

# *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: Key findings of Australian Institute of Family Studies Research Report No. 15*



LAWRIE MOLONEY, BRUCE SMYTH, RUTH WESTON, NICHOLAS RICHARDSON, LIXIA QU and MATTHEW GRAY

**T**his research, which used court files as its primary data source, was commissioned by the Australian Government Attorney-General's Department to provide information that could assist in monitoring its Family Law Violence Strategy in the wake of the 2006 family law reforms. In essence, the study sought to produce relevant baseline data that preceded the reforms. To meet this aim, the researchers drew on a sample of files that were as recent as possible but had been finalised. Knowing that it is not uncommon for litigants to return to court even where 'final' orders have been made (Kelly & Fehlberg, 2002), the researchers selected the 2003 calendar year as the time period of interest. It was hoped that sufficient time had passed for most of these matters to have been finalised by the time the samples were drawn in May 2006.

### **Background to the research**

The 2006 family law reforms were outlined in a series of 'Fact Sheets' that were available from Family Relationships Online.<sup>1</sup> Key reforms include:

- the establishment of 65 Family Relationship Centres around the country, the rollout commencing in July 2006 and concluding in July 2008;
- expansion of a range of early intervention services;
- the establishment of the Family Relationships Advice Line;
- the passing of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth); and
- significant amendments to the existing child support legislation.

Many commentators have noted that two core objectives of the reforms stand in some tension with each other. On the one hand, there is the aim to support the right of each child to grow up with love and support from both parents, even if they have separated. On the other hand, there is a further aim to ensure that children in separating families are kept safe from harm, especially

the harm caused by inter-parental violence and child abuse.

Changes to the *Family Law Act* introduced through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* aim to ensure that cases in which violence or abuse are alleged are handled quickly, fairly and properly. At the same time, there is a recognition that alleged violence and abuse cases are among the most difficult within the family law system.

Difficulties in implementing an effective family violence strategy are further exacerbated by the fact that there has been ongoing debate about the 'real' extent of violence and abuse allegations in family law cases, and whether or not most of them are 'true'. There has been an increasing acceptance that family violence and child abuse allegations have become or have come to be recognised as 'core business' within the Family Court. However, a difficulty with most of the key studies that have made such claims is that they have not been tied to clear definitions of violence or child abuse and/or descriptions of what is being alleged.

It can of course be legitimately argued that instead of being overly concerned with definitions or descriptions, an acceptable starting point is to record cases with allegations, regardless of the circumstances in which these allegations are made. From this point

of view, all allegations matter because violence and abuse are never acceptable. A responsible default position from this perspective might also be to assume that allegations are much more likely to be 'true' than 'false'.

From a research perspective, however, an ongoing tension in this field has been in the capacity to distinguish between scholarly research and advocacy. According to Johnston, Lee, Olesen, and Walters (2005), many North American writers on the subject need no further convincing that:

the extent of real abuse suffered by children and their mothers has been largely ignored, dismissed, or greatly minimized by family courts. For this reason, they believe that the safety of mothers and children has too often been placed at grave risk by custody and access arrangements awarded by the court that favour a controlling and manipulative abuser. (p.283)

Conversely, Johnston et al. (2005) have noted that some fathers' groups frequently claim that separated mothers routinely make false accusations of family

violence and/or child abuse for revenge or to gain a tactical advantage in child custody disputes, with the aim of reducing their former partners' involvement in their children's lives or of cutting them out altogether. Johnston et al. suggest that those who hold this view often support Gardner's (1999) formulation of a 'parental alienation syndrome' to buttress their claims. Gardner claimed to have produced evidence that 'vindictive parents' (mainly mothers) commonly pressure their children to make false claims of mistreatment, especially of sexual abuse in child custody cases.

Though now largely debunked by the research community (see, for example, Faller, 1998, 2003; Garber, 2004) and ruled inadmissible in a number of North American courts (Shields, 2007),<sup>2</sup> some of the thinking that informed Gardner's largely self-published views continue to strike a popular chord. In Australia, for example, a recent telephone survey of 2000 people in Victoria (VicHealth, 2006) found that 46 per cent of respondents agreed with the statement that "women going through custody battles often make up claims of domestic violence to improve their case" (p. 24).<sup>3</sup> Men and women in the general population were equally likely to hold this view, while men from certain cultural groups were more likely than women in those groups to believe that women fabricate allegations to gain a tactical advantage in custody disputes (Taylor & Mouzos, 2006).

