

Post-Separation Conflict and the Use of Family Violence Orders

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Abstract

181 parents in 164 different families across Australia, who had been involved in disputes about parenting after separation, were interviewed by the authors about the history of the dispute. In 37 per cent of the families there were known to have been applications for family violence orders ('FVOs') made by or on behalf of one of the former partners against the other. While there were some cases of severe physical violence, the majority of cases did not involve physical assaults causing injury, or a significant threat of such assaults. The research demonstrates the wide range of situations in which FVOs may be sought. FVOs were sought in a number of cases to manage the process of separation from one household into two, and to maintain boundaries following separation. They were also sought to address issues of verbal abuse or alleged harassment. While applicants reported a valid legal basis for applying for FVOs, in certain cases FVOs were used on legal advice for collateral purposes connected with potential family law disputes. While FVOs often played the protective role for which they were designed, they could also exacerbate conflict and make it harder to resolve parenting disputes. These findings raise questions about whether there needs to be some reform of state and territory laws on FVOs.

I Introduction

For years, there has been controversy about the issue of domestic violence in parenting cases. In the last two years research studies, inquiries and law reform commission publications have given the issue particular attention. Professor Richard Chisholm, a former Family Court judge, conducted a review in 2009 of the processes of the Family Court and Federal Magistrates Court in handling cases where there are issues of domestic violence and recommended that in each parenting case there should be a risk assessment conducted soon after the case comes into the system.¹ A major evaluation of the 2006 reforms to the *Family Law Act 1975* (Cth), conducted by the Australian Institute of Family Studies (AIFS), found that for 'a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drug misuse are relevant' and that the 'family law system has some way to go in being able to

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¹ The Hon. Richard Chisholm, *Family Courts Violence Review* (Federal Attorney General's Department, 2009).

respond effectively to these issues'.² Issues of domestic violence and family law have also been considered by the Australian and New South Wales Law Reform Commissions.³

Physical violence and emotional abuse are, regrettably, common features of separated families. In the course of its evaluation, the AIFS surveyed some 10,000 recently separated parents. It found that 26 per cent of mothers and 17 per cent of fathers reported being physically hurt by their former partner either before or during the separation. A further 39 per cent of mothers and 36 per cent of fathers reported emotional abuse without also reporting being physically hurt.⁴ Evidence from an earlier study conducted by the AIFS and based on interviews with a general population of separated parents found that 65 per cent of women and 55 per cent of men reported that they had experienced assaults against them by their former partner either during the relationship or after separation.⁵

Violence and abuse that occurs following separation ought to be of particular concern to policymakers, for whatever emphasis the law may place on the importance of maintaining a meaningful relationship between a child and both his or her parents,⁶ it is appropriate that an absolute priority be given to the safety of victims of violence and their children when there is a risk of serious harm to them. In its evaluation of the 2006 family law reforms, AIFS found that 21 per cent of mothers and 16.5 per cent of fathers reported concerns for their own safety or the safety of the children at the time of the interview.⁷

A Typologies of Post-separation Violence

While the definition of family violence in law and in research varies, there is an acknowledgment in some quarters at least that there should not be a one-size-fits-all response to behaviour that might be categorised as 'family violence'. Thirty years of social science research has demonstrated that there are a number of different patterns of violent conflict between intimate partners, or formerly intimate partners,⁸ and responses to the problem of family violence should

² Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 364.

³ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response* (Report No 114, 2010).

⁴ Kaspiew et al, above n 2, 26.

⁵ These were the figures for assaults within the legal definition. Fifty-three per cent of women and 24 per cent of men reported violence or threats of violence that induced fear; 14 per cent of women and 3 per cent of men reported injuries resulting from violence that required medical treatment. Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* 102.

⁶ *Family Law Act 1975* (Cth) ss 60B and 60CC(2).

⁷ Kaspiew et al, above n 2, 28.

⁸ Janet Johnston and Linda Campbell, 'A Clinical Typology of Interparental Violence in Disputed-custody Divorces' (1993) 63 *American Journal of Orthopsychiatry* 190; Joan B Kelly and Michael P Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implication for Interventions' (2008) 46 *Family Court Review* 476; Nancy Ver Steegh, 'Differentiating Types of Domestic Violence: Implications for Child Custody' (2005) 65 *Louisiana Law Review* 1379; Stacey L Williams and Irene Hanson Frieze, 'Patterns of Violent Relationships, Psychological Distress, and Marital Satisfaction in a National Sample of Men and Women' (2005) 52 *Sex Roles* 771. There is nonetheless a difference of view as to whether intimate partner violence is best explained by typologies, or should rather be seen as a continuum from mild conflict to severe

depend on the circumstances. Four types of violence are commonly described in the literature: coercive controlling violence; violence driven by conflict; violent resistance; and separation-instigated violence.⁹ While these categorisations are useful for understanding the dynamics of individual family relationships and identifying the degree of risk to a person's physical or psychological wellbeing, it should not be thought that they are entirely discrete categories. Each intimate partner relationship has its own unique features and there is some continuity between types.¹⁰

The pattern of violence that has been most discussed in the legal literature is 'coercive controlling violence',¹¹ or 'intimate terrorism', as Michael Johnson has described it.¹² Women who have experienced coercive controlling violence often report a pattern of intimidation, social isolation, and control as well as physical or sexual assault. Behaviours that are involved in this intimidation and control have been characterised as economic, verbal and emotional abuse. Coercive, controlling violence involves male perpetrators and female victims almost without exception. The period around separation can be a particularly dangerous time for women who are victims of such controlling violence and challenging that control by leaving the relationship.¹³

While coercive controlling violence is the type of violence most often seen by police, women's refuge workers and hospital emergency wards, in general community studies, the patterns of intimate partner violence often involve different dynamics. The majority of the violence revealed in such community studies is not coercive controlling violence, but what researchers have variously classified as

controlling violence and homicide: see Michael P Johnson, 'Domestic Violence: It's Not About Gender—Or is it?' (2005) 67 *Journal of Marriage and Family* 1126; David M Fergusson, L John Horwood and Elizabeth M Ridder, 'Response to Johnson' (2005) 67 *Journal of Marriage and Family* 1131.

⁹ The categorisation of family violence by means of typologies has its critics. See Jane Wangmann, 'Different Types of Intimate Partner Violence? A Comment on the Australian Institute of Family Studies Report Examining Allegations of Family Violence in Child Proceedings under the Family Law Act' (2008) 22 *Australian Journal of Family Law* 123.

¹⁰ Janet R Johnson, 'Response to Clare Dalton's "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System"' (1999) 37 *Family and Conciliation Courts Review* 422, 426.

¹¹ Mary Ann Dutton and Lisa A Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52 *Sex Roles* 743. See also Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

¹² Michael P Johnson, 'Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence' (2006) 12 *Violence Against Women* 1003. Johnson used to call it 'patriarchal' terrorism. See Michael P Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 *Journal of Marriage and Family* 283. The use of the language of 'terrorism' in relation to domestic violence may be traced to Lewis Okun, *Woman Abuse: Facts Replacing Myths* (State University of New York, 1986), who used the term 'conjugal terrorism'.

¹³ Margo Wilson and Martin Daly, 'Spousal Homicide Risk and Estrangement' (1993) 8 *Violence and Victims* 3; Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 85–7; Holly Johnson and Tina Hotton, 'Losing Control: Homicide Risk in Estranged and Intact Intimate Relationships' (2003) 7 *Homicide Studies* 58. See also Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991–2) 90 *Michigan Law Review* 1.

‘conflict instigated violence’,¹⁴ ‘common couple violence’,¹⁵ ‘situational couple violence’¹⁶ or, in the language of the US Wingspread Conference, ‘violence driven by conflict’.¹⁷ The Wingspread Conference defined this as follows:

This type of violence takes place when an unresolved disagreement spirals into a violent incident, but the violence is not part of a larger pattern of coercive control. It may be initiated by either the male or female partner. However, female victims are more likely to suffer negative consequences, including injury, than are men.¹⁸

Violence driven by conflict typically involves intimate partners ‘losing’ control, rather than ‘using’ violence to assert it.¹⁹ In their anger, either partner or both may behave in ways that may be characterised as verbal abuse or emotional abuse. Arguments may escalate into hitting, punching and throwing things.²⁰ Typically, the incidence of injuries resulting from this is not nearly as great as would be seen in coercive controlling violence;²¹ however, the two types of violence are not differentiated by the level of seriousness of the violence or risk of injury but rather by the degree of control.²² In characterising the key differentiation to be made, Ellis and Stuckless draw the fundamental distinction between *conflict-initiated* and *control-initiated* violence.²³

The language of ‘victim’ and ‘perpetrator’, ‘abused parent’ and ‘violent parent’ does not easily fit with the nature of violence driven by conflict; nor does an analysis that insists that only one gender is responsible,²⁴ even if the patterns of

¹⁴ Peter Jaffé et al, ‘Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans’ (2008) 46 *Family Court Review* 500.

¹⁵ Johnson, ‘Patriarchal Terrorism’ above n 12.

¹⁶ Kelly and Johnson, above n 8.

¹⁷ Nancy ver Steegh and Clare Dalton, ‘Report from the Wingspread Conference on Domestic Violence and Family Courts’ (2008) 46 *Family Court Review* 454.

¹⁸ Ibid 458.

¹⁹ Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Northeastern University Press, 2008) ch 4. Kerrie James, Beth Sneddon and Jac Brown, ‘Using It’ or ‘Losing It’: Men’s Constructions of their Violence towards Female Partners (Research Paper No 1, Australian Domestic and Family Violence Clearinghouse, 2002). See also Kelly and Johnson, above n 8, 481.

²⁰ Michael P Johnson and Kathleen J Ferraro, ‘Research on Domestic Violence in the 1990s: Making Distinctions’ (2000) 62 *Journal of Marriage and Family* 948, 949.

²¹ Nicola Graham-Kevan and John Archer, ‘Physical Aggression and Control in Heterosexual Relationships: The Effect of Sampling Procedure’ (2003) 18 *Violence and Victims* 181; Kelly and Johnson above n 8, 481.

²² Johnson, ‘Conflict and Control’, above n 12, 1006.

²³ Desmond Ellis and Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks, 1996).

²⁴ The research evidence from general population studies make it clear that both women and men engage in physically aggressive altercations in intimate relationships. In a meta-analysis of 82 studies, it was found that women were slightly more aggressive than men. John Archer, ‘Sex Differences in Aggression between Heterosexual Partners: A Meta-analytic Review’ (2000) 126 *Psychological Bulletin* 651. See also Williams and Frieze, above n 9; Tami P Sullivan, Jennifer Titus et al, ‘Does the Inclusion Criterion of Women’s Aggression as Opposed to Their Victimization Result in Samples That Differ on Key Dimensions of Intimate Partner Violence?’ (2010) 16 *Violence Against Women* 84. While many of these studies rely on use of the Conflict Tactics Scale (Murray A Straus, ‘Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales’ (1979) 41 *Journal of Marriage and Family* 75, the same patterns are discerned using other measures. See, eg, David M Fergusson, L John Horwood, and Elizabeth M Ridder, ‘Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort’ (2005) 67 *Journal of Marriage and Family* 1103. This research has proved highly controversial for those committed to

female violence within intimate partnerships are different from male violence,²⁵ and women are at greater risk of injury.²⁶

While violence driven by conflict predominates in general community studies, coercive controlling violence is much more common in cases that go to court and for women in domestic violence shelters. Michael Johnson, reviewing Frieze's US data from the 1970s²⁷ and focusing on wives' accounts of violence by husbands, reported that 89 per cent of the violence in a general community sample was best characterised as violence driven by conflict, and 11 per cent as coercive controlling violence. In the court sample, only 29 per cent of the violence was driven by conflict and 68 per cent was coercive and controlling. In the sample of women who had been in shelters, the proportions were 19 per cent and 79 per cent respectively.²⁸

Coercive controlling violence and violence driven by conflict are not the only patterns of violence identified in research. Violent resistance and separation-instigated violence have also been identified.²⁹ 'Violent resistance' is force used in self-defence. 'Separation-instigated violence' was identified by Johnston and Campbell, who observed—in their studies of ongoing and entrenched disputes over post-separation parenting—that there was a group of parents where uncharacteristic acts of violence were precipitated by the separation or were reactions to traumatic post-divorce events. In these cases, violence occurred only during or after the separation period and was not present during the marriage itself.³⁰

B Family Violence Orders

An important strategy in promoting the safety of people who are, or used to be, in intimate relationships is through the use of FVOs. All states and territories in Australia have laws that allow state magistrates' courts to make FVOs. The

a single causal factor theory of domestic violence centred in patriarchy and male control. For discussion, see Murray A Straus, 'Future Research on Gender Symmetry in Physical Assaults on Partners' (2006) 12 *Violence Against Women* 1086.

