is a need to address the ongoing issue of court delays to minimise possible “systems abuse” of children as result of court delay.

In matters involving false allegations of child abuse, the alleged offender is treated as guilty until proven innocent, and this often impacts upon the meaningful relationship between the child and the alleged offender (parent), particularly where there is a long delay between the date of the allegation and the date of the trial.

A further systemic issue raised by some participants concerned the Federal Magistrates Court. A consistent suggestion from participants in the QSLSP 2008 and the FLS 2008 suggested that some federal magistrates in particular demonstrated a lack of understanding of family violence. According to one respondent:

There is a tendency amongst judicial officers in the Federal Magistrates Court not to deal with allegations of family violence or child abuse adequately. The key to having it dealt with adequately appears to be in the preparation of the court documents and succinctly prepared submissions to the judicial officer.

In my area, the Federal Magistrate is unwilling to transfer matters to the Family Court that should rightly be Magellan cases. This has resulted in cases where there are serious recent allegations of child abuse (either about the subject child or another child in the household) not being given the judicial case management they need.

Other systemic issues raised concerned delays in allegations of family violence and child abuse being dealt with, even where a Form 4 notice was filed.

10.4.3 Issues in the legislation

While some aspects of the 2006 amendments were intended to increase the emphasis placed on protecting children from family violence and child abuse (s60B(1)(b), s60CC(2)), there are perceptions among some legal professionals that other aspects of the amendments (eg., s117AB, s60CC(3)(c)) may inhibit concerns about these issues being raised.

¹⁴ Magellan is a case management system for matters involving allegations of serious sexual or physical abuse, which is available in the FCoA. More information is provided in Chapter 13.

Costs orders for false statements

The *SPR Act 2006* introduced a provision obliging courts to make a costs order against a party found “to have knowingly made a false allegation or statement in the proceedings” (s117AB). There was significant concern that this provision would inhibit disclosures of family violence and child abuse, and the Senate Legal and Constitutional Affairs Committee, in considering the SPR Bill, recommended against its inclusion until the AIFS report, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings* (Moloney et al., 2007), was released (Recommendation 7). There is evidence of this provision being applied, but published judgments where costs are ordered on this basis are relatively uncommon.¹⁵ Some judgments have taken the approach that in order for a court to be satisfied that a false statement has been made “knowingly”, it requires proof to *Briginshaw v Briginshaw* (1938) 60 CLR 336 standard.¹⁶ One judge has articulated the test in this way: “There should be no ‘room for misunderstanding or doubt’: objectively, the person making the statement cannot believe that statement to be true” (per Cronin J in *Charles and Charles* [2007] FamCA 276, ¶ 26).¹⁷

Other judges proceed on the basis that a finding may be made on the basic civil standard: the balance of probabilities (e.g., *Sharma and Sharma* (No. 2) [2007] FamCA 425 ¶8; *Claringbold and James* (Costs) [2008] FamCA 57 ¶35). Instances where costs have been ordered under s117AB include matters where:¹⁸

- a mother was found to have fabricated allegations of abuse against a father (*Sharma and Sharma* (No. 2) FamCA 425 ¶ 13);
- a father was found to have “knowingly” made false statements about the mother’s parenting capacity (*Klumper and Klumper* (Costs—Parenting) (2008) FamCA 360);
- a mother was found to have knowingly made false statements that a child sustained an injury while in his father’s care (*Hogan and Halverson* [2007] FMCAfam 1131);
- in *Claringbold and James* (Costs) [2008] FamCA 57, Bennett J relied on s117(2A)(c) to make a costs order against a mother who was found to have knowingly made false statements about family violence in her current relationship (¶ 26). Her Honour held this also fulfilled her obligation under s117AB.

In both the FLS 2006 and 2008, participants were asked to indicate the extent of their agreement with two propositions that: (a) the prospect of an adverse costs order has discouraged allegations of violence or child abuse that are genuinely held and/or likely to be true; and (b) the prospect of an adverse costs order has discouraged false allegations of violence and child abuse. The resulting data suggest that the level of concern about the provision discouraging true or genuinely held allegations dissipated between 2006 and 2008, but some concerns remained. Doubt about its capacity to discourage false allegations grew between 2006 and 2008.