Popular perceptions such as these can persist irrespective of factually based evidence. But as the literature review in the *Allegations of Family Violence* report (Chapter 3) demonstrates, Australia has produced little in the way of sound empirical evidence that might assist family law policy makers move forward with confidence. Indeed most of the research to date has reported on small and/or non-probability samples. Provision of reliability and validity tests is unusual and, with some exceptions (e.g. Kaspiew, 2005), reporting on how the data were gathered and analysed has tended to be opaque. It must be said that again with some exceptions, the review of the international literature (Chapter 2) revealed a similar pattern of findings.

When convincing reliable data are unavailable, there is a tendency for the 'loudest voices' to dominate (Smyth, 2004). The 'loud voices' may of course be correct, partially correct, or in serious error. While the existence of solid empirical data will not in itself re-direct erroneous attitudes, without such data it is likely that entrenched positions are simply likely to persist.

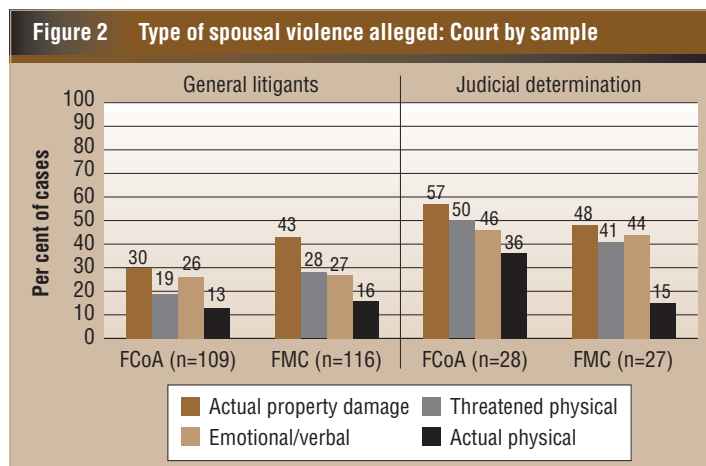
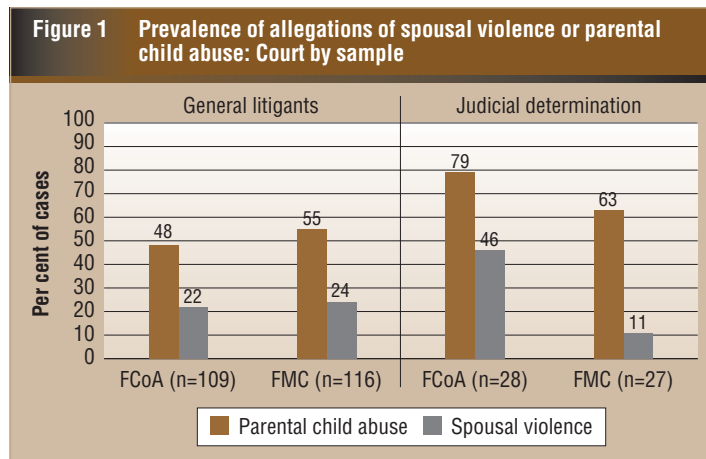
### **Aim and method**

Thus a core aim of the research reported here was to examine as objectively and dispassionately as possible (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings; (b) the extent to which alleging parties provided evidence in support of

their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.

The full study has been published as *Research Report No. 15* and is also available, along with a synopsis, on the Australian Institute of Family Studies website. The study was based on a content analysis of two random samples of court files from the Melbourne, Dandenong and Adelaide registries of the Family Court of Australia (FCoA) and the Federal Magistrates Court (FMC): 240 files from the general population of cases in which parenting matters were in dispute (which the researchers chose to call the 'general litigants sample')<sup>4</sup>, and 60 files from judicially determined matters in which parenting was in dispute (the 'judicial determination sample').

In summary, a total of 300 court files was analysed: 150 from the Family Court of Australia and 150 from the Federal Magistrates Court. Although this design called for randomised sampling from three Family Court registries and two Federal Magistrates Courts in two Australian states, it cannot be assumed that this sample is representative of the divorcing population generally, or of separating couples who bring their child-related disputes into the family law adjudication system. Thus the findings should not be generalised to these populations.



An innovative aspect of the study was the development of an electronic coding frame. This meant that coders<sup>5</sup> could enter data directly from the court files into laptop computers. (Reliability and validity data on the development and subsequent use of the codes are described in the full report.) Background information from the file was entered and any allegation of violence or child abuse was noted. If an allegation was raised, information was entered on:

- the nature of allegations, including the frequency and amount of detail provided;
- what, if any, corroborative evidence was supplied;
- any involvement by relevant state human services departments;
- responses to allegations and the nature of those responses;
- evidence or recommendations from family reports; and
- case outcomes.