²⁵ See, eg, Russell P Dobash and R Emerson Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324; Marianne Hester, *Who Does What to Whom? Gender and Domestic Violence Perpetrators* (June 2009) University of Bristol, School for Policy Studies, <<http://www.bristol.ac.uk/sps/research/projects/reports/2009/rj4843/whodoeswhat.pdf>>.

²⁶ In one study of incidents of domestic assault reported to the police in 2004 in New South Wales, nearly 74 per cent of women who reported assault by their partners or former partners had suffered injuries compared with 36 per cent of men who reported assault by their partners or former partners: Julie People, 'Trends and Patterns in Domestic Violence Assaults' (2005) 89 *Crime and Justice Bulletin* 9. See also Richard B Felson and Alison C Cares, 'Gender and the Seriousness of Assaults on Intimate Partners and Other Victims' (2005) 67 *Journal of Marriage and Family* 1182.

²⁷ Irene Hanson Frieze, 'Investigating the Causes and Consequences of Marital Rape' (1983) 8 *Signs* 532; Irene Hanson Frieze and Angela Browne, 'Violence in Marriage' in Lloyd Ohlin and Michael Tonry (eds), *Family Violence* (University of Chicago Press, 1989) 163; Irene Hanson Frieze and Maureen McHugh, 'Power and Influence Strategies in Violent and Nonviolent Marriage' (1992) 16 *Psychology of Women Quarterly* 449.

²⁸ Johnson, 'Conflict and Control' above n 12. Johnson used the terminology of 'situational couple violence' and 'intimate terrorism'.

²⁹ See Kelly and Johnson, above n 8.

³⁰ Johnston and Campbell, above n 8, 196–7.

names given to such orders vary from one jurisdiction to another. In New South Wales, for example, they are called ‘apprehended violence orders’ (often abbreviated to AVOs). In Victoria they are called ‘family violence intervention orders’. Another term used by participants in this study is ‘DVO’ (domestic violence order).

The grounds upon which such orders may be sought also vary from one jurisdiction to another. For example, in New South Wales an order may be sought if an applicant fears the commission of an offence involving physical or sexual violence, property damage, stalking, harassment or intimidation.³¹ In other states, the grounds for FVOs are more wide ranging. In Tasmania’s *Family Violence Act 2004*, for example, the definition of family violence includes verbal, economic and emotional abuse.³² Similarly, Victoria’s *Family Violence Protection Act 2008* offers a broad definition of family violence which includes emotional, psychological and economic abuse³³ but a final order requires the likelihood of repetition.³⁴ Emotional or psychological abuse includes behaviour that is ‘offensive to the other person’.³⁵ In the Australian Capital Territory, conduct which is offensive to a relevant person is also termed ‘domestic violence’.³⁶

The variation in the definitions and the grounds for orders as well as police involvement means that the actual rate of orders varies markedly across jurisdictions. There is also some evidence that the number of applications for FVOs in Australia³⁷ is increasing quite significantly, in contrast, for example, to England and Wales where there was a 15 per cent decline in applications for such orders between 2002 and 2006.³⁸ To put the Australian figures into some perspective, the number of applications for restraining orders made in England and Wales in 2006 was 16 937,³⁹ with a population base of about 54 million.⁴⁰ In New South Wales, there were 22 684 orders made two years later in 2008, nearly one-third more than in England and Wales, although the population of New South Wales was about 7 million, about an eighth of the population of England and Wales.⁴¹ One reason why

³¹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

³² *Family Violence Act 2004* (Tas) s 7.

³³ *Family Violence Protection Act 2008* (Vic) s 5.

³⁴ *Ibid* s 74(1): The court may make a final order if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to do so again.

³⁵ *Ibid* s 7.

³⁶ *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1).

³⁷ In New South Wales, the number of AVOs increased from 13 831 in 1996 to 24 310 in 2009, an increase of 75 per cent: NSW Bureau of Crime Statistics and Research, *Criminal Court Information* (1 November 2010) <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats>. In Queensland, the number of domestic and family violence orders rose from 9 585 in 1996–7 to 13,305 in 2006–7. This is a 39 per cent increase. Statistics cited in Chris Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (Queensland Department of Communities, 2010) 57.

³⁸ Mandy Burton, ‘Civil Law Remedies for Domestic Violence: Why are Applications for Non-molestation Orders Declining?’ (2009) 31 *Journal of Social Welfare and Family Law* 109, 111.

³⁹ *Ibid* 111.

⁴⁰ Office for National Statistics, ‘Population Trends’ (Winter 2007, Issue No 130) 13 <<http://www.statistics.gov.uk/statbase/product.asp?vlnk=6303>>.

⁴¹ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2008*, 6, Table 1.14.

FVOs are so common in Australia is because of the high level of police involvement, at least in some jurisdictions.⁴²

C Australian Research on Post-Separation Violence

In addition to a considerable amount of research on domestic violence generally,⁴³ and on FVOs,⁴⁴ empirical research has been undertaken specifically into domestic violence in the aftermath of separation.⁴⁵ Some studies have been based on interviews with women who have experienced violence.⁴⁶ Others have examined court files to see what material is contained in affidavits, reports and judgments.⁴⁷ Some information about issues of violence has also emerged from more general studies of the family law system.⁴⁸

There is still, however, a relative paucity of information about experiences of post-separation family violence in the general population of Australian parents who live apart and, in particular, research that reports on the different perspectives of women and men. The research described in this article adds to the literature on

⁴² In Victoria, for example, nearly half of all orders were sought by the police in 2006–07. The percentage is similar in Queensland. In New South Wales, over 70 per cent of orders are sought by the police.

⁴³ In Australia, empirical studies include: Helen Spowart and Rebecca Neil, ‘Stop in the Name of Love’ (1997) 22 *Alternative Law Journal* 81; Angela Melville and Rosemary Hunter, ‘“As Everybody Knows”: Countering Myths of Gender Bias in Family Law’, (2001) 10 *Griffith Law Review* 124; Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 733; Dale Bagshaw et al, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (2010).

⁴⁴ See, eg, Rosemary Hunter, *Domestic Violence Law Reform and Women’s Experience in Court* (Cambria Press, 2008); Lily Trimboli and Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, 1997); Jennifer Hickey and Steven Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Victorian Law Reform Commission, 1999); Belinda Carpenter, Sue Currie and Rachael Field, ‘Domestic Violence: Views of Queensland Magistrates’ (2001) 3 *Nuance* 17; Anna Stewart, ‘Who Are the Respondents of Domestic Violence Protection Orders?’ (2000) 33 *Australian and New Zealand Journal of Criminology* 77; Heather Douglas and Lee C Godden, ‘The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence’ (2003) 27 *Criminal Law Journal* 32, 36 (46 per cent—data collected in 2001); Jane Wangmann, ‘She said ...’ *He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings* (PhD Thesis, University of Sydney, 2009).

⁴⁵ For a review of the North American literature, see Jennifer L Hardesty, ‘Separation Assault in the Context of Postdivorce Parenting’ (2002) 8 *Violence Against Women* 597.

⁴⁶ Miranda Kaye, Julie Stubbs, and Julia Tolmie, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence* (Families, Law and Social Policy Research Unit, University of Sydney, 2003); Kathryn Rendell, Zoe Rathus and Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (Brisbane Women’s Legal Service, 2002).

⁴⁷ Lawrie Moloney et al, Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings (Research Report 15, Australian Institute of Family Studies, 2007); Rae Kaspiew, ‘Violence in Contested Children’s Cases: An Empirical Exploration’ (2005) 19 *Australian Journal of Family Law* 112; Rae Kaspiew, ‘Empirical Insights into Parental Attitudes and Children’s Interests in Family Court Litigation’ (2007) 29 *Sydney Law Review* 131; Amanda Shea Hart, ‘Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law’ (2004) 18 *Australian Journal of Family Law* 170 (study of first instance judgments).

⁴⁸ Helen Rhoades, Regina Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (The University of Sydney and the Family Court of Australia, 2000).

post-separation family violence by examining accounts of violence—and, in particular, the use of FVOs—by a population of 181 parents who were interviewed about their family law disputes, including 17 former couples. Both women’s and men’s accounts are analysed, based upon in-depth personal interviews. The inclusion of both men and women, and particularly those who were party to and reporting on the same relationship, is an important aspect of this research.⁴⁹

The advantage of examining issues of domestic violence in these cohorts is that they represent personal accounts from people who have had family law disputes and have reported a history of violence, but who were not recruited to the study *because* there had been violence, or allegations of violence, in the relationship. The accounts of participants give an indication of the diverse range of incidents and behaviours that might lead to an application for a FVO, and the range of purposes for which such an order may be sought.

II Method

The data comes from three research studies conducted by the authors: (1) on children’s participation;⁵⁰ (2) on relocation disputes;⁵¹ and (3) on contact disputes in high conflict families.⁵² All the projects were approved by the Human Ethics Committee of the University of Sydney.

The Children’s Participation Study involved interviews with 90 parents, 43 women and 47 men. Ninety-one per cent of the mothers were resident parents, and 66 per cent of the fathers were non-resident parents. There were six former couples in this study. The interviews were conducted between 2002 and 2004. Parents whose children had also taken part in the study were reinterviewed along with their children about two years after the first interview.

The Relocation Study, which is a continuing, prospective longitudinal project, involves interviews with 40 women and 40 men. The findings reported in this study are based mainly on the first interviews—completed between July 2006 and August 2008—with some further information from the second round of interviews conducted in 2008–09. Lawyers were asked to identify relocation disputes that had been resolved in the six months prior to being contacted for this study. The criterion for a client’s inclusion in the study was that he or she had come to see the lawyer for advice concerning a relocation dispute. There were nine former couples in this cohort.

⁴⁹ See Dobash and Dobash, above n 25, who also emphasise the importance of being able to look at ‘shared events’.

⁵⁰ Hereafter the ‘Children’s Participation Study’. This was a study on how children’s views should be taken into account in resolving disputes about parenting after separation. See Patrick Parkinson and Judith Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008). This research was supported under the Australian Research Council’s *Discovery Projects* funding scheme (DP210033).

⁵¹ Hereafter the ‘Relocation Study’. A relocation dispute occurs when one parent, almost invariably the mother, wants to relocate to another place with the effect that the non-resident parent’s contact with the children will be significantly diminished. This research was supported under the Australian Research Council’s *Discovery Projects* funding scheme (DP0665676 and DP0988712).

⁵² Hereafter the ‘Contact Disputes Study’. Judith Cashmore and Patrick Parkinson, ‘Understanding Contact Disputes’ (Report to the Federal Attorney-General’s Department, 2009).

