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In the research, policy and practice communities, we often hear frustration about the role of evidence in making decisions.

Gaps between research evidence and policy and practice have existed for a long time. Weiss (1973) suggested 40 years ago that we need to remain vigilant about the different and sometimes conflicting factors that influence actors in these sectors and limit the ability to apply evidence to policy and practice.

Each sector has its own drivers, aspirations and culture. Together, we live within a broader political universe, which has a different set of parameters again.

We can all cite examples of policy decisions made on scant evidence. Building the evidence with funding constraints is a challenge. And where there is evidence, it sometimes has little influence on policy decisions. There is an apparent disconnect which limits our ability to solve complex social problems. The reality is that research evidence is only one factor that may influence decisions.

In the past few years we have seen significant policy reform in disability services and in domestic and family violence across many Australian jurisdictions. In these fields, after a very long time, a tipping point was reached and the gates seemed to swing open. These examples are rare.

The challenge for us is, “How can we dial up the value of existing and emerging research evidence in order to achieve better policy and practice outcomes—at scale—and within shorter time frames?”

Here are some questions for consideration:

1. Are we focusing too much on the evaluation of individual programs and target groups at the expense of building capability for scaling up evidence-informed practice and broader system reform?

As noted by Weiss (1973), one problem is that: “We mount limited-focus programs to cope with broad-gauge problems” (p. 105).

Often funding is raised as a barrier, but there is value in using evidence of what works in shaping existing investments to build the scaffolding needed for better results.

We need a broad-based or universal system that can proportionately target those needing extra help. The service system needs to be interdisciplinary (integrated across health, education and social services), innovative (using flexible modes of delivery including new technologies), and designed according to the needs of kids and families, not the requirements of professionals or funders.

2. Do we need an integrated Family Policy Framework for Australia?

We currently have a fragmented patchwork of services and policies. It’s often a case of “let a thousand flowers bloom”. We have no overarching roadmap to guide the investment of research dollars in a coherent knowledge-building fashion.

For example, recent policy discussion on child care is disconnected from paid parental leave, and from early childhood and family services for parents and children. These and other elements are logically connected and could be part of an integrated families policy framework. The Organisation for Economic Co-operation and Development’s (OECD), 2011) Future of Families to 2030 report noted that the challenges for all countries “will be to design and introduce a robust, sustainable framework of policies capable of withstanding the pressures, and adapting to the changes that lie ahead” (p. 47).

The OECD (2016) is currently pulling together knowledge from health, education and social policy in order to build a child wellbeing framework—in what they describe as a “comprehensive strategic approach that cuts
across the different areas determining child wellbeing’ (p. 3). For example, Germany is promoting equal partnerships in families and a report called Dare to Share looks at the benefits of reducing gender inequality in families through integrated policies cutting across sectors including taxation and employment.

3. Where are the opportunities for innovation? What are the game-changers, the opportunities for breakthrough transformation in families policy and practice?

4. How can we do more with what we have already?

Existing knowledge can be used to build a long-term road map for reform. For example, harnessing existing investments in health, education and social services and building service integration at a local community level can help us to achieve impacts on later life employment, health and wellbeing.

Linking existing separate national plans in domestic violence and child protection, and creating outcomes frameworks across Commonwealth and states/territories would also help to build on existing strengths.

5. What helps or hinders the uptake of evidence by policy-makers?

A systematic review by Oliver, Innvar, Lorenc, Woodman, and Thomas (2014) found that what helps is improved relationships, skills and collaboration, and timely access to relevant, reliable and clear research findings. Can we find ways of achieving better inter-professional collaboration? How can we ensure that research evidence is policy relevant and policy ready?

Can we improve the timelines for communicating research findings to our colleagues in the policy and practice sectors—especially given the short political cycles? It’s great to see, at an international level, a growing dialogue about “what is evidence?” and how we can use it to make sound social policy decisions. A recent paper on evidence-informed decision-making and service delivery (Moore, 2016) synthesises this literature.