### Key findings

Set out below are key findings from the study with respect to:

- prevalence of spousal violence and child abuse allegations;
- type of alleged spousal violence;
- co-occurrence of spousal violence and child abuse;
- type of alleged child abuse;
- apparent severity of allegations;
- evidence in support of allegations;
- the nature of the responses;
- level of detail of allegations and responses;
- outcomes; and
- findings from those cases that resulted in written judgements.

These findings relate to allegations of spousal violence and parental child abuse in the context of 'couple cases' only – that is both the applicant and the respondent were the parents of the child. (There were only a small number of 'non-couple' cases in the samples, and only a small number of cases involving allegations of 'other family violence' that did not overlap with allegations of spousal violence.)

With respect to prevalence of allegations, it was found that more than half the cases in both samples of the FCoA and FMC contained allegations of spousal violence or child abuse. Allegations of spousal violence were much more common than allegations of child abuse. Cases that progressed to a defended hearing were the most likely of all cases to contain allegations; these were also more likely to involve allegations by both sides.

Key details with respect to prevalence can be found in Figure 1.

With respect to the type of violence alleged, it was found that the most common forms, in order of frequency, were physical abuse (actual or threatened), emotional/verbal abuse, and property damage.

Figure 2 provides more detail on the issue of types of alleged violence.

The co-occurrence of spousal violence and child abuse has been noted in the general population studies. In the present family law samples, it was found that allegations of child abuse were almost always accompanied by allegations of spousal violence. Figure 3 provides further details.

Figure 4 demonstrates that allegations of child abuse are mainly related to physical abuse, with only a relatively small number of sexual abuse allegations being noted.

It will be seen that a higher proportion of allegations of child abuse were found in the Family Court's judicial determination sample. This suggests that these allegations are more often formally litigated than dealt with at a pre-court negotiation stage. Interestingly, no case of alleged child sexual abuse was heard in the FMC. This suggests that the Family Court is probably recognised as better resourced in this regard, especially with its capacity to oversee the Magellan program, which is designed to deal as expeditiously as possible with such allegations (see Higgins on p. 40 in this issue).

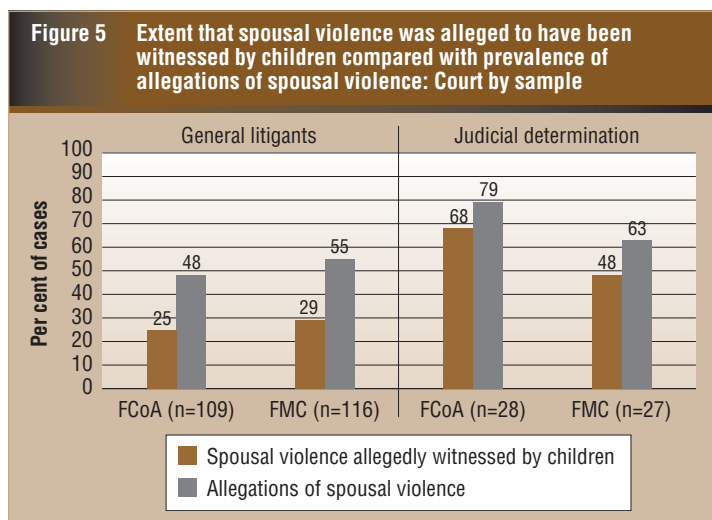
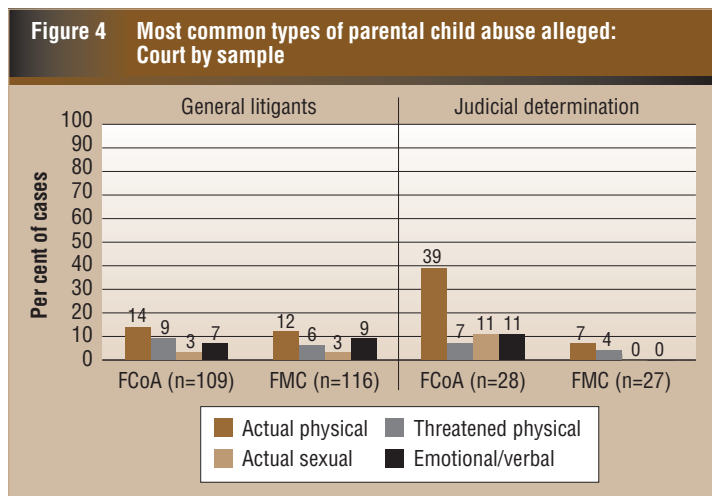
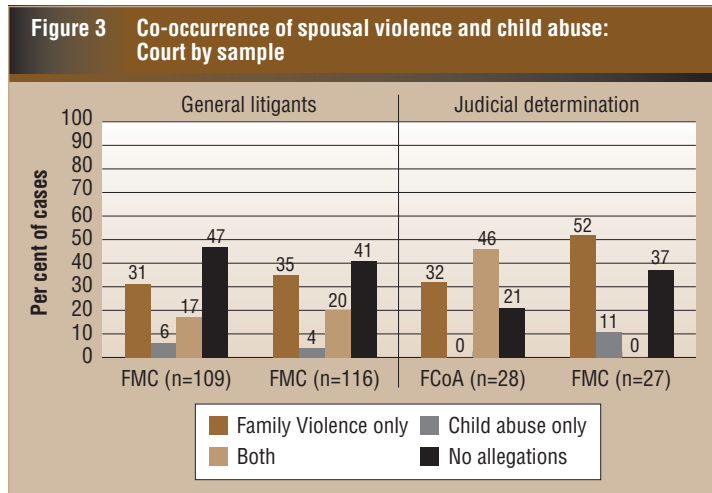
Figure 5 addresses the alleged witnessing of spousal violence by the children and compares this with the actual allegations of spousal violence figures presented in Figure 1.