In both the Children's Participation and Relocation Studies, a majority of participants were involved in cases that went to trial. In the Children's Participation Study, this was a consequence of the recruitment strategy, in which two discrete groups of participants were sought—one group which had resolved matters with relatively little involvement of the court system, and another group that had been involved in contested proceedings.⁵³ In the Relocation Study, while the only criterion for the invitation to participate was that there had been a relocation dispute about which a person had sought legal advice, the majority of cases went to trial. Others settled shortly before, or during trial.⁵⁴

In both these studies, participants were recruited through solicitors, who wrote to clients inviting them to participate. Legal Aid solicitors were included, but most participants were recruited through private lawyers. All participants had had legal advice or representation at some point in the course of resolving their family law dispute, but a few represented themselves at various times.

In the third study—a small qualitative analysis of contact disputes in high-conflict families—participants were recruited from Unifam's *Keeping Contact* program, a therapeutic program for parents where there has been entrenched conflict. Many of the participants had been mandated to attend by the court. The Contact Disputes Study added 11 cases that were not part of the other two studies, including two former couples.⁵⁵ In total there were 181 participants in 164 families; 17 former couples took part.

Face-to-face interviews were conducted with almost all participants. A small number were interviewed by telephone due to the distance and expense involved in travelling to interview them in person. The face-to-face interviews were usually conducted in people's homes, but on some occasions were conducted in an office or a public location.⁵⁶ All interviews were taped with consent and transcribed verbatim.

The relaxed environment of interviewing in the home with most parents on more than one occasion, together with a flexible interview schedule which allowed plenty of time for each participant to tell his or her story, meant that all interviews were in-depth explorations of the history of the family law dispute. Interviews typically lasted between one-and-a-half and three hours. The interviews, in all three studies, began in much the same way, with an invitation to each participant to speak about the history of the relationship and the family law dispute. While the main focus of each interview was on the post-separation legal dispute, participants often took considerable time to describe the history of the relationship, and how and why it ended.

⁵³ It might be expected that more allegations of violence would be found in cases that went to trial than cases that settled out of court since that is the pattern in children's cases generally.

⁵⁴ See Patrick Parkinson, Judy Cashmore and Judi Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44 *Family Law Quarterly* 1.

⁵⁵ There was some overlap between the Contact Disputes Study and the other two larger studies, since some participants' responses were analysed for the purposes of more than one study.

⁵⁶ A strict safety protocol was used for interviews in the home which included a phone-in system within a reasonable time of the expected end of each interview.

In the Children's Participation and Contact Disputes Studies, no specific questions were routinely asked about a history of violence, although violence and child abuse featured in many of the accounts, and these included detailed accounts of violence that occurred while the parents were still living together.⁵⁷ Family violence orders were frequently a part of the history of legal conflict between the parents.

In the first interview of the Relocation Study, female interviewees were asked whether escaping violence was a reason for wanting to relocate, and issues of violence which emerged in the course of the narratives were explored. In the second interview of the Relocation Study, interviewees were asked specifically about any violence or allegations of violence in the course of the relationship and in the aftermath of separation, including whether FVOs had been obtained. No definition of violence was given to interviewees. Rather, they were invited to describe any behaviour that they considered to be 'violence'.

Some indication of the level of disclosure, and differences between the accounts of those who were reporting on the same relationship, can be seen from the 17 former couples (34 participants) across the three studies. In one case, the woman disclosed a history of violence during the course of the relationship but her former partner only referred to the fact that she had sought assistance from a domestic violence service. In another very high-conflict case involving a large number of court appearances, a woman made three unsuccessful attempts to get FVOs, but in the interview her former partner did not mention these particular applications. In the other six cases where there were allegations of violence or applications for FVOs, the account of one former partner is corroborated, at least to some extent, by the other, even if they had different versions of events.

A Methodological Considerations and Limitations

Given their engagement in the interviews and their in-depth accounts of the history of the relationship, there is reason to believe that the interviewees highlighted those aspects of the relationship and incidents after separation that were most salient and important to them. For women, this included accounts of violence where that was, for them, a significant part of their story; the history of obtaining FVOs formed an aspect of their narrative about the legal conflict. For men, reports of violence were much less common, but their narratives often included applications for FVOs that were made against them.⁵⁸

It is certainly possible, however, that there were FVOs sought by one parent against the other in the Children's Participation and Contact Disputes Studies which participants did not reveal in the absence of specific questioning, and that other issues of violence, particularly prior to separation, were not reported. In the second interview for the Relocation Study, with specific questions directed to exploring a history of violence, two men and two women who had not previously

⁵⁷ Because the definition of violence in some research studies may include forms of abuse which do not involve physical violence, in this article we refer to 'physical' violence when that is what is meant, and describe other forms of abuse specifically.

⁵⁸ Clearly interviewees are likely to present their story in a positive light and there is no assumption that their accounts are 'unbiased': see Dobash and Dobash, above n 25.

spoken about FVOs in the first interview reported on applications for FVOs that had previously been made either by or against them.

Interviewees may also be reluctant to disclose that they have been victims of violence, without a level of trust being established over more than one meeting.⁵⁹ One woman disclosed violence in the second interview, when specifically asked, that she did not reveal in the first.

It is also possible that interviewees may not have seen violence as relevant because their reason for participating in the study was focused elsewhere (on Children's Participation or Relocation). They may also not have identified violence as an issue during or after their relationship although they may possibly have later come to see their former partner's behaviour in this light.

As it was only in the Relocation Study that interviewees were asked specifically about a history of violence, it may well be that the total incidence of violence and applications for FVOs was understated across the three studies. It is not the numbers as a proportion of all interviewees that are the focus of this article, but rather the patterns of violence and the dynamics of post-separation conflict that led to applications being made for FVOs.

III Results

A Prevalence of Family Violence Orders

In total, out of 164 different families across the three studies, there were reports of FVOs sought by one former partner against the other, or involving mutual FVOs in 61 families—37 per cent of the families. Most applicants were women, but in six cases mutual FVOs were sought, and in six other cases, men were the applicants.

Interim FVOs were not necessarily made into final orders. This is consistent with the national picture. In New South Wales, about 45 per cent of applications for FVOs do not lead to final orders, mostly because the complainant does not proceed beyond an interim order.⁶⁰ In Victoria, about 40 per cent of applications in domestic cases are also finally disposed of by being withdrawn or dismissed, with a further 5–6 per cent being withdrawn after receiving an undertaking.⁶¹

On the issue of whether the FVO was made final, the women's and men's reports differed significantly. Men reported with some frequency that they had contested the FVO application and that it had been withdrawn or dismissed.

⁵⁹ On reluctance to disclose violence, see Hilary Astor, 'The Weight of Silence: Talking about Violence in Family Mediation' in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); see also Martin Schwartz, 'Methodological Issues in the Use of Survey Data for Measuring and Characterising Violence Against Women' (2000) 6 *Violence Against Women* 815.

⁶⁰ Wangmann, 'She said ...' 'He said ...', above n 44, 109.

⁶¹ Victorian Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria, Intervention Order Statistics: 2002/03–2006/07* (2009) 50. See also Rosemary Wearing, *Monitoring the Crimes (Family Violence) Act 1987: A Study of Those Who Do Not Proceed* (Victoria Law Foundation, 1996).

Women's reports very infrequently recorded the withdrawal or dismissal of a FVO application. However, the men's and women's accounts can to a large extent be reconciled in terms of how each spoke about the application. Women referred usually to 'taking out' a FVO as if it were an order that was automatically granted just because they asked for it. The normal course of events across the country is that after such an application has been made, an interim order is put in place by consent or by court order until such time as a contested application can be set down for hearing. It is not the case that an interim order will invariably be made. The magistrate must be satisfied that the application discloses a reasonable basis for the order, and occasionally interim orders are not made. Nonetheless interim orders tend to be made as a matter of course.⁶² If the application is contested, then the applicant may well choose not to go through to the final stage of the hearing, and this is one reason why interim FVOs may not become final.

By way of contrast to the women's accounts, the men who were aggrieved about what they considered to be an unjustifiable FVO tended to talk in terms of fighting the FVO and having it dismissed. It would be dismissed if the applicant did not turn up to court to pursue it.

The 61 families in which there were FVOs taken out against former partners are the focus of this article, but this did not represent the entirety of the FVOs reported by participants. There were applications for FVOs sought by fathers against the new male partners of the mothers, and by the mothers' new partners against the fathers. In other cases, participants were applicants for FVOs against other members of the former partner's family, or were respondents to applications brought by these relatives. There were also FVOs sought against a parent to protect a child where there had been concerns about child abuse.

The cases in which there were FVOs also do not represent the entirety of the violence and abuse reported by participants. There were women who recorded incidents of physical violence in the course of the relationship or after it ended who did not at any stage seek a FVO. Seeking a FVO may be a risky step to take for women who are scared of unpredictable and unstable former partners.

B Pre-Separation Violence

About a quarter of the women who gave details of a history of violence, or had applied for a FVO, reported physical violence that resulted in bruising, wounding or broken bones. Mostly, this violence occurred during the time they were cohabiting with their partner and eventually led to the separation. For example, Sarah⁶³ (Relocation Study) recounted a history of violence during her short de facto relationship, including bad bruising of the face, hips and shoulder. She went to court for a FVO. Leena described how her husband had been physically violent towards her infrequently, but these episodes were very serious:

⁶² See Hunter, *Domestic Violence Law Reform*, above n 44, 115.

⁶³ Throughout this article, pseudonyms are used. This includes in quotations where the interviewee referred to the name of a former partner or a child.

There weren't many areas of violence or many episodes of them but they were bad ... Well, he beat me up terrifically—that caused Sonia's premature birth.

— Children's Participation Study

Leena's case is indicative of the particular dangers some women face during pregnancy and after childbirth with violent partners.⁶⁴

Diana described a history of serious violence which led her to separate from her partner:

I was emotionally and physically abused. There were two instances of breaks, and one when I was actually drugged. And I was suffocated as well.

— Relocation Study

Eventually, Diana decided to leave and told her former partner that she was not going back to him. After serious threats to her life, she applied for a FVO.

So then he left and then came back and then threatened to blow me up. And then two days later, he tried to run me off the road and that's when I got an AVO on him.

It was a minority of cases in which any physical violence was reported prior to separation. The most common pattern was that the behaviour that led to police involvement and applications for FVOs arose either around the time of separation or afterwards. It was a recurrent theme in many of these accounts that there had not been physical violence or the threat of it while the partners were living together, or that any such incidents had been isolated.

C Post-Separation Violence and FVOs

The period around the time of separation and afterwards led in many cases to incidents of physical violence which women indicated were atypical. Jennifer, for example, recorded a post-separation incident which led her to apply for a FVO. She was taking the children to see their father and was late. Although she had sent him a text message to let him know, he was furious. She decided that she was not going to let the children go with him if he was so angry. He tried to get his own way by physical force:

He picked me up and he threw me out of the way ... And after that I was just sort of stunned, because he's never really hurt me in our marriage or anything.

— Relocation Study

Another woman, Kimberly, recounted why she needed a FVO at the time of separation:

I ended up having to get an AVO—he came and kicked my front door in ... he wasn't violent to me when we were married but when I left him he was. When it got to the point where I was saying, 'I'm leaving, I've had enough', he didn't

⁶⁴ Angela Taft, 'Violence against Women in Pregnancy and After Child Birth: Current Knowledge and Issues in Health Care Responses' (Issues Paper No 6, Australian Domestic and Family Violence Clearinghouse, 2002).

punch me, he just dragged me around, things like that. So the police ended up putting an AVO on him.