In 2008, participants’ views on the operation of adverse costs orders were mixed. Most did not perceive that adverse cost orders discouraged allegations that were likely to be true, with 68% (46% in 2006) disagreeing with this statement, compared to 14% (38% in 2006) of respondents who agreed (Figure 10.7).

Adverse costs orders were perceived by a majority of participants to be unsuccessful in discouraging false allegations, with 65% disagreeing in 2008 that the prospect of adverse costs orders had discouraged false allegations of violence (50% in 2006) and 10% agreeing (32% in 2006) (Figure 10.8).¹⁹

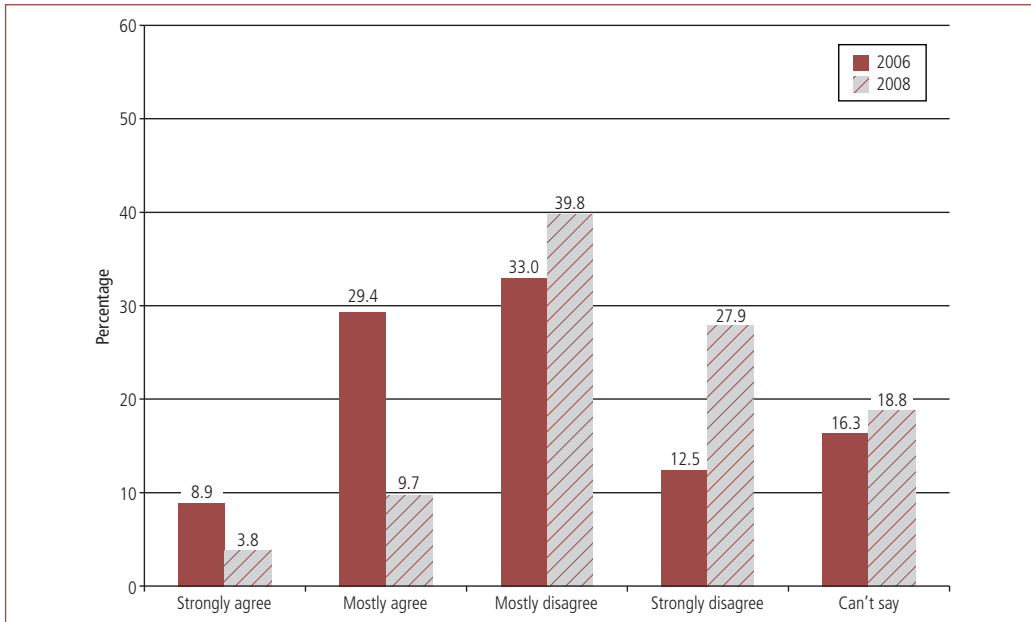
15 The data collection instrument for the FCoA, FMC and FCoWA court files post-1 July 2008 required data collectors to record whether a costs order had been made under s117AB. Not one such order was recorded.

16 Codified in the *Evidence Act 1995* (Cth) s140(2).

17 This approach was followed in *Elenozska and Patronis* (No. 2) [2007] FMCAfam ¶ 10, 11. The civil standard of proof is the balance of probabilities (*Evidence Act 1995* (Cth) s140(1) and the *Briginshaw* standard places the burden of proof at the stricter end of the civil spectrum.

18 Refusal to make an order under s117AB in an appeal case (not involving children or family violence) is in: *Kitman and Kitman* (Costs) [2008] FamCAFC 180.