It can be seen from Figure 5 that these allegations were more likely to be made in the judicial determination sample than in the general litigants sample. Indeed, in the general litigants sample, parents in only half the cases in which violence was alleged went on to allege that the violence had been witnessed by the children.

Aside from distinguishing between different types of spousal violence and child abuse, the research team also classified each party's set of allegations and each case's set of allegations according to how abusive or potentially injurious the overall alleged situation was likely to be. (The typology developed for this appears in Appendix B of the full report.) Clearly, any attempt to code cases along these lines is fraught with conceptual and philosophical difficulties. Nonetheless, imagining being in the 'shoes' of legal representatives, judges or federal magistrates, having to sift through the many complex and varied pieces of information surrounding allegations of family violence, we reasoned that we should attempt to draw out some notion of the severity of the alleged situation.<sup>6</sup> The grounded theory approach to building the typology, including a description of the reliability checks, is described in Section 5.1.2 of the full report. To make our approach as transparent as possible, each case was also summarised and placed in its respective category (see Appendix C of the full report).

This process led to the conclusion that many of the allegations appeared to be at the severe end of the spectrum. Moreover, this finding was not con-

finned to the Family Court cases. The Federal Magistrates Court, too, dealt with a substantial proportion of cases involving allegations of apparently severe violence. Further details are presented in Figure 6. The three categories in this figure represent allegations from the potentially least serious (Category A) to the potentially most serious (Category C). Cases in which there was a mixture of categories were classified according to the more (or most) serious category.



Consideration of the findings related to prevalence (Figure 1) and apparent severity (Figure 6) reinforces previous research-based and anecdotal accounts of violence being or having become ‘core business’ in the Family Court. In addition, the finding that the Federal Magistrates Court was also dealing with a

substantial proportion of allegations at the severe end of the spectrum presents a significant challenge to notions of this court being a court that aims to expedite hearings and outcomes.<sup>7</sup>

On the question of the apparent strength of evidence accompanying allegations (Figure 7), it was found that with respect to allegations of both spousal violence and child abuse, most commonly the allegations contained no information.

It can be seen from Figure 8 that by far the most common response to all allegations, both from mothers and fathers and across all samples, was ‘no response’. The next most common response was denial of the allegation, though in the judicial determination sample, a mixture of denials and admissions was equally common. Full or substantial admissions were relatively rare. Figure 8 provides further details of this pattern.

When the levels of detail of allegations and responses to these allegations were combined, the most common finding was a pooling of low detail in the allegation and low detail in the response. Next most common was medium level of detail in the allegation accompanied by low level of detail in the response. Allegations and responses containing high detail appeared to be rare. Figure 9 outlines this pattern.

These three layers of ambiguity surrounding the allegations – that is, relatively few allegations with evidence of strong probative weight or high level of detail, plus relatively little in the way of detailed responses – suggest that decision-making by judicial officers or agreements made (mainly) with the assistance of clients’ legal representatives, are likely to be taking place in the context of widespread factual uncertainty.

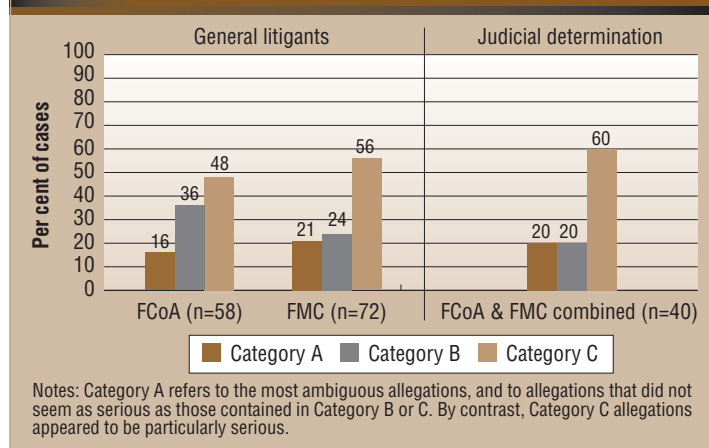
How, then, did allegations appear to impact on outcomes? Regardless of the apparent severity or probative weight of allegations, it remained unusual for some form of contact<sup>8</sup> between the child and the alleged perpetrator to be denied.