— Children’s Participation Study

In some instances, participants referred to other forms of abusive behaviour such as verbal abuse while living together, and this might be understood, at the time or later, as a form of ‘domestic violence’:

[T]he lady at the court showed me this flow chart of domestic violence and it actually made me realise that that’s what I’ve dealt with since I’ve been with him, but it’s been verbal and emotional rather than physical.

— Jane, Relocation Study

Her sister got her to take out an AVO, for saying that I was violent and everything else. Um, which I’m not. I’m just—oh well I, I explode verbally. Better to be verbal than um physical, ‘cause that’s always been my motto. What’s the use of bashing the daylight’s out of someone when you can just sort of embarrass them more by verballing abusing them?

— Ian, Children’s Participation Study

Where there had been no physical violence prior to separation, the most common reasons for seeking FVOs, in women’s accounts, were men’s threatening behaviour, verbal abuse and ‘loss of control’ in the course of heated arguments that led to physical altercations. Men and women typically had different perspectives on these arguments and who was responsible. Louise, for example, reported that there had been no physical violence in the course of the relationship but that she sought a FVO after her former partner had tried to attack her on a contact handover.

He tried to attack me through the side of the car with Matthew in the car. He was just pissed off, you can tell with him, he sort of builds up. That was a very minor thing that he was pissed off about, Matthew had lost something and we couldn’t find it and he just cracked.

— Relocation Study

Louise’s former partner, Anthony, had a rather different version of events:

Oh, she gave me the finger out of the car. Yeah, incident at changeover where, yeah, she went nuts and abusive and stuff and then turned around and blamed it on me. Drove off with Matthew with the door open and that sort of thing.

Both parents’ description of the event was that the other had ‘lost it’ and each blamed the other, although Louise’s account indicates an attempted physical attack not mentioned by Anthony. Their post-separation relationship was characterised by ongoing conflict involving police, the courts and child protection services. Anthony made complaints against Louise to the child protection department, alleging physical and emotional abuse of Matthew. Louise complained that Anthony had ‘a habit of holding the door open and not letting us go’ and so court orders were varied to provide that he could not touch the car. They used a police station car park for contact handovers and between the first and second interviews there were more appearances at court to extend the FVO.

While much of the post-separation conflict reported was of this kind, Susan and Jim’s post-separation relationship offers an example of how post-separation

conflict can escalate into very dangerous behaviour, with no reported history of violence during the course of the marriage.

(a) *Susan and Jim: The Storm after the Calm*

Susan and her former husband, Jim, were interviewed for the Children's Participation Study many years after their separation.⁶⁵ They were married for ten years, and both said there was no violence and that they never 'even argued' during the course of the marriage. Jim believed that they had 'a good relationship' and that he 'treated her right'. Susan's account, however, indicates that outwardly all was peaceful because she 'kept the peace'—but 'it was a marriage where I did as I was told, I didn't buck the system'.

In the immediate aftermath of the separation, tensions ran high. Although it was Jim's decision to leave, Susan suggested that his hostility at that stage was because she challenged his control.

Because I wasn't doing what I was told anymore. Yeah, and I had to pay the price for not doing as I was told. So yeah, lots went on.

They were in separate bedrooms within the house for a short while and then an incident occurred in which Susan reported that Jim 'started going off his face ripping the phone out of the wall and carrying on'. She called the police, who helped her move out with the children. Jim referred to the same incident as a 'heated discussion'.

After that incident, Susan stayed with her parents for a while and then rented a house. Jim reported that he did not know where she had gone and did not see his children for three months.

Both parents reported verbal abuse on changeovers, but without any physical conflict. Jim said:

There was a slanging match every time, and it got to the stage where it was just, there was never violence, verbal, yeah, very verbal, both sides and I'm guilty of it just as much as she was, you know, just aggression.

However, the tensions increased. About nine months after Susan had left the house, and after Susan and Jim had been in court over the occupation of the house and the parenting arrangements, Jim's anger escalated into life-threatening violence. Susan said:

[M]y father rang in the afternoon, he said 'Jim rang here and you're dead', so a threat, he said 'So just lock yourself in and make sure everything is locked in'. I said OK. So then my solicitor rang me and said 'He's gone off his brain, he's out to find you, get out of your house'. So I rang my parents, they said 'Stay locked in until we get the OK'. Then the cops rang me and they said 'Your ex-husband's gone off his brain, he's trying to find you, will you get out of your house?' So mum and dad came and they took the kids with them and I followed in my car to their place. About nine o'clock that night we heard a

⁶⁵ The criterion for entry into the Children's Participation Study was that the parents had recently been involved in a parenting dispute for which they had sought legal advice. This could include disputes that occurred many years after separation.

noise out the front, couldn't see anything, and the next minute there was a big explosion and my father's truck blew up in the front yard. We called the fire brigade and all that type of stuff and they had to come and put it out, and I said 'Look can you go and check on my house?' and they went and looked at the house and it was absolutely trashed. He'd been to the house. I'd say he must've been watching because it was a matter of a couple of hours. And he'd just, he'd ripped it apart and there was food thrown on the floor, everything was up-ended.

After this, Jim checked himself into a psychiatric hospital for two weeks. Susan's solicitor made another application to the court, and contact with the children was suspended. Jim did not see the children for the next two and a half years. After that time, contact was gradually reintroduced.

Jim and Susan's accounts were largely consistent with each other in the incidents to which they referred. The differences were in what each of them omitted from their accounts. For example, Susan omitted to say anything about keeping the children from Jim. He reported being accused of molesting his daughter at one point, and on another occasion of 'stalking' his former wife for many hours during a time when, according to him, multiple witnesses said he was with them at work and had not left the building. His narrative also referred to his admission to the psychiatric hospital, but gave no detail of the incident that precipitated this:

I just couldn't cope with it. I'd lost the plot and I admit it, I lost the plot, you know, so I was in there for two weeks and she used that against me and I didn't get to see the kids for two years or something.

He minimised his behaviour and attributed it to the trauma of separation. He was aggrieved that he was now being seen as the one at fault:

Oh yeah. I mean before our divorce, before our separation, I never even had a parking fine, and now I've got a criminal record. I'm the 'baddest' person you can meet, but I copped it in the shoulder, on the chin, whatever, and then I've gotten on with my life. So it's been very traumatic, very traumatic.

He also saw his behaviour as resulting from frustration with a legal system that he perceived as biased against fathers:

I unfortunately wasn't able to control my—and I call it passion, not temper—my love for my children and my wanting and having to see them on a regular basis spilled over into anger and they unfortunately couldn't see that I was just so frustrated with the system and so, in my opinion, being one-sided, that I was getting angry. I wasn't violent but she made me out to be violent.

In the few years after these events there was constant conflict and returns to court over alleged breaches of the parenting orders. There were mutual FVOs. Each blamed the other for the ongoing conflict and tension in the post-separation relationship, and each accused the other of making false allegations. At the time of the first interviews, the oldest child had stopped seeing her father and the younger children indicated that they wanted to spend less time with him. By this stage, Jim had entered a same-sex relationship, and Susan reported that one of the children struggled with this. By the time of the second interviews more than two years later, all contact had ceased between Jim and the children. He had moved to another city to avoid 'running into them' in their community.

This example of life-threatening, separation-engendered violence raises questions about whether the outcome, which was a poor one for mother, father and children, was preventable. It is difficult to know whether this escalation might have been averted if the parents had access to support services, for example through a Family Relationship Centre,⁶⁶ and had been able to take a different pathway to resolve the issues about the occupation of the house and the parenting arrangements in that first few months after separation. Jim's violence was of course inexcusable, but it took them all by surprise at the time and appeared not to have been predictable.

***D 'Losing Control': Verbal Abuse and Property
Damage in the Context of Separation***

Other applications for FVOs arose from events that occurred in the heat of separation, when emotions are raw, and people may feel deeply that they have been wronged by the other.

Adam and his wife had been separated for a few weeks and he had been suspicious that there was more to his wife's decision than he was being told, so he hired a private investigator. The private investigator filmed Adam's ex-wife at the pub with a man and Adam found out that she had been seeing this man for some time. Adam reacted badly:

So it got very, very heated—a lot of yelling and screaming. I threw a bit of the furniture over only because if I hadn't done that I probably would have hit her, 'cause I was that angry and I've never hit her or done anything like that before, and left. Of course the next day the police knocked on the door and served me with an AVO.

— Children's Participation Study

In the end they went to counselling and the FVO application was dropped, although there were subsequent FVOs against Adam after this time.

Family violence orders were also sought as a consequence of verbal abuse. Three of the men in the relocation study reported that FVOs had been taken out against them because of abusive phone calls.

We had an argument on the telephone and then there was an email exchange that followed and she mixed the police in. Go figure.

— Gary, Relocation Study

In this case, the application for the FVO was dismissed.

⁶⁶ The development of Family Relationship Centres in communities all over Australia now offers a different pathway from the one that Jim and Susan embarked upon. See Patrick Parkinson, 'Keeping in Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

E The Role of FVOs in Managing Separation

Family Violence Orders were also used to manage the process of separation and to maintain the boundaries between parents after one parent had moved out.

(a) Vicki: The Impossibility of Staying under one Roof

For example, Vicki, in the Relocation Study, told of how she used a FVO to manage the separation from her husband. There had been one incident of physical assault during an argument earlier on in their marriage, when her husband punched her and gave her a black eye. Fear of a recurrence, she explained, was the reason why she felt ‘a bit under his thumb’ during their marriage. In the period prior to her decision to leave him, she described mostly emotional abuse. Asked whether there had been physical violence, she responded:

No, no, no god, it was more that there had been a little bit of violence in the previous part, but it was more of him just mentally, oh it was just, mental, sort of standing in my face and telling me I was a slut and just that thing in front of the boys and saying that he’d wish I’d get run over by a truck.

After she had decided to end the marriage, she moved into the spare room:

... he’d just walk into the spare room, and he’d just be mouthing off at me, and it was just getting really bullying, so I decided ‘Ok, I’ll go ahead and get the DVO’.

On Vicki’s account, her decision to seek a FVO led to a sudden and very serious deterioration in their relationship:

And that was just huge, it just escalated from there, he sent me papers saying he wanted custody of the boys, because when we’d discussed it before it was like we wanted to keep the courts out of it and try to discuss these things.

Vicki eventually decided to drop the FVO when her husband agreed to let her stay in the house with the children and promised not to harass her. That very afternoon as soon as she had dropped the FVO, her husband came back into the house with his bags, and told the children that he was home. Vicki says she ‘fell to pieces’ at this betrayal of trust. She was also scared by this: not just scared of him, but scared of herself as well.

I thought that the DVO was the only way, and I was scared. I was frightened, for him and me, because he was pushing me and I was going a bit funny and we could have hurt each other or the children.

For this reason, Vicki decided to seek another FVO the following day to get her husband out of the house. For Vicki, the FVO was not a tactical ploy to achieve that purpose, but nor was it just to protect her from his violence. She felt it was necessary to stop the conflict escalating out of control—which she thought would happen if she and her husband remained under the one roof—and to prevent anyone in the family getting hurt.

When Vicki went back to court for the second FVO, the duty solicitor persuaded her to put the children on the application as well because the father had indicated he was seeking custody:

The duty solicitor who was there, was saying ‘Look, I think you should put the boys on this one, because if you get served, he can easily grab the boys, and he’ll take the boys and then you won’t see them’, and at that time, you know, the boys had been in my care.

The husband was very angry that the children had been brought into it:

He was absolutely furious about that, and he was saying ‘You know I wouldn’t hurt the boys’, and I said ‘Well, I don’t know what you are capable of at the moment, I really don’t know’.