Typically expenditure in our field is considered a burden on the economy rather than an investment in our shared prosperity. If those working in family research, policy and practice can forge effective collaborations for solving problems and getting evidence into action on the ground, we may see better results. When we can collaborate to communicate the science—it’s a compelling voice.
This special edition of *Family Matters* has a thematic focus on issues that are challenging for families from personal and systemic perspectives. The topics covered range from family violence and family law, the way that the family law system deals with child representation, the personal and legal consequences of conceiving and raising children through donor conception, and elder abuse. Each of these areas raises complex issues for the people whose lives are affected by them and for the policy and legal responses to them. They also reflect issues that will continue to offer challenges for policy and practice into the future.

One of the articles sets out insights from the Australian Institute of Family Studies' *Evaluation of the 2012 Family Violence Amendments* (Kaspiew, Carson, Dunstan, Qu et al., 2015), which was released in October last year. It provides an overview of the evaluation findings. Themes highlighted in some of the significant findings of the evaluation of the 2012 family violence amendments are further explored in two other articles. Andrew Bickerdike and Helen Cleak offer a considered analysis of approaches to screening for family violence in light of the evaluation findings that indicate that this remains a key focus for practice development after the 2012 family violence reforms. Kylie Beckhouse canvasses existing approaches to the representation of children's interests in family law proceedings and considers some of the steps that need to be taken—including filling significant gaps in the research evidence and the need to develop clearer practice guidelines—to support a more coherent approach in this important area.

Viewed in the context of the way the family law system has evolved in the past decade, it is clear that screening and assessment for family violence and other risks and the treatment of children's interests are issues of central concern for the continued development of a system that meets the needs of families generally and, perhaps most critically, children. For more than a decade now, the Australian family law system has been under significant scrutiny. Since the 2003 Parliamentary Inquiry into child custody arrangements in the event of family separation, which resulted in the *Every Picture Tells a Story* report (House of Representatives Standing Committee on Family and Community Affairs, 2003), there have been two main sets of legislative reforms. In 2006, legislative amendments were introduced and services expanded to support parents to resolve parenting arrangements without going to court, and to support shared parenting after separation if it was compatible with protecting children from abuse or family violence. Then in 2012, amid growing community concern about family violence and child abuse, a narrower set of legislative amendments were introduced that strengthened the emphasis on protecting children from harm when making parenting arrangements.

These changes responded to a growing body of research, including the AIFS evaluation of the 2006 family law reforms, that showed the families using the family law system to make parenting arrangements are those who also report a history of family violence and other problems including safety concerns for themselves or their children as a result of contact with the other parent, mental ill-health and substance abuse. The AIFS evaluation of the 2012 amendments to the Family Law Act demonstrates that now it is a troubled minority of parents that calls on the system for substantial help, especially in the case of those that end up using lawyers and courts to sort out their issues. This explains the increasing need to consider and assess family violence, safety concerns and other matters raising risk when making parenting arrangements.

Despite the increased scrutiny of the family law system over the last decade, the treatment of children's interests has not been prominent in the public debate. The 2003 *Every Picture Tells a Story* report called for processes in the family law system to become more child focused. A partial response came with the establishment of Family Relationship Centres and family dispute resolution services designed to focus attention on the needs of the children. Further
changes occurred in 2012, with the inclusion of a provision in Part VII of the Family Law Act specifying that an Object of the Part was to give effect to Australia’s obligations as a signatory of the United Nations Convention on the Rights of the Child. The findings of the evaluation of the 2012 family violence amendments found no indication that children’s views were receiving any greater emphasis in litigated matters in courts after this amendment. More broadly, parents’ views on whether the family law system “meets the needs of children” changed only marginally after the 2012 family violence amendments, with 47% of those who separated after the changes agreeing that it did, compared to 44% of the parents who separated before the changes (Kaspiew, Carson, Dunstan, De Maio et al., 2015).

An earlier AIFS study that examined the role of Independent Children’s Lawyers (ICL) in the family court system found that children and young people wanted a greater say in family law proceedings (Kaspiew et al., 2014). The children expected to meet with an ICL, usually more than once, and to be supported to understand what was going on in the proceedings. A lack of meaningful contact between children and ICLs caused significant disappointment among the children and young people interviewed.