As Figure 10 suggests, however, the making of allegations of spousal violence or child abuse that were judged by the research team to be at the severe end of the spectrum, appeared to impact on the proportion of cases in which overnight contact occurred.<sup>9</sup>

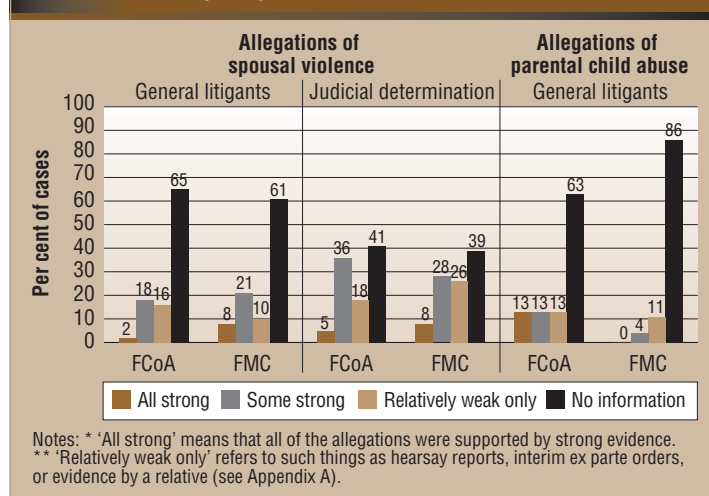
A similar pattern can be seen with respect to allegations, at least one of which had evidence of strong probative weight.<sup>10</sup>

In summary, in the general litigants sample, allegations of spousal violence or parental child abuse appeared to make a difference to case outcomes if they were supported by evidence that appeared to have strong probative weight; the proportion of cases with orders for overnight stays decreased, and the proportions of cases with orders for daytime-only and no contact increased. A similar pattern emerged where the sets of allegations were classified as serious (Category C). In addition, the report found (Chapter 6, Table 6.13) that cases classified as containing the most severe allegations of spousal violence were more likely than other cases to be accompanied by evidentiary material of a strong

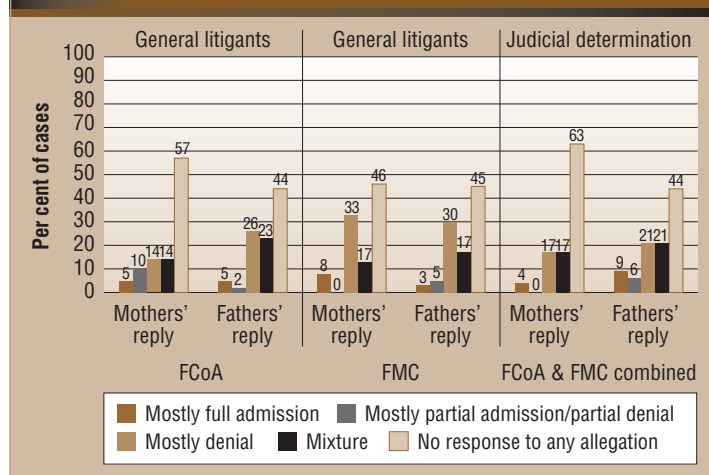
**Figure 6 Apparent severity of allegations: Court by sample**



**Figure 7 Extent of corroborative evidence of spousal violence and parental child abuse provided by the alleging party: Court by sample**



**Figure 8 Response of litigants to allegations of spousal violence: Court by sample by gender of respondent**



probative weight. (Most allegations of child abuse were classified into the Category C grouping.) This means that there was some overlap between the apparent severity of allegations and the apparent weight of evidence in support of such allegations. In the end, however, overnight contact remained the most common of orders, irrespective of the apparent severity of the allegation and the apparent weight of evidence that supported these allegations. And regardless of the weight of evidence or the apparent severity of allegations, daytime-only contact was more likely to be ordered than no contact.