The relationship went further downhill from there. A relocation dispute was resolved with Vicki remaining where she was living. The conflict between them reduced for a while—until Vicki got a new boyfriend. That was the catalyst for her former husband to engage in a variety of intimidating behaviours. He accused her boyfriend of abusing his young children and attacked him physically when they met. He engaged in other behaviour that she found harassing, but she felt there was not enough to justify another FVO and she was worried about his reaction if she pursued the matter.

Vicki’s account illustrates the complex mixture of reasons why she sought a FVO. Her first application was to get her husband out of the house because he was ‘mouthing off’ at her and she felt bullied. The second application was necessitated by an apprehension that the tension in the household could spill over into physical violence, if her husband wasn’t forced to leave again. Clearly, the situation was likely to be intolerable if they were living together under one roof. However, it was not merely a concern about *his* potential for violence that led her to apply for the FVO, but also her own.

The decision to put the children on the second FVO had another motivation. Because the father was now indicating he wanted custody, the duty solicitor recommended putting the boys on the FVO as well in case he sought to snatch them. There is nothing in Vicki’s account that would have justified the duty solicitor in believing this. There was also no indication that the boys were at risk of harm. The solicitor’s advice may, however, have arisen from, or fed, her concern that she didn’t know what the father ‘was capable of’ at that time.

F Maintaining Boundaries after Separation

A recurring theme in the interviews was that FVOs were sought in order to prevent the former partner coming back into the house they had left, or because of incidents where they had forced their way in:

He just came in and wanted a computer. He kicked the door. I mean everything, all this took place in front of the children. And that was also a big thing in his life and he’s not a violent man.

— Ruth, Children’s Participation Study

There were a couple of instances he’d turned up here, going ballistic, and because this is his house, he’d just walk in, threaten me, go aggro and I’m lucky I’ve got three police officers who live upstairs so I went and got an AVO and the fact that they were upstairs I think made him realize he had to toe the

line. The court then said I was allowed to stay in the family home until settlement.

— Rebecca, Children's Participation Study

Then I get a call from the police. He'd taken out a domestic violence order against me, and it said that I had banged down his door and I'd grabbed him. I had shaken him and yelled obscenities at him and I had abused him to his girlfriend, been verbally abusive to his girlfriend.

— Sandy, Relocation Study

We had to get the locks changed straight away, because he could come home at any time, so, yeah, that was the first intervention order.

— Carolyn, Relocation Study

Michael's and Isobel's accounts in the Children's Participation Study illustrate from both parties' different perspectives the role of FVOs in keeping the other parent from coming to the house.

(a) Michael and Isobel: 'Once She's Left, She's Left'

Michael's account was that the separation had been very acrimonious. Isobel had left the house and then come back to collect her personal possessions but she had 'lost control', threatening to kill Michael. While that threat provided the legal justification for seeking a FVO, it was not because Michael was afraid of Isobel that he sought the order. The major issue to which he referred was that she was taking items that were not hers:

She kept coming back to my house to take things whenever she wanted to. And I'd remind her that all the stuff she'd taken was what my mother had bought the first time around.

Both the police and his solicitor advised him to pursue the FVO in order to stop her coming to the house.

So I rang the solicitor and he said 'You may have to get an AVO on her otherwise she'll think she can come and go as she pleases, and the law is that once she's left, she's left. But this is her house and only one of you can live there, and she's left and that's the way it is'. So I took his advice and did what he said.

Isobel's account is that the allegations of violence were entirely fabricated:

I thought this is ridiculous. What's he giving me an AVO for? I haven't done anything to him. I haven't hit him, kicked him. We never had any violence in our marriage. Why have I got an AVO? And apparently the AVO was ... you can put an AVO on someone and say that they're violent, and the only way you can get a child off their mother is because they're violent. And that's why I think he gave me the AVO. He made out that I threw a cup at his head. But I didn't. The first time he said that I threw a cup at his head and missed and it hit a cupboard and shattered all over the place. Then the second time he said I threw a cup at his head and I hit his head and cut his head and it was bleeding. And the solicitor got the AVO squashed because the two things that he said were different and didn't match up. So I signed an undertaking to say that I wouldn't go to the house.

Michael's version is that he agreed he would drop the FVO as long as she signed the papers to say she would never come to this house.

*G 'Stalking', 'Harassment'
and Non-Interference after Separation*

The term 'stalking' was also used extensively in interviews.⁶⁷ Allegations of stalking appeared mostly to be about keeping boundaries between the parents and marking the appropriate limitations of visits to the mother's home in the aftermath of separation. Constant unwelcome visits were seen as stalking.

Karen felt continually hassled by the father of her infant daughter, who would not accept her word that the little girl was sick when it was his time with her:

If I said she was sick, he was always stalking the house. I had to move back to my parents because I felt unsafe.

— Relocation Study

Of course, men's and women's accounts differed. For Adam, allegations of stalking seemed to be made just because of their proximity in a relatively small country town:

I decided to stay here and live here with the current arrangement we had of 50/50 and stick it out, but being a small town, you go to the shops and there is only one shopping centre, I bump into her and if Heidi is with her, I'm going to say 'Hello' to her and one of the things she put in the AVO order is that I'm stalking her because she listed that we were in a shopping centre—she went to five shops and I ended up either being in it or coming into it.

— Children's Participation Study

Maintaining boundaries in terms of telephone calls was another issue that emerged in a number of interviews, and the language of stalking and harassment was used in this context as well. Raoul was told that frequent phone calls to his children could be seen as stalking:

I'd asked for seven [nights per week phone contact] and basically I was told if I had seven, it'd be almost tantamount to harassment and stalking. It needed to be reduced to maybe a maximum of three. So I said, 'Alright, three'.

— Relocation Study

The word 'harassment' was also used to refer to phone messages. Jackie, a non-resident mother reported:

I have message machines full of messages—they're not hostile messages but it's just total harassment, just for the sake of it.

— Children's Participation Study

For another man, even phoning at all, he reported being told, could be 'harassment'. He had to rely on his children calling him.

⁶⁷ Australian jurisdictions enacted laws against stalking in the 1990s. NSW Law Reform Commission, 'Apprehended Violence Orders' (Report No 103, 2003) ch 12.

Allegations of stalking were made not only by mothers against fathers. In two different cases, a parent of the mother also sought FVOs against the father for stalking—one successfully. In another case, allegations of stalking were made by the mother against her former husband's new female partner.

Across the three studies there were two or three cases reported by women in which there appeared to be a deliberate pattern of conduct by the former partner, where he would either stake out his ex-partner's house or follow her around in order to cause her to fear for her safety. In one case, the mother reported that her former partner drives past her house 2 or 3 times per night and sends her threatening text messages. In another case, a mother who had suffered a long history of violence and control, reported that her former husband deliberately found a flat close to where she was living and frequented the places where she would be in order to maintain control over her. She thought he did not know where she lived. In a third case, a mother reported being upset that her former partner had driven by numerous times in circumstances that appeared threatening.

The word 'stalking' thus seems to have passed into common usage by both men and women, sometimes in a manner consistent with its definition in the criminal law,⁶⁸ where there has been a history of violence or coercive control within the relationship, but often meaning something quite different. In the accounts of the women and men in these studies, 'stalking' could, for example, include repeated attendance at the other parent's house or frequent phone calls that transgress the sometimes newly established boundaries of the post-separation household. 'Stalking' might also mean conduct that unduly interferes with one parent's post-separation freedom from having to deal with the other. Interviewees did not usually associate the behaviour with causing fear.⁶⁹ More commonly, the emotion that was expressed was annoyance. There was a similar usage of the word 'harassment', although this word was less commonly invoked.

It is apparent from respondents' accounts that the very broad meaning given to the term 'stalking' by some people, to refer to failures to maintain a distance following separation, was a source of grievance.

H Tit For Tat and Defensive FVOs

In six cases, both former partners applied for FVOs. The female interviewees saw these as 'tit for tat' FVOs. For example, Carolyn's account is that she took out a FVO because her former partner 'could come home at any time' and she wanted to stop that. It appears from her account that at one stage she involved the police and they decided to make the FVO application.

⁶⁸ In the *Crimes (Domestic And Personal Violence) Act 2007* (NSW), for example, stalking is defined 'as the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity' (s 8(1)). In determining this, the court may have regard to 'any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour' (s 8(2)).

⁶⁹ In New South Wales, the relevant offence is stalking another person 'with the intention of causing the other person to fear physical or mental harm'. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

Then he rang here on the Monday, after having been served, after having been here, and he said, 'I am going to now make allegations and charges for you'. So, first thing off the bat it was like 'tit for tat' and he went for an application to get an intervention order against me because I swore at him over the phone when he was swearing all the time at me. And he said some really, really disgusting things about prostitutes in front of my son Josh who was then eight. And he was telling Josh what it was like to be with a prostitute, and what he did to a prostitute. So, after he had been ringing me telling me what his terms and conditions were and that, I went off on the phone and I said, 'Don't you dare do this and this'. But he's edited the tape, and he's reworded it. If you read the affidavits now, you would think I ring him up a couple of times a week and call him this and that. So he got his intervention order.

— Relocation Study

Following breaches by her ex-partner, there was a second FVO made against him. The legal conflict in this case escalated to an extraordinary level, and Carolyn ended up spending hundreds of thousands of dollars in legal costs.

Men's accounts of seeking FVOs were somewhat different. Men reported using FVOs in a defensive way when allegations of violence were made against them.

(a) *Luke: Farms, Guns and Tactical FVOs*

Luke, from the Relocation Study, took out a FVO in response to one taken out by his wife, Kylie. He believed that Kylie took out a FVO for tactical reasons. They lived on a rural property and according to Luke, Kylie claimed he was dangerous because he had a gun on the property. However, the day after applying for the FVO, she visited him alone in the motel where he was staying, indicating that it is unlikely her fears were genuine. Luke denies there was any violence in the course of their long marriage. When he sought legal advice, the lawyer asked him straight out whether he had been violent.

And I said, 'No, actually she's the violent one. She'd lose it and she'd punch and kick, she'd kick and scratch and all that sort of stuff'. And they said, 'Well, you'd better take out a DVO on her'.

Luke received similar advice, to take out a FVO, from a psychologist he was seeing. He reports being very reluctant to follow this advice, but complied anyway. It does not appear from his account either that he felt he needed a FVO for his protection, or that it was in his own mind, a 'tit for tat'. His report was that the advice he received from both the lawyer and the psychologist was based on a need to respond to Kylie's allegations that he was dangerous, given that she had applied for a FVO against him. His application was a way of correcting the record about the history of violent conflict during the marriage, and protecting himself in the event it became an issue in a family law dispute.

The result was that they both had temporary restraining orders against each other. When the matters came back to court, he and his wife tried to resolve it:

Kylie was really, really angry about everything and I couldn't talk to her. And then we got to an agreement that she'd drop hers if I dropped mine. We went into the court and we had a bit of time to wait, so I had nothing to do, there's a duty solicitor up there and I went in and had a chat and he said, 'Oh mate, not a

good idea to drop it because if she's obstructive and sets you up over the next 18 months, you've got no come-back. If she won't let you see the kids, if you lose your temper, whatever'. So I didn't know what to do.

She was even more furious when he told her that he was having second thoughts. She interrupted the duty solicitor, who by this time was seeing other clients, and 'went off the handle at him'. Luke then went out and saw Kylie's father.

Her father was sitting out there and I always got on really well with the parents up until this happened, and he said 'It was the solicitor's idea to take out the DVO because it was the best chance of Kylie keeping the kids'. And I thought 'Oh, that's great'. So I went in and I said 'Yeah drop it', and she dropped hers. But things got a lot worse from there.