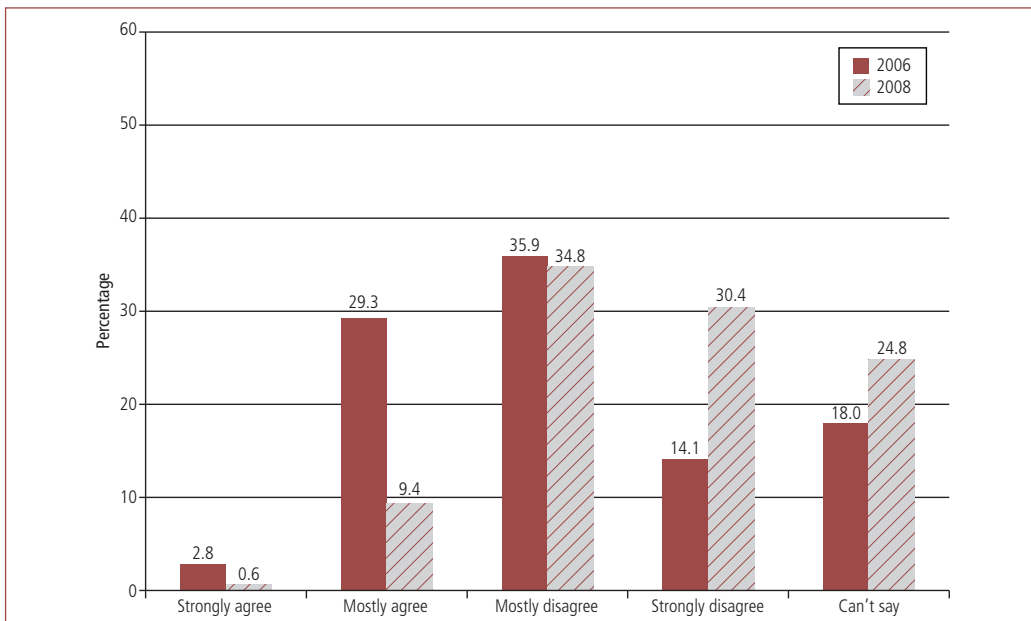
19 “Can’t say” responses were 19% in 2008 and 17% in 2006.



Note: Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2006 and 2008

Figure 10.7 Agreement with the statement: "The prospect of an adverse costs order has discouraged allegations of violence or child abuse that are genuinely held and/or likely to be true", lawyers, 2006 and 2008



Note: Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2006 and 2008

Figure 10.8 Agreement with the statement: "The prospect of an adverse costs order has discouraged false allegations of violence or child abuse", lawyers, 2006 and 2008

Legal practitioners who participated in the QLSLP 2008 made it clear that they took their obligation to warn clients about costs orders very seriously and were aware of the impact that such warnings had on their clients. For example, one solicitor said: "I do find that people do get a bit nervous about that ... the thought of having to pay out any amount of money for any reason at all, is something that really petrifies them".

Finally, it should be noted that there were very few statements from family relationship service professionals concerning the question of false allegations or costs orders for false statements. This is probably because, while service professionals must carefully screen for indicators of violence and abuse, it is not their role to make a judgment with respect to whether a statement is “true or “false”. Thus, if a client expresses fear or makes significant allegations against a former partner with respect to child abuse, the default position of the service professional must be to accept such an expression at face value. FDR should not proceed, for example, when one former partner says that she or he is fearful either about proceeding or about the possible consequences of being asked to make an agreement.

This is likely to be what one FDR practitioner was suggesting in providing the following feedback:

We’ve never had a case here where we’ve believed there were false allegations of family violence. People tend to generally try to cover it [family violence] up rather than make false allegations. It’s not until you start unpicking their stories that it becomes apparent [that there is family violence].

We take it that the FDR practitioner is not implying here that false allegations are never made. Rather we understand this statement to mean that it is not the function of an FDR practitioner to conclude that the allegation is a false one.

The friendly parent criterion

A further aspect of the legal framework that potentially impinges on decisions about whether to raise concerns about family violence and child abuse is what has become known as “the friendly parent criterion” (s60CC(3)(c)). This is one of a series of factual considerations contained in the s60CC enumeration of primary and additional considerations that guide the courts’ determinations as to what orders may be in a child’s best interests. This factual consideration was newly included in the *SPR Act 2006* but, consistent with research on the *Reform Act 1995* (Kaspiew, 2007), judicial officers interviewed for the QSLSP 2008 indicated that this had always been a relevant and important factor under the previous framework.²⁰

As part of the 2006 amendments, the following sub-section was included in s60CC(3)(c), in the list of considerations a court must take into account in determining what orders are in a child’s best interests: “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parents”. Similar issues are also referred to in s60CC(4)(b), which requires courts to consider a range of issues relevant to the extent to which a parent has fulfilled their parental obligations. A discussion of post-2006 case law on s60CC(3)(c) is in Chapter 15.