**Judicial findings concerning violence**

It will be recalled that the original sample was divided into the general litigants sample and a separate sample of 60 cases that went to judicial determination. The report produced a flow chart (Figure 7.1) that shows (a) the proportion of the original 240 ‘general litigants’ that proceeded to full judicial determination and what proportion of these had written judgments; and (b) the proportion of the judicial determination sample of 60 cases that also continued on to written judgements.

In the general litigants sample, 6 of the 109 couple cases in the FCoA and 4 of the 116 couple cases in the FMC proceeded to full litigation.<sup>11</sup> Thus, the percentage of this group that proceeded to litigation is broadly consistent with previously cited FCoA data that suggest litigation rates with respect to all applications of approximately 5 to 6 per cent (FCoA, 2006). Of the 55 couple cases in the judicial determination sample, 18 FCoA and 4 FMC couple cases were fully litigated (that is, both parties contested the case).

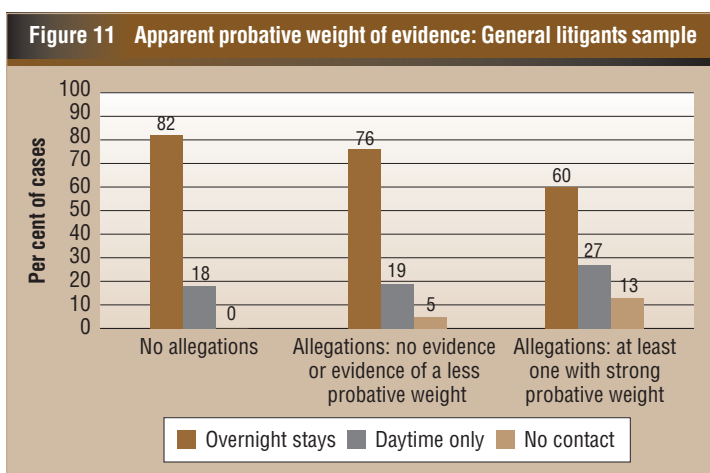
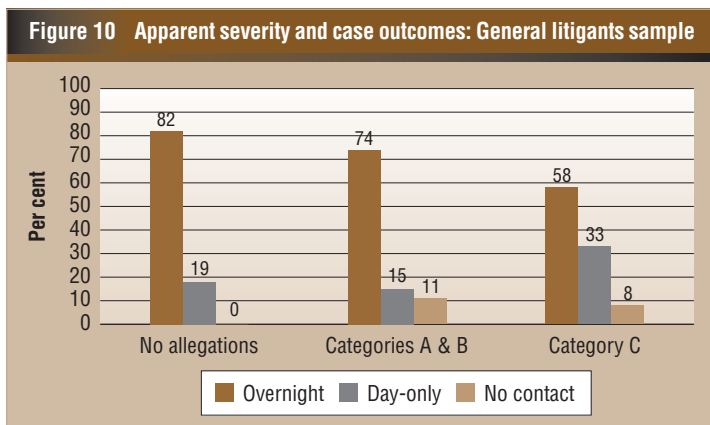
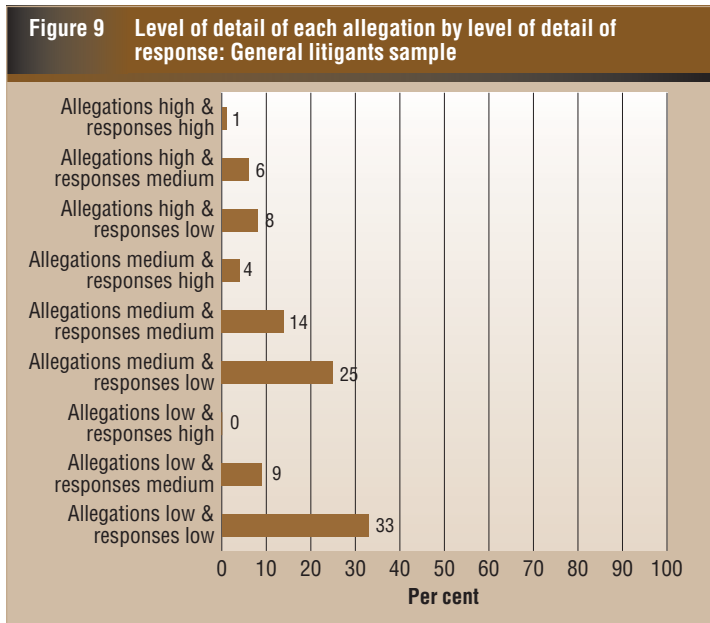
For a variety of reasons outlined in the report, not all litigated cases resulted in written reasons for judgement. In the end, the final grand total of written judgements on couple disputes in which allegations had been made, was 24 (18 FCoA and six FMC). Of the 18 FCoA alleged violence cases that contained written reasons, 11 made findings about allegations of family violence and/or child abuse (while in one other case, findings were made about mental health issues). Of the 11 cases where findings were made, 10 cases resulted in a finding that violence had occurred, with a link between violence and the court orders evident in 9 of these 10 cases.