As Kylie Beckhouse argues, findings like these underscore the need to understand what effective professional practice is from the viewpoint of those who are most directly affected—the children and young people. New research that the Attorney-General’s Department has commissioned from AIFS, the Children and Young People in Separated Families: Family law System Experiences and Needs project, will provide important insights into what children need when their parents are separating and using family law system services. The research involves interviewing children whose families have used family law system services, including family dispute resolution, lawyers and courts, to examine the extent to which children’s needs are met within these processes. The new research will open a window into the world of children and young people affected by parental separation and their needs and experiences in engaging with family law system services. This will be vital in informing thinking about the family law system and its capacity to serve the interests of the children and young people who experience the upheaval of parental separation and may live in families affected by domestic violence, safety concerns and other complex issues.

Our final article in the area of family law and family violence is authored by Jenn McIntosh, Jamie Lee and Claire Ralfs. In this article, the authors provide an update on the Family Law DOORS (FL-DOORS). This risk screening framework was a practice initiative that accompanied the 2012 family violence amendments, with its announcement by media release on 31 January 2013.

Two articles in this special edition provide insight into an area of increasing significance to Australians—accessing donor conception and the rights of children and young people more generally. Sonia Allan’s article examines the history, passage and future application of Victoria’s new legislation to provide all donor-conceived people with access to any available identifying information about their donor. Fiona Kelly’s article focuses on the experiences of single mothers by choice in relation to donor linking—that is, making contact with their child’s donor while the child is under the age of 18 years, with a view to exploring the implications of this for the family law system in Australia.

The articles on family law and family violence in this edition reflect the development of policy and practice thinking and the development of research evidence over more than a decade. This body of work evidences the significant challenges that exist in meeting the needs of parents and children in the current service landscape, where responsibility for legal, policy
and services framework in family law, family violence and child abuse are spread over areas of federal, state and territory competence.

In comparison with family violence, the knowledge base and policy thinking on elder abuse are much less well-developed, as the summary of the AIFS research paper on elder abuse (Kaspiew, Carson, & Rhoades, 2016) in this edition indicates. Prevalence data is lacking in Australia, but it appears that elder abuse is an issue experienced by a small proportion of elder Australians and that a background of abuse or family violence at earlier life stages is associated with susceptibility to elder abuse in later life. In this area too, legal, policy and service responses are spread across an array of areas where federal, state and territory agencies operate in parallel or overlap in the areas of criminal and civil justice, health and aged care. The range of laws and frameworks canvassed in the Australian Law Reform Commission's (June 2015) issues paper on safeguarding the rights of older Australians evidences the complexity of the challenges in formulating coherent and accessible responses to elder abuse. As thinking on policy responses to elder abuse develops, it should be informed by the last decade of experience of change in the family law system, particularly from the perspective of understanding the need for and impact of change through empirical evidence.

Endnote


References and further reading


Identifying and responding to family violence and child safety concerns
Findings from the AIFS Evaluation of the 2012 family violence amendments

Rachel Carson, Rae Kaspiew, Jessie Dunstan, Lixia Qu, Briony Horsfall, John De Maio, Sharnee Moore, Lawrie Moloney, Melissa Coulson and Sarah Tayton

The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) introduced amendments to the Family Law Act 1975 (Cth) that were primarily intended to improve the family law system’s screening of, and response to, family violence and child abuse. The reform agenda responded to the concerns raised about the capacity of the family law system to respond effectively in cases involving family violence and child abuse. These concerns had been raised in a number of reports examining the operation of the family law system (including Australian and New South Wales Law Reform Commissions, 2010; Chisholm, 2009; Family Law Council, 2009; Kaspiew et al., 2009).

The legislative amendments, which came substantially into effect on 7 June 2012, sought to better support the disclosure of concerns about family violence, child abuse and child safety on the part of parents interacting with the family law system and to encourage professionals to identify and respond to these concerns with parenting arrangements that prioritised protection from harm.