Comments from solicitors suggested that in combination with the presumption and the linked obligation to consider equal or substantial and significant time, this change contributed to a more conservative approach to raising concerns. A strategy of challenging the role of the other parent was seen as risky because mothers in particular may be seen as “unfriendly parents”. For example, one solicitor said: “We’re very much reminding them of that to ensure that they come across as best they can” The analysis of case law (see Chapter 15) demonstrates how this provision operates in practice and the jurisprudence that has developed around it under the *SPR Act 2006*. A further indication of the level of significance it has is evident from the FCoA, FMC and FCoWA court files, which included the collection of data from affidavits, family reports and judgments. These data are examined in Chapter 14.

Burdens of proof

Issues concerning proof of family violence and child abuse were also suggested by legal professionals as being problematic, according to a range of data sources in the Legislation and Courts Project. There are some complex questions about the extent to which proof must be provided in support of family violence and child abuse concerns. Potentially, there are three relevant burdens of proof. At the most basic level, evidence providing “reasonable grounds” to believe that a parent has engaged in family violence or child abuse needs to be provided to trigger an

²⁰ It was mostly considered under the umbrella of s68F(2)(h), which required the court to consider the parents’ attitude to the responsibilities of parenthood. This provision is replicated in s60CC(3)(i).

exception from family dispute resolution (s60I(9)(b)) or to establish the non-applicability of the presumption of equal shared parental responsibility ((s65DA(2)).

The second level of “proof”, the civil standard, is applicable in most circumstances to questions of fact in civil proceedings, including family law proceedings. This means that in order to be taken into account as being relevant to a parenting matter, concerns about family violence and child abuse need to be established by evidence to satisfy the “balance of probabilities” standard. The issue of how such factual findings may then influence the orders that a court makes remains a question of discretion, and a wide range of approaches are evident in the case law (see Chapter 15).

The third relevant burden of proof arises in a context where a court is being asked to make findings relating to allegations that a child has been subjected to abuse. According to the High Court, courts should refrain from making such findings unless “impelled by the circumstances of the case to do so” (*M and M* 1988 166 CLR 69 ¶ 23). Where such circumstances exist, the appropriate burden of proof is the balance of probabilities toward the strictest end of the civil spectrum.²¹ The High Court in *M and M* emphasised that, rather than making findings about past abuse, the most important task for family courts was to make orders that were in the best interests of children. This includes taking into account whether the evidence indicated the existence of an “unacceptable risk” to the child in the future (see Higgins & Kaspiw, 2008).

Data from evaluation studies, in particular the QSLSP 2008, suggest a range of different views and practices exist in relation to how issues concerning family violence and child abuse may be dealt with at an evidentiary level. This point is reinforced by the discussion of case law in Chapter 15. In the eyes of some participants in QSLSP 2008 and FLS 2008, issues concerning proof have become more difficult in the post-reform environment. It seems that a number of factors may be relevant in informing this perception.

One factor is the way in which family violence is dealt with as an exception to family dispute resolution and grounds for non-application of the presumption of shared parental responsibility. A judge, for example, noted that such features of the legal framework may have practically rather than technically raised the stakes in terms of proof. “If you say to the wife, say, prove when, where etc. ... she’s going to have ... trouble particularising it, she’s going to have ... trouble proving it except that a court might accept her over him ... she’s going to be subjected to a whole lot of cross-examination about things that ultimately aren’t very relevant to the issue”. This was not an isolated view.