Of the six FMC alleged violence cases that contained written reasons, five contained findings about allegations of family violence and/or child abuse. In four of these five cases, violence was found to have occurred, with a link between violence and the court orders evident in three of these four cases.

Thus, of the small select sample of 24 fully contested cases containing allegations and written reasons behind the judgment,<sup>12</sup> the final court order appeared to take into account the allegations raised in half these cases (n = 12). These data can, of course, be approached positively or critically. (Is the glass half full or half empty?) From a critical perspective, the following questions can be asked: Why were there no findings in eight cases? What led to a finding that an

allegation was unfounded? Where there was a finding that violence had occurred, why was this finding unrelated to the outcome in two cases?

A key aspect that appeared to differentiate between cases in which allegations were and were not addressed was the level of evidentiary material in support of the allegations. In all eight of the cases where allegations were not addressed, the court file contained no evidence or only evidence of lower



probative weight in support of allegations. In contrast, 9 of the 16 cases where allegations were addressed had supportive evidence of higher probative weight in support.<sup>13</sup>

It is also interesting to note that in all but two cases in which allegations were addressed, allegations were made by both the applicant and respondent; one case that was the exception was (albeit unsurprisingly) undefended. Three of the eight cases that involved 'unaddressed' allegations were made by one party only, compared with 14 of the 16 cases in which allegations were 'addressed'. In addition, three of the eight cases contained emotional abuse exclusively, compared with none of the 16 cases in which allegations were addressed. This suggests

evidence when cases are judicially determined. Nor can it analyse the informal admissions, concessions or, perhaps, promises that might be made during the negotiations that take place with a view to resolving a matter without the need for a fully defended hearing. In other words, the data do not permit us to assess the possibly more nuanced nature of the determinations or of the negotiating processes that may be taking place on behalf of each litigant and on behalf of their children.

In addition, on the data presented, we can only speculate about the circumstances, thinking, motivation or advice that led the majority of litigants to make so many non-specific allegations which, in turn, often elicited no response. The issues that



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that those cases in which allegations were addressed were more complex and/or perhaps involved more tangible allegations.

### Discussion

These data, which reveal the existence of a considerable number of concerning allegations of violence and abuse accompanied by low levels of specificity, low levels of corroborative evidence, and either denials or a complete absence of responses, inevitably pose challenges with respect to assessing outcomes. When specific allegations with evidence of a high probative weight were fully litigated, the courts' orders were much more inclined to reflect the concerns that were raised. For example, they may have demonstrated signs of caution (such as daytime parenting arrangements only) or built in stronger protective qualifiers (such as supervised parenting). In addition, when specific allegations with evidence of a high probative weight led to consent orders, these orders also tended to be similarly responsive to the allegations.

As we have seen, however, most of the allegations in all four court sub-samples lacked supporting evidence and specificity. In addition, when responses were made, they were mainly (and overwhelmingly in the case of child abuse allegations) in the form of full denials. In cases involving allegations that lacked evidence or specificity, the outcomes, whether fully litigated or not, were much more similar to the outcomes in the cases in which violence or abuse was not alleged. It would appear at first glance, therefore, that if the parenting outcomes for many of the alleged violence cases were indistinguishable from the outcomes in the cases in which no violence or abuse was alleged, then both categories (alleged violence and no alleged violence) were being treated, on average, as if they were the same.

In considering these findings, it should of course be appreciated that this study cannot adequately tap into the subtleties that accompany the weighing of

influenced litigants' behaviour may have included the well-recognised difficulties experienced by those who have been in a victim role in *simultaneously* breaking free, asserting their rights, detailing the nature of the violence or abuse *and* gathering evidential support. More speculative is the idea that legal processes within a settlement-oriented family law 'culture' might inhibit the making of fully fledged allegations or responses.<sup>14</sup>

Perhaps, too, amidst the ongoing controversies surrounding 'false allegations' and 'false denials' in family law disputes, practitioners and researchers may underestimate the extent to which it is no trivial matter for many litigants to make any allegations against a former partner with whom one has had children, and with whom one probably wanted to share a lifetime. The data may therefore be reflecting some ambivalence on the part of some of the litigants – perhaps a desire to set a tone that speaks of violence or abuse without being totally condemning of the other party.