According to Luke's account, his wife's FVO application was tactical, although his main evidence for this was his father-in-law's account of the legal advice given to her. On his version of events, there was absolutely no substance to it. On the other hand, his FVO application was also a tactical response to her FVO. He did not need it for his own physical protection, but was advised he needed it for his own protection legally, in terms of the potential family law dispute.

(b) Simon: Police Involvement after his Former Partner's Complaint

Simon's account offers another illustration of how a FVO might be used defensively. He describes how he would not have gone to the police to deal with the aggression of his former partner following separation, but he had to provide information to the police when they were called in response to her allegations of violence against him.

She went to the car and came back down and totally lost it and then she was abusive. And anyway she starts smashing shit up and hitting me. Well she's done that before, it's not a new thing. There's been lots of rooms trashed and lots of fists thrown at me. But it's like 'Fine, just get out'. I wouldn't take it any further. But this time when she started lashing out, I got the camera and said 'Look, I'm documenting this. Can you please leave? Get out, we'll sort this out through another medium. Not sort anything out here. I'll organise the mediation, we'll discuss it'. She lunged at the camera and smashed it. It was pretty hairy. But then the police turned up here two days later saying I had attacked her, that she'd been abused. And, actually I don't know what she was thinking when she did that. I would never have pushed for police intervention or anything. But I was able to prove, I was able to show them the video I made on the camera ... And the police then served her with a family violence order, which she didn't take well or make it easy and went to the police quite a few times spacking out and they ended up pressing charges against her. I didn't want to press charges but they pressed charges against her.

I A Sense of Grievance—Respondents to FVOs

Almost all interviewees who were respondents to FVOs had a strong sense of grievance that a FVO had been taken out against them. They either denied or minimised the violence, threats of violence, or abusive words, or contextualised it in terms of mutual conflict.⁷⁰ This was true of both men and women. For example, Isobel, who was the respondent to Michael's FVO application, complained that the allegations were made up, with the FVO being interpreted as a tactical manoeuvre. Numerous men, like Luke, said similar things. Others did not deny that the alleged behaviour had occurred. However, they gave it a context which cast a different light on the events from the typical perpetrator-victim dichotomisation.

(a) The FVO was Unjustified

Steven's account, in the Contact Disputes Study, exemplifies the sense of grievance that so many of the men felt that the FVO was totally unwarranted. According to his account, Steven phoned his former partner repeatedly because she was not letting him see his daughter:

The mother stopped the contact for about four or five months. And then she goes, I kept on ringing up saying, 'Can I speak to Stephanie?' and she goes, 'Sorry she's not here, you'll have to ring back another time', when I could hear in the background she was there. Then I rang up again and she goes, 'If you ring once more, I'm going to get you for harassment with the police.' So then I got an AVO and they said, 'If you want to see your daughter, you've got to go to court'.

On the other hand, there were clear cases of minimisation of severe assaults. Richard records several FVOs being taken out against him and, like almost all other respondents, he was aggrieved by that:

She took these DVOs on me that were really unjustified, and we just agreed to 'em. But it was very difficult you know. I wasn't supposed to go within 200 metres and it was just a load of crap. I've had three DVOs and they were just misuse of the law. I have an assault charge because one night we went there and I talked to her and she said something...I grabbed her, and I left there in tears and the whole family was there and words said, and anyway, she then called the police and they came and they arrested me. And I got charged with assault and I got convicted of assault.

— Children's Participation Study

Richard's former wife, Lauren, and children gave a rather different account. Lauren recorded a long history of domestic violence during which she had suffered bruising, black eyes, a broken wrist and broken ribs. The violence began early in the marriage before the couple had had children. Richard had also engaged in multiple affairs. Lauren recounted the way in which the violence often occurred:

⁷⁰ For such patterns in the responses of men convicted of domestic violence offences, see Kate Cavanagh et al, 'Remedial Work: Men's Strategic Responses to their Violence against Intimate Female Partners' (2001) 35 *Sociology* 695.

With Richard and I, the violence was often about other women. I would push him and push him and question him and question him. And then I would get angry. He'd end up shoving me around, or punching me or hitting me. Richard says, 'I'm not an angry man, I'm not a violent man. I'm not this, I'm not that. I didn't come home drunk every night and bash you up'. No, he didn't, that's very true, but he *was* a violent man and he *is* a violent man.

Lauren had experienced violence in her family of origin as well, and put up with it in her own marriage for a long time:

I used to say and think 'Oh well, it's not as bad as dad. Richard just loses control every so often'. One day about five years ago, I was just sitting somewhere and you know how all of a sudden you get this flash of reality. Sometimes the denial all just slips away and all of a sudden the reality's in front of your face. And I just thought to myself, 'I am a battered wife. I am a battered wife. Can you believe it? My children are battered children'. And that was like, how scary! How scary that people so 'respectable' can be like this. And that's when I started actually facing what was really going on in my marriage.

The violence continued after separation. One incident occurred in which Lauren suffered serious injuries. She feared for her life. She moved 800 kilometres away because she was so scared of him. Eventually the children stopped seeing their father.

(b) *FVOs as Tactical Manoeuvres*

It is, of course, impossible to 'know the truth' when participants allege that FVOs were tactical, but several respondents gave convincing accounts of allegations being proven to be untrue and applications for FVOs consequently dismissed.

Alexander eventually gained orders that the children live with him following a history of abuse of the children by the mother and her new partner. He also records being physically assaulted by the new partner a few times with baseball bats. The fact that FVOs had been sought against him was another element of the intense conflict between him and his former partner:

AVOs have been attempted on me five times, I defended them by myself each time and won each time, I proved that they were lies each time. So, it's absolutely ridiculous, the whole situation.

— Children's Participation Study

In another case, Daniel records his long battle over his former partner's relocation. Two weeks before she lodged an appeal against an adverse decision of the Family Court, she sought a FVO, alleging that Daniel had hit his two boys across the head. Under the *Crimes Act* in the state where this allegation was made, it is an assault to hit a child on the head, but otherwise smacking is lawful.

Daniel was clear about what he saw as her motive:

She was hoping to get an AVO and an assault charge against me.

— Relocation Study

The application was brought by the police prosecutor, and the state child welfare department was involved as well. Daniel records how the magistrate was

not at all impressed by the application and asked the police to consider whether they should press on with it. In the end, according to Daniel, the allegations were dismissed as false. However, it took him nine court appearances over 12 months in the magistrates' court finally to resolve the matter.

In a third case, Adrian records how the police explained to him the tactical use of FVOs:

When I got back [from seeing his parents] all the locks were changed. Fortunately, something in my head said 'There's something very suss about this', so I just went up to the police station and the sergeant took me in and made me a cup of tea and explained how AVOs work. He said 'That's what your wife is after'. He said 'The minute you go home, she'll ring us up, we'll go down, if she makes the accusations that you are trying to break into the house to assault her, then we have no discretion under the law but to arrest you', and then he explained to me the whole process about AVOs. While he was doing this, two constables walked in the back door and overheard the conversation and they said 'Are you from — Street?' I said 'Yep', they said 'Oh, we've just come from there'. The minute I got home and put the key in the door, she'd rung. So the whole thing was to get an AVO, to get the leverage to start the process.

— Children's Participation Study

(c) *The Abusive Behaviour was Mutual
or the Other was the Perpetrator*

Perhaps the strongest theme in fathers' accounts of FVOs is how they arose out of arguments in which the strong language and threats were mutual. Grant, for example, had a FVO taken out against him for abusive phone calls. He did not deny that he had been verbally abusive. However, he said his former partner had been as well. What angered him was that she had tape-recorded some of their conversations, edited them from different time periods, and took them to the police:

I'll be honest with you I made a couple of pretty upsetting, we had upsetting phone conversations. She'd get abusive and I'd get abusive but she was recording the conversations and some of them were 6 or 8 months old. So she played them all for the police one night and the police decided to put an AVO on me.

— Relocation Study

The context was that the mother was threatening that she was not going to let him see the children anymore.

In another case, Jeff recorded a long history of conflict with his ex-partner and was at one stage charged with assault, as well as having a FVO application made against him; but he saw his ex-partner as the one who had initiated the violence:

She's supposed to feel so endangered that I'm such a violent threat, but it's never been me that's really initiated any violence, I reacted one day and I'm on the assault charge, where she just about took my son's life, smashed my mother's arm in a 4WD door, forced entry in the homes, her sister and all of

that doing all their stuff as well. I mean we haven't charged them, but I've never played that part, and so I'm this big violent criminal and she gets all this attention and it makes me sick, it really does, because it works, they're so convincing.

— Contact Disputes Study

In another case, Neil was also very angry about having a FVO taken out against him. His account was that his former partner had been the violent one, but she was the complainant for the FVO.

Well, she hit me. Nearly broke my jaw. We had a big argument in front of the kids and she hit me and reckoned I raped her in front of the kids and all this sort of stuff and pulled her out through the car window and she went back [home] and made a complaint about me, and I was put on an AVO, which I beat, and that's when we started getting to see the kids again.

— Relocation Study

IV Discussion

This study is unique in the Australian literature on domestic violence, in three ways. First, the cohort of interviewees was not selected for the purposes of a study on domestic violence and was not recruited through domestic violence support services or advocacy groups. Second, it includes men's accounts of being respondents to FVOs—or in a few cases, applicants or cross-applicants. Third, in a number of cases, there were accounts from both of the former partners, giving their different perspectives of the same events.

The results nonetheless need to be evaluated, taking into account that people who volunteered to participate in this research were not entirely representative of the population of people who have family law disputes. The Relocation Study focused on a particular kind of dispute. In both the Children's Participation and Relocation Studies, participants were recruited mostly through private lawyers, and so they may represent a particular demographic.⁷¹ It is possible that research conducted with a different recruitment strategy would yield a higher proportion of cases involving injurious violence.

A further issue is that interpreting these accounts is fraught with difficulty. In the majority of cases, only one account was obtained—the woman's or the man's—and even where the accounts of both former partners were given, as researchers we cannot determine the 'truth' between conflicting accounts of events.

Men and women may also have different experiences and understandings of the same events. A man who insists that the worst he was guilty of was verbal abuse may be unaware of, or insensitive to, the fear that this verbal abuse caused his former partner, or he may understandably be trying to present his case in the best light.

⁷¹ It should be noted, however, that Hunter, in her analysis of solicitors' files, recorded little difference in the prevalence of domestic violence allegations between the legal aid and private solicitors: Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, 1999) 28,80.

Theoretical frameworks also influence how these accounts are read. American domestic violence scholar Clare Dalton has observed how professionals with different theoretical orientations tend to 'see' violence and abuse in different ways:

At the level of research and theory, there are at least three separate bodies of learning that describe problematic intimate relationships ... One set of literature deals with conflict, another with violence, and a third with abuse. A prime source of tension between specialists in partner abuse and the majority of mental health professionals who work within the family court system is that where the former see abuse, the latter tend to see conflict. A second difference that contributes to this tension is that before taking a relationship out of the conflictual category and putting it into the abusive category, the mental health professional looks for significant evidence of a one-sided pattern of physical violence. Those who specialize in abuse, on the other hand, understand abusive relationships as being first and foremost about power and control.⁷²

These different perspectives can all co-exist to describe different patterns of conflict and violence within intimate personal relationships, but too often one theoretical perspective is maintained to the exclusion of any other understanding of the problem.⁷³

The different theoretical perspectives are particularly important in characterising behaviour that does not involve physical assaults. One person's 'blazing row', involving a lot of yelling, name-calling and recrimination, may be another's 'verbal abuse' or 'emotional abuse'. One person may see a couple in conflict, while another identifies a party to the relationship as the victim and the other party as the perpetrator.