The difficulties in pleading issues around family violence were a recurrent theme, with solicitors noting the difficulties clients have in disclosing family violence and providing details specific enough to satisfy legal requirements. This description of the advice that may be given from a barrister illustrates this point: “What have you done about it? Have you done anything? Do we need to subpoena anybody to show you have made complaints? Then I think you advise them that we can still raise it but you’re going to be knocked out essentially because you have never done anything about it. I think you’re always pointing out the weaknesses in their cases”.

Another barrister observed that: “Where such allegations are raised, then material has to be prepared properly and the issues have to be properly litigated—that’s expensive ... And it costs a lot of money to do the Form 4 because it all has to be detailed”.

Other participants suggested that even where sufficient proof was available, the family violence was not always taken into account in an appropriate way: “Now there’s an assumption that it’s [parenting’s] going to be shared so the onus of proof has shifted. If you’re alleging abuse you’ve got to put on notices of abuse. I’ve had cases where we’ve had proof and the woman’s still being treated like she’s on trial”.

Some other comments referred to the difficulties faced by litigants and their advisors in circumstances where there were concerns about family violence and child abuse but objective evidence was not available to substantiate them. This response in the FLS 2008 illustrates such concerns:

The complaint I most hear is that “no one wants to listen to me” about [his] violence toward me. Unless [state child protection authority] or police or the client (usually the mother) has attended a hospital or doctor for injuries sustained, or obtained a [state

²¹ As explained above, this test was articulated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and has since been codified in s140 of the *Evidence Act 1995* (Cth).

family violence protection order] then there's not much initial opportunity to be heard before the Court on the issue. The problem is that, in my experience, it is in the worst cases of DV that the woman is too afraid to act and therefore there is no independent or supporting evidence available, at least initially.

Making equal time or shared care basically the starting point has exposed children to higher levels of violence and conflict in cases where there is domestic violence, but it either can't be proven or isn't at the most serious level.

10.4.4 Claims about tactics

Some participants in the FLS 2008 and QSLSP 2008 raised concerns about the role that allegations of family violence and child abuse play in relation to arguments about shared care-time arrangements. Some of these responses suggested that allegations concerning these issues are used tactically in some cases to counter arguments for shared care. These comments relate to the themes reported in the two preceding sections in complex ways. To some extent, some of the comments discussed in this section tend to contradict the views encapsulated in the comments described in the preceding section, in the sense that they assert that too much emphasis is placed on family violence and child abuse, with the potential for parent–child relationship being curtailed as a result of these issues, on the basis of slim evidence. Thematically, however, the comments are consistent with the concerns that point to insufficient forensic capacity in the system and, overall, they demonstrate the range of views in this area. Such comments were reflected in a small group of responses, along these lines:

An allegation of child abuse or risk of harm is a “tool” used by some parents against the other. It is easy to make such a claim. Interim hearings will be determined on a risk of harm where real evidence of such can be minimal. The ability to “answer” such an accusation is very difficult and this can have serious adverse effects to both the long-term outcomes to the litigation and, more importantly, the parent–child relationship.

The question of the use of state protection orders was also raised in a number of comments, to contradictory effects. On the one hand, some comments suggested that undue emphasis was placed on family violence orders obtained either on an interim or final basis under state-based laws,²² with such orders being used to trump claims for shared parenting arrangements:

In [state jurisdiction], police frequently issue Police Family Violence Orders in the situation where the wife “creates” a scene and says she is scared [in order] to have the husband removed from the home and he is prevented from returning. This has huge impacts on father's ability to see the children in the interim and must be taken into account by the Court. The Police Family Violence Orders are issued without any testing of the evidence and the FCA must still have regard to them.

According to one participant, this led to a situation where:

there appears to be a presumption of guilt in the family law system (i.e. re: AVO and allegations—especially interim matters or people who self-represented at criminal court and consented to a final AVO with facts they don't agree with). Consequently this has an incredible impact in the family law system. It's like a double whammy to the person being accused.