A further way of approaching this issue is to consider that the fact that violence in the home has become a criminal matter does not in itself address the highly complex *meaning* of the behaviour. Bala, Jaffe, and Crooks (2007), for example, cite a prosecutor in a Toronto domestic violence court who describes the situation this way:

*it's a crime. But you can't tell me a stranger hitting you is the same as your husband hitting you. There are just not as many factors involved. A stranger doesn't pay the mortgage; he isn't the father of your children and he's sure not someone, rightly or wrongly, that you love. (p. 22)*

At this stage, the data suggest that to the extent that the information that informs litigation processes is a reflection of the information contained in the court files, much of the decision-making and negotiating in family law children's cases in which violence is alleged in Melbourne and Adelaide appears to be taking place

in a climate of considerable factual uncertainty. This could mean that courts and negotiators are generally struggling to make transparent links between many of the violence-related allegations and the final outcomes. One possible explanation for this is that allegations of violence were simply so ubiquitous and, on average, so difficult to assess in detail, that the impact they had on the outcomes became 'blunted'. It could, on the other hand, mean that negotiations and decisions are being based largely on material that is not formally recorded on court files. If the first of these hypotheses is the case, one way forward would be to explore ways in which this material can be made clearer and more informative. If the second hypothesis has more weight, then the focus of future research would need to move further in the direction of understanding decision-making processes within the courts themselves, and decisions being made at the level of pre-trial negotiations conducted mainly, though not exclusively, by legal representatives.<sup>15</sup>

But in either case, it is difficult to see how persisting with such a paucity of information attached to core sworn documents can be helpful. We suggest that where uncertainty predominates in a set of such core documents, its impact is most likely to be in the direction of a relative downgrading of the violence and child abuse allegations. We suggest this because if allegations of serious violence or abuse were to be reflected in the details of the parenting arrangements ordered or agreed to, one would expect these arrangements to look somewhat different to the parenting orders in the sample in which no allegations were made.

### Endnotes

1. <http://www.familyrelationships.gov.au>
2. Johnston (2005) is among those who have provided more sophisticated analyses of the phenomenon of the rejection of a parent by a child.
3. The survey was administered to two random samples: (a) 2000 Victorians 18 years and over; and (b) an over-sample of 800 adults from specific culturally and linguistically diverse (CALD) backgrounds.
4. The clients in this sample were referred to as 'litigants' because they had made formal applications requesting the court to grant them certain orders with respect to their children. In many of these cases, however, disputes are resolved before any significant litigation takes place. Typically, negotiations take place with the assistance of clients' legal representatives, sometimes aided by advice given at preliminary hearings and/or meetings with court-appointed mediators (now called 'Family Consultants'). This complex process conducted 'in the shadow of the law' (Mnookin & Kornhauser, 1979) is sometimes referred to (see Galanter, 1984) as 'litigation'.
5. A further possibly unique feature of this study was that (a) the researchers were guided in the development of the coding by an experienced barrister; and (b) the transfer of material from the court files into the coding frame was done by this and another experienced barrister.
6. We acknowledge that lawyers, judges and federal magistrates would have access to more information than is available in the file material that forms the basis for this analysis.
7. This refers to the general litigants sample. There were too few Federal Magistrates judicial determination cases for the percentages to be meaningful.
8. Parenting arrangements in 2003 were called 'residence' and 'contact'.
9. It is important to note that this figure only focuses on specified orders for overnight stays, daytime-only contact and 'no contact', and excludes 'other orders'. 'Other orders' mostly concern parental decision-making responsibilities, but also includes orders that were recorded as 'as agreed' or 'as specified', changeover arrangements and scheduling of parenting time.
10. As with Figure 10, this figure only focuses on specified orders for overnight stays, daytime-only contact and 'no contact', and excludes 'other orders'.

11. See Step 2 of Figure 7.1 in the full report.
12. Step 4: 18 FCoA, 6 FMC – Figure 7.1 in the full report.
13. See definitions of 'lower' and 'higher' probative weight in Chapter 6 and Appendix E in the full report.
14. Though such speculation has support. See, for example, Kimm (2006), who has written on lawyers' settlement conventions in the context of Australian family law.
15. See previous studies in this regard, such as Ingleby (1992) and Eekelaar, Maclean, and Beinart (2000).

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- Lawrie Moloney** is an Associate Professor in the School of Public Health at La Trobe University, and is employed on a part-time basis with the Institute; **Bruce Smyth** is an Associate Professor at the Australian Demographic and Social Research Institute at the Australian National University; **Ruth Weston** is General Manager of Research and a Principal Research Fellow at the Australian Institute of Family Studies; **Nick Richardson** is a Senior Research Officer at the Australian Institute of Family Studies; **Lixia Qu** is a Research Fellow at the Australian Institute of Family Studies; **Matthew Gray** is Deputy Director Research at the Australian Institute of Family Studies.