These different theoretical perspectives also lead to quite different views about family violence. On one view, violence is physical assault or the threat of it. Domestic violence specialists often posit a much wider view. One recent study funded by the Commonwealth Government defined family violence as including 'physical, sexual, psychological, social and financial abuse and neglect'. In the survey instrument, these different forms of abuse were then given further definition by way of examples, including 'criticising or judging my behaviour', 'having sex with others', 'putting me down socially' and 'controlling the money and how it is spent'.⁷⁴ All of these were identified as facets of 'violence'. Terms such as 'emotional' or 'psychological' abuse may also be subjective labels adopted by the respondent to a survey that are difficult to interpret in objective terms.⁷⁵ A similar issue arises with words such as 'stalking' and 'harassment', which were given a very broad meaning by some of the participants in this study.

⁷² Clare Dalton, 'When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System' (1999) 37 *Family and Conciliation Courts Review* 273, 275.

⁷³ See, eg, Hunter, above nn 43 and 44, who divides perspectives on family violence into feminist and non-feminist views, with only the former gaining endorsement.

⁷⁴ Bagshaw et al, above n 43, vol 2, Survey Instrument 3, 10.

⁷⁵ In a major study of free, court-mandated mediation in Arizona, 98 per cent of women and 97 per cent of men reported at least one incident of psychological abuse in the last 12 months: Connie J A Beck, Michele E Walsh and Rose Weston, 'Analysis of Mediation Agreements of Families Reporting Specific Types of Intimate Partner Abuse' (2009) 47 *Family Court Review* 401.

Given the broad range of understandings about what constitutes ‘violence’, it is inevitable that some readers will view the accounts of the behaviours reported by participants in this study as all being manifestations of violence, while others would limit the use of that description to the cases involving physical assaults or a threat to personal safety.

While achieving agreement on what does and does not constitute ‘violence’ may be impossible, the findings of this study do at least justify asking the question whether FVOs are always the best way of addressing the diverse range of behaviours and circumstances that may lead to an application for a FVO, and which currently receive an undifferentiated response from legislatures and the courts.

In this study, the wide spectrum of family violence is evident, including the various patterns of violence outlined earlier. A minority of women who at some stage sought FVOs reported physical violence involving injuries or bruising. In most of those cases the accounts were consistent with coercive controlling violence, although the nature of the research studies was such that these issues were not systematically explored. The majority of cases appeared to fit the pattern of conflict-initiated rather than control-initiated violence. Sometimes it appeared from the accounts that both parents were involved in behaviour that might be classified as involving violence or abuse.

This diverse range of situations where FVOs were sought suggests that post-separation family violence does not fit neatly into any one-size-fits-all definition of family violence based upon elements of power and control, although such a definition is very common in government reports on domestic violence.⁷⁶ These findings of the heterogeneity of violence are consistent with a large body of overseas research.⁷⁷

A Pre-Separation and Post-Separation Violence

In this study it was clear from a number of accounts that the behaviours that led to FVOs after separation were not a continuation of patterns of violence or abuse that occurred before separation. Many of the female respondents who sought FVOs after separation specifically reported that there had been no violence or abuse while they were living together, or that violent or abusive incidents only occurred during the last days and weeks prior to separation. Typically, such incidents involved property damage and verbal abuse, rather than physical assaults. Other respondents reported serious physical violence prior to separation, which led in some cases to the need for protection after separation. In several cases, women also made it clear that while they had not seen their relationships

⁷⁶ The National Council to Reduce Violence against Women and their Children, for example, defined domestic violence as referring ‘predominantly to abuse of a person, usually a woman, by their intimate partner. While there is no single definition, the central element of “domestic violence” is an ongoing pattern of behaviour aimed at controlling one’s partner through fear, for example by using behaviour which is violent and threatening. It occurs between people who have, or have had, an intimate relationship. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over women and children, and can be both criminal and non-criminal’. *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (Department of Families, Housing, Community Services and Indigenous Affairs, 2009) 186.

⁷⁷ See above nn 8, 12 and 24.

as having been 'violent', they had been aware, or later became aware, of aspects of their partner's behaviour that was emotionally abusive or controlling, or of the need for them to keep the peace.

The findings from this qualitative study are consistent with data from a large-scale community study in Canada. In a survey of Canadians who had had some contact with their ex-partner in the previous five years, 28 per cent of the women and 22 per cent of the men reported physical violence or the threat of it, perpetrated by a former partner, either while living together or after separation. Of these, 37 per cent of women and 42 per cent of men stated that the violence began after separation, with women typically reporting more severe forms of physical violence than men.⁷⁸

These findings should be contrasted with those of other studies where women were recruited to the research because they were known to have experienced domestic violence. Such studies suggest that post-separation violence is typically a continuation of long standing patterns. Humphreys and Thiara reported on a survey distributed through domestic violence intervention services in Britain, to which 161 women responded. The majority reported fearing they would be killed or were afraid for their mental health if they remained living with the partner. More than three-quarters reported experiencing further abuse and harassment from their former partners after they ended the relationship.⁷⁹ Kaye, Stubbs and Tolmie, reporting on the accounts of 40 women who had experienced violence and abuse within their relationship, found that almost all reported post-separation abuse as well. The women were invited to participate through the Family Court, women's refuges and women's health centres. Most sought FVOs at some stage.⁸⁰

The evidence from this study is consistent with the position that where there is physical violence prior to separation, there will very often be a need for a FVO subsequently. However, there were nonetheless many cases where FVOs were sought without such a pre-separation history, only some of which involved allegations of post-separation physical violence against their former partner. This indicates again the importance of not generalising about domestic violence in the community based only on data from those who are known to be victims of domestic violence by government or non-government services such as women's refuges,⁸¹ or by advocacy organisations.

Much of the behaviour that led to FVOs being sought and granted in this study may best be characterised as post-separation conflict-initiated violence. The characteristics of such violence, abuse and harassment are that conflicts about the occupation of, or access to the home in the immediate aftermath of separation, arguments about post-separation parenting, or the rawness of emotions arising in the

⁷⁸ Tina Hotton, 'Spousal Violence after Marital Separation' (2001) 21 *Juristat* 1.

⁷⁹ Cathy Humphreys and Ravi K Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-separation Violence' (2003) 25 *Journal of Social Welfare and Family Law* 195. See also Cathy Humphreys and Ravi K Thiara, 'Mental Health and Domestic Violence: "I Call it Symptoms of Abuse"' (2003) 33 *British Journal of Social Work* 209.

⁸⁰ Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 97.

⁸¹ Johnson, 'Patriarchal Terrorism', above n 12.

immediate aftermath of a separation, escalate into physical violence, verbal abuse or harassing behaviour. The violence is conflict-initiated and not part of a larger pattern of coercive control. Nor does it involve pre-meditated violence. It is also different from separation-engendered violence, as identified by Johnston and Campbell, who reported that violence was perpetrated by the partner who felt abandoned.⁸²

B Gender and Family Violence

As was to be expected, most applicants for FVOs were women and most respondents were men. This is consistent with data from Victoria that shows that 81 per cent of respondents to FVOs are male and 19 per cent are female,⁸³ with similar figures from Queensland.⁸⁴ If men took out FVO applications, or the police initiated them on their behalf, it was usually in response to allegations of violence made against them. Only two men initiated an application for a FVO without such allegations first being made by their former partners.

Most violence causing physical injury, according to these accounts, was perpetrated by men on women. In terms of non-injurious behaviours, many men claimed that their former partner engaged in the kinds of behaviour that was sufficient for women to seek FVOs—and often to succeed in their applications. Some men spoke of physical violence against them. Others reported threats of violence and verbal abuse.

C The Collateral Uses of FVOs

Many respondents to FVOs took the view that the application was tactical or otherwise motivated by factors apart from feeling safe. A particular theme was that some women, according to men's accounts, looked for reasons to obtain a FVO and went to the police and the courts as soon as they had evidence to justify such an application. Family violence orders were thus seen as one of the weapons in the war between parents, a means of striking a blow against the other, and gaining an advantage in parenting proceedings.

It is difficult to assess such views of FVO applications with only one side of the story, particularly given the evidence that some men seriously minimised the level of their own violence, and also that men may not recognise how frightening their behaviour might be to their former partners. Nonetheless, there were certainly accounts by men of women, or their new partners, seeking FVOs where the timing seemed tactical and where the cases were apparently thrown out.

There was also evidence from the interviewees' accounts that FVOs were sought for collateral purposes. Legal advice played a role in this. Michael was advised of the benefits of a FVO to stop Isobel coming back to the house to take things that did not belong to her; Vicki was advised to put the children on the FVO application although there was no apparent threat to them; Luke was told that he needed to make a FVO application defensively, since his former partner had sought

⁸² Johnston and Campbell, above n 8, 196–7.

⁸³ Victorian Department of Justice, above n 61, 67.

⁸⁴ Douglas and Godden, above n 44, 36 (also 81 per cent male respondents).

one, and, when he considered dropping the FVO, he was subsequently advised against this course of action by another lawyer.

In evaluating whether FVOs are being used for tactical or collateral purposes, it is important to distinguish between two questions. First, were there grounds at least for seeking a FVO, or were the ostensible reasons fabricated? Secondly, was the main motivation for seeking a FVO because the applicant was fearful for her (or his) safety?

Given the acrimony that often attends relationship breakdown, particularly when the decision to end a relationship is unilateral, it is hardly surprising that people should quite commonly have grounds for seeking a FVO, particularly in those jurisdictions such as Victoria, Tasmania and the Australian Capital Territory where reasons for which a FVO can be obtained are very broad.⁸⁵ The grounds for a FVO need not be fabricated for the FVO to be sought for a collateral purpose. It may well be that many FVOs are sought on the basis of verbal abuse, alleged threats or because of non-injurious physical altercations, when the real motivation seems to be a collateral purpose such as striking a blow in the legal conflict, engaging in a 'tit for tat' application or attaining some other perceived advantage.⁸⁶ Such collateral uses may have the effect of discrediting FVOs to the detriment of all those who really do fear for their safety and need the protection of the courts.

D FVOs as a Source of Post-Separation Conflict

The accounts of participants in some cases illustrate that the mere act of obtaining a FVO increases the conflict after separation. Most respondents to FVOs spoke about them very angrily.

Of course, the fact that a respondent to a FVO application is outraged is hardly a reason to say that the application was unwise or unwarranted. Indeed, it may demonstrate why such an order was needed. However, one of the issues with FVOs which may lead to a sense of outrage and injustice among respondents is that they appear to be used for many purposes which have little to do with protecting women and children from significant harm. For many respondents, there was, in particular, a deep sense of injustice in being subject to the involvement of police and the courts in circumstances where they had not committed criminal offences and where the behaviour complained of did not accord with their personal understanding of what constitutes 'violence'.

⁸⁵ See above, text accompanying nn 32–6.

⁸⁶ A national survey conducted in 2009, with over 12,500 respondents, found that 49 per cent of respondents agreed with the proposition that 'women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case', and only 28 per cent disagreed. Fifty-six per cent of men agreed, compared with 42 per cent of women: VicHealth, the Australian Institute of Criminology and the Social Research Centre, *National Survey on Community Attitudes to Violence Against Women 2009: Changing Cultures, Changing Attitudes — Preventing Violence Against Women: A Summary of Findings* (2010) 44. See also Patrick Parkinson, Judy Cashmore and Atlanta Webster, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *Australian Journal of Family Law*, 313 (interviews with 40 family lawyers in NSW); Hickey and Cumines, above n 44, 37 (survey of NSW magistrates); Carpenter, Currie and Field, above n 44, 21.