Conversely, a couple of comments suggested that men were agreeing to state protection orders to take advantage of the requirement in s60CC(3)(k) for the family courts to have regard to orders made on a final or contested basis. Orders made by agreement are not caught by this provision, meaning that a court is not obligated to have regard to them. A further couple of comments reflected some participants' views that state protection orders were obtained too easily, with too little evidence. A different perspective on the issue is provided by comments suggesting that people who experience family violence are under more pressure to go to a contested hearing as a result of this provision, since the “significance of the [state protection order] is greater”.

²² The *SPR Act* requires the court to consider any state family violence order made on a final or contested basis (s60CC(3)(k)).

10.5 Summary

The material in this chapter demonstrates that the overall picture in relation to how well the policy objective of keeping children safe from family violence and child abuse is being met is complex. This is an area where a range of views is evident both among parents and family law system professionals. The evidence considered in this chapter demonstrates that, post-reform, parenting arrangements where there are safety concerns are taking longer to resolve and there is more use of services among these families. However, the rate of shared care-time arrangements among parents with safety concerns was no different to that among parents without safety concerns.

A little under 30% of parents who had used various relationship services reported experiencing fear of the other party when these services were being used. Of these parents, around 35% (depending on the service attended) indicated these concerns or fears were not addressed at the time of attending the service.

Lawyers and professionals who work in the relationship services sector indicated that concerns about family violence and child abuse and neglect were common among separating families and perceived to be even more prevalent among the client base of service and legal sectors in the family law system. However, both lawyers and relationship service provision professionals expressed much greater confidence in the family law system's ability to ensure that children had meaningful involvement with each parent than its ability to ensure that children are protected from harm from family violence, child abuse and neglect. Just over half the lawyers who participated in the FLS 2008 disagreed with a proposition that the legal system deals adequately with family violence and child abuse.

Service provision professionals expressed confidence in their own ability to identify and work with families who experience family violence and child abuse and neglect, although the optimistic self-assessments of these professionals are modified somewhat by data from the Survey of FRSP Clients 2009 and the views of lawyers. Service provision sector practice often means engaging with such families in ways that will ensure that these concerns are also addressed via liaison with or referrals to other services specialising in areas such as mental health, addictions and family violence. These interventions can be in some tension with the perceived need to develop comprehensive parenting arrangements as a matter of priority. Family relationship services staff spoke of assisting with "holding" arrangements for parents and children while some of the dysfunctional behaviours and attitudes are attended to.

Lawyers were largely confident in their own ability to screen for family violence and child abuse and neglect, but less confident (and largely unfamiliar with) the service provision sector's ability to do so. This contrasts with the confidence expressed by service provision professionals about their own ability to screen for family violence and abuse.²³

Both lawyers and service provision professionals expressed reservations about the adequacy of the legal system's response when concerns about family violence and child abuse are raised. A little over half the lawyers in the FLS 2008 expressed the view that the legal system had not been able to adequately screen for family violence and child abuse.

Qualitative comments also suggest a range of complex issues underpin their global assessments of the lack of efficacy in handling family violence and child abuse and neglect across the system. Relevant issues include a lack of understanding of family violence and child abuse in various parts of the system and perceptions of a pressure to reach agreements notwithstanding the presence of such concerns. Problems also stem from the intersection of the state and federal legal systems.

There are some concerns about aspects of the legislative framework (s117AB and s60CC(3)(c)) inhibiting people in raising concerns about family violence and child abuse and contributing to a cautious approach among lawyers. Costs orders under s117AB appear to be uncommon but have been made in a range of circumstances. Some of the concern about costs orders discouraging genuinely held allegations appear to have dissipated, while lack of confidence in their ability to discourage false statements has grown.

Finally, while there was widespread concern that family violence and child abuse and neglect are being inadequately responded to, some legal professionals and fathers also claimed that

²³ It should be noted that service provision professionals were not asked their views about legal sector screening.

such allegations are being used to impede fathers' claims for a shared parenting role after separation. However, these concerns were expressed by a small minority of participants and the predominant concerns expressed by professionals (legal and service provision sectors) were about the high levels of prevalence of family violence and child abuse and neglect and the complexity of eliciting disclosures.