FVOs were used, for example, to establish occupancy of the family home and to prevent the other partner from coming, uninvited, to what was, in many cases, *their* home before the separation. Family violence orders marked out territory, and established fences of exclusion around post-separation family units. In other cases, FVOs were sought following heated arguments in which, according to respondents, both parties were behaving badly. People often lose control when they are overwhelmed by powerful emotions. In the circumstances of separation, where anger, grief, a sense of betrayal and a desire for revenge can come upon people like tidal waves, it is not surprising that there is so much conflict.

There is of course a role for court orders in some of these situations. Court orders can establish boundaries, at least until such time as there has been a clear transition from pre-separation togetherness to post-separation differentiation in terms of lives and households.

The problem is not that restraining orders or occupation orders are available, but what they are called and the reasons for which, ostensibly, they are made. Court orders that use the emotive language of ‘violence’ in ways that are discordant with the normal English usage of the word, may well do much to damage the prospects of early resolution of parenting issues. That in turn can have negative consequences for women and children. Legal conflicts may escalate, with a consequent impact upon legal costs.⁸⁷ It is a misreading of the situation to define one person as the ‘victim’ and the other as the ‘perpetrator’ in many of these cases of violence driven by conflict in the aftermath of separation.

If the purpose of the order is to keep the parents at a safe distance from one another or to place limits on their interactions, then in many cases such orders can be made without attributing blame. These are properly civil remedies, with which the police ought not to be involved except in a facilitative way to help the parties to find the proper pathway to obtain appropriate court orders.

The FVO should be the minimum intervention necessary to achieve a legitimate purpose for which the order has been sought, and referral should be made to services that can assist the parties to work through their post-separation conflicts without the need for further court involvement. At present, if there is a FVO in place, it may actually mean the family is screened out from mediation, when in circumstances that do not involve coercive controlling violence or significant risks to safety, mediation may be the most helpful and supportive intervention for them.

E Police and Court Involvement in Post-Separation Family Conflict

While there were some very serious cases of family violence in this study, and numerous other situations where police involvement was undoubtedly necessary, there were a number of cases where, it appeared, people were caught up in police and court processing without significant issues of physical safety, or fear for

⁸⁷ On the severe financial pressures caused by legal costs in family law disputes, see Parkinson, Cashmore and Single, above n 54.

safety, being involved. For many, it was the first time there was third-party intervention in their family life or they had been the subject of police action.

Police involvement to deal with cases of relatively minor post-separation conflict comes at a substantial cost to the community. The costs can be measured not only in terms of taxpayer funds but also in the opportunity costs of using police resources when those resources might be better allocated elsewhere.

Inevitably, women are caught up in police and court processing as 'perpetrators' of violence as well as men.⁸⁸ Feminist scholars argue that women's violence is qualitatively and quantitatively different to men's and that when police respond to violence in terms of incidents, and only ask 'who hit whom', they fail to analyse the context in which the violence occurs.⁸⁹ That may be so, but when two individuals give conflicting accounts and offer different explanations of the context, it is difficult for the police or other interveners to do much beyond refer the incidents or allegations of violence to the courts.

The courts also appear to have great difficulty in sorting out the wheat from the chaff when dealing with the overwhelming volume of applications. Rosemary Hunter's observations and interviews in Victoria in 1996–97 indicate the scale of the problem. She found that the median hearing time for each application was only about three minutes.⁹⁰ The time available gives very little opportunity for differentiation between cases. Applications were typically dealt with in a bureaucratic and routinised manner, with magistrates being distant and emotionally disengaged.⁹¹ To the extent that applicants were asked to give oral evidence, they were typically asked to confirm the content of their written application, and very little exploration of the grounds for the application took place. Only where the matter was contested on a final basis was there a proper hearing into the issues, but that contest was often avoided by the respondent consenting to the order without admissions.

Jane Wangmann, in a recent analysis of court files in NSW, discovered that the information provided in written complaints was brief and sometimes vague.⁹² In her observations of FVO matters in 2006–7, she found, like Hunter, that cases were dealt with in three minutes or less. She reported that 'it was rare for there to be any comment about the types of violence/abuse experienced, how the victim felt as a consequence of the alleged violence/abuse, how the defendant responded to the allegations, or any comments from the magistrate about the allegations'.⁹³ The great majority were resolved by consent without admissions.

⁸⁸ On the dilemmas of mandatory arrest and no-drop prosecution policies that women thereby experience more arrests and state control, see Meda Chesney-Lind, 'Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women' (2002) 2 *Criminology and Public Policy* 81; Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4 *Buffalo Criminal Law Review* 801, 831–2.

⁸⁹ See, eg, Wangmann, 'She said ...' 'He said ...', above n 44; Dobash and Dobash, above n 25.

⁹⁰ Hunter, *Domestic Violence Law Reform*, above n 44 at 77, 81–2; Wangmann *ibid*.

⁹¹ Hunter, *ibid* 84–8.

⁹² Wangmann, 'She said ...' 'He said ...', above n 44, 98–100.

⁹³ *Ibid* 104–5.

While one response to this is to call for increased resources so that applications can be given individualised attention which is more than cursory,⁹⁴ the reality is that if the total resources were doubled in terms of judicial time and courtroom availability, it would only allow for about six minutes per case rather than three.

There must also be concern about the potential devaluation of the currency of a FVO because so many are sought and granted. This may put at risk those women and children who really need such an order to protect them from physical harm. The risks involved in devaluing FVOs can be seen in a major study in Queensland of systemic responses to breaches of protection orders. Heather Douglas reported minimisation by police, prosecutors and magistrates, evidenced by a reluctance to prosecute for criminal offences, charging less serious offences, and not imposing punitive sanctions for breaches. Police records indicated there were 61 cases of alleged stalking (17 per cent of the total in the study). In none of the cases were stalking charges laid.⁹⁵

V Conclusion: The Need for a New Conversation about FVOs

Domestic violence is a highly politicised issue, and this means it is difficult to make comments about it that depart from the standard orthodoxies. Yet the evidence from this study is that an open and honest conversation about the strengths and weaknesses of the current FVO system is needed.

The findings of this study indicate that there may be particular problems with using FVOs as a one-size-fits-all remedy for such a diverse range of issues and problems arising from post-separation conflict. As this study shows, they are properly sought in situations where women (and occasionally men) fear for their safety, but they are also sought for a range of other purposes. They are meant to prevent conflict, but in some cases it seems they exacerbate it, perhaps unnecessarily.⁹⁶ FVOs may also be a means by which conflict is continued through the court system in a way that does not lead to productive outcomes. They may, in other words, sometimes be offensive rather than defensive weapons in the battle between parents.

At the very least, there is a need for more research utilising general community samples rather than clients of domestic violence services or participants recruited through advocacy groups. Such research needs to be conducted without a priori assumptions which might limit researchers' openness to a range of

⁹⁴ Hunter, *Domestic Violence Law Reform*, above n 44, 88-100; Wangmann *ibid.*, 105ff.

⁹⁵ Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439. See also Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 200; Hayley Katzen, "'It's a Family Matter, Not a Police Matter': The Enforcement of Protection Orders' (2000) 14 *Australian Journal of Family Law* 119; Trimboli and Bonney, above n 44.

⁹⁶ Of course, it is not possible to know what would have happened in these cases if no FVO was sought, and certainly women report not seeking such an order for fear of provoking further violence or conflict.

perspectives on the issues.⁹⁷ It is important also for such research to include both women's and men's perspectives concerning the process of applying for and responding to FVOs, as well as drawing on the experiences of professionals including the police and magistrates.⁹⁸

The downside of FVOs, in aggravating conflict, also needs to be considered. The best way to address the issue of violence is to prevent it, and, in relation to violence driven by conflict, that involves reducing the level of hostility between parents. The overwhelming evidence from social science research is that children are harmed by ongoing conflict between the parents.⁹⁹

When there are no significant safety concerns, the efforts of the family law system need to be on helping parents to manage the transition from parenting together to parenting apart, getting over the anger and hurt about the breakup, and moving on with their lives. Strategies like the establishment of Family Relationship Centres, the requirement for most people to attempt mediation before initiating proceedings,¹⁰⁰ and the Less Adversarial Trial,¹⁰¹ are all aimed at trying to maintain as far as possible, the parental alliance and to help parents focus on the best interests of the children. The evidence from this study suggests at least a danger that applications for FVOs have become such a routine aspect of post-separation conflict that the efforts of others in the family law system to reduce that level of conflict between parents is being undermined. Children will suffer as a consequence.

The question needs to be asked whether state laws could be amended to encourage use of a greater variety of orders to resolve issues about the occupation of the home after separation and to maintain the boundaries of separation without bringing all such matters under the heading of 'violence'. It may well be also that there could be a greater use of referrals to Family Relationship Centres, or relationship counselling services as an early intervention strategy in appropriate cases: these might provide a much more effective intervention to help parents work out new rules for living apart when there are no significant physical safety issues, rather than processing otherwise law-abiding parents in large numbers through the magistrates' courts.

⁹⁷ On the importance of this for the development of effective policies to address domestic violence, see Sotirios Sarantakos, 'Domestic Violence Policies: Where Did We Go Wrong?' (2001) 3 *Nuance* 45.

⁹⁸ The evaluations that have been conducted on FVOs are now quite old, and occurred before the major increases in the numbers of orders sought in the last 15 years: see Trimboli and Bonney, above n 44 (data collected 1995–96); Sandra Egger and Julie Stubbs, *The Effectiveness of Protection Orders in Australian Jurisdictions* (Australian Government Publishing Service, 1993).

⁹⁹ Christy M Buchanan, Eleanor E Maccoby and Sanford M Dornbusch, 'Caught Between Parents: Adolescents' Experiences in Divorced Homes' (1991) 62 *Child Development* 1008; Paul R Amato and Sandra J Rezac, 'Contact with Non-resident Parents, Interparental Conflict, and Children's Behavior' (1994) 15 *Journal of Family Issues* 191; Catherine C Ayoub, Robin M Deutch and Andronicki Maraganore, 'Emotional Distress in Children of High-Conflict Divorce. The Impact of Marital Conflict and Violence' (1999) 37 *Family and Conciliation Courts Review* 297; Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9 *Journal of Family Studies* 63.

¹⁰⁰ *Family Law Act 1975* (Cth) s 60I.

¹⁰¹ *Ibid* pt VII, div 12A.

At federal level, consideration ought to be given to removing the references to FVOs in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), as Richard Chisholm has recommended.¹⁰² This might reduce the incentive to seek FVOs as a weapon in litigation over the parenting arrangements. The Act's reference to FVOs is superfluous in any event. One of the primary considerations in s 60CC(2) is protection from violence and abuse, and an additional consideration (s 60CC(3)(j)) is 'any family violence involving the child or a member of the child's family'. It is therefore difficult to see what is added by a reference to FVOs. What the court will really be concerned with is the substance of the matters with which the FVO sought to deal.¹⁰³

Having a conversation of this kind does not mean going soft on family violence, or diminishing the protection of women and children. On the contrary, the purpose of such a conversation would be to enhance that protection by ensuring that the police and the courts do not lose sight of the serious cases requiring their attention among the overwhelming numbers of cases with which they have to deal. If police, lawyers and courts become cynical or blasé about family violence in the context of FVOs, then women and children may be put at greater risk than would be the case if there was an appropriate rethinking of the system. At the same time, we need to find a better way of dealing with the many cases of post-separation conflict where there are not serious safety concerns, in order to reduce, rather than inflame, that conflict.

¹⁰² Chisholm, above n 1. The Government has rejected this recommendation, opting instead to overturn the 2006 reforms which provided that FVOs were only to be considered if final or contested. See *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.

¹⁰³ This is the view of family law practitioners also: see Parkinson, Cashmore and Webster, above n 86.