The main elements of these 2012 family violence reforms included:

- the introduction of wider definitions of “family violence” and “abuse in relation to a child” (s 4AB and s 4(1));
- the inclusion of s 60CC(2A) to clarify that when determining the best interests of the child, the court is to accord greater weight to the protection of children from harm where this conflicts with the benefit to the child of having a meaningful relationship with both parents after separation;
- the introduction of obligations on advisors1 to inform clients that the best interests of children are the paramount consideration when making parenting arrangements and to encourage parties to make arrangements that are consistent with s 60CC(2A) (s 60D);
- the imposition of legislative obligations on “interested persons”2 to file a Form 4 Notice/
The reform agenda responded to the concerns raised about the capacity of the family law system to respond effectively in cases involving family violence and child abuse.

Notice of Risk when making allegations of family violence or risk of family violence (s 67ZBA) and extending the obligation when making allegations that a child has been abused or is at risk of being abused to other interested persons as well as parties to family law proceedings (s 67Z);

- the imposition of obligations on parties to proceedings to inform the courts about whether the child in the matter or another child in the family has been the subject of attention from a prescribed child welfare authority (s 60CI);

- the imposition of a duty on the court to actively enquire about whether a party to the proceedings considers that the child has been, or is at risk of being, subjected or exposed to family violence, child abuse or neglect (s 69ZQ1(aa)(i)), and whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence (s 69ZQ1(aa)(ii));

- setting out the court’s obligation to take prompt action in relation to Form 4 Notices/Notices of Risk filed in relation to allegations of child abuse or family violence (s 67ZBB); and

- amending the additional best interests consideration relating to family violence orders (s 60CC(5)(k)) and amending or repealing other FLA provisions identified as potentially discouraging disclosure of concerns about child abuse and family violence (e.g., the former s 60CC(3)(c) and s 117AB).

The Australian Institute of Family Studies (AIFS) was commissioned by the Australian Government Attorney-General’s Department to undertake an evaluation of these 2012 family violence reforms, with the reports arising from this evaluation being released in late 2015. The research questions guiding the evaluation covered:

- the extent to which patterns in post-separation parenting arrangements had changed since the reforms and whether any changes were consistent with the intent of the reforms;

- whether more parents were disclosing concerns about family violence and child safety to family law system professionals;

- whether there were any changes in patterns of service use following the reforms;

- the size and nature of any changes in relation to practices among family law system professionals, court-endorsed and court-ordered outcomes and court-based practices, and whether any changes were consistent with the intent of the reforms;

- whether there was any evidence that the reforms had influenced any of these patterns or changes; and

- whether there were any unintended consequences arising from the reforms.

Methodology

A mixed-methods strategy was employed to address the research questions outlined above, with the evaluation comprising three main studies and a synthesis report drawing together findings from each study.

The Responding to Family Violence Study (RFV)

A survey of family law practices and experiences examined the views and experiences of professionals working across the family law system between December 2013 and February 2014 via an online survey of judicial officers and registrars (n = 37), lawyers (n = 322) and non-legal family law professionals (e.g., family consultants and family dispute resolution (FDR) practitioners; n = 294). A further component of this study involved telephone interviews with parents who had used family law system services in the period of approximately 12 months preceding August 2014 to examine their experiences of these services. This sample of parents was drawn from the first half of the fieldwork period for the Survey of Recently Separated Parents 2014 (see below), with 2,473 parents in this interim sample (n = 3,428) reporting that they had used family law system services in the relevant period.

The Experiences of Separated Parents Study (ESPS)

The ESPS involved the comparison of two nationally representative and comparable samples of separated parents with children under the age of 18 years derived from the Department of Human Services–Child Support (DHS-CS) database. The pre-reform survey data collection (Survey of Recently Separated Parents [SRSP] 2012) examined the experiences of parents who had separated between 1 July 2010 and 31 December 2011 (n = 6,119). The experiences of this cohort of separated parents reflected the way in which the system operated in the two-year period prior to the operation of the 2012 family violence reforms. The post-reform survey data collection (Survey of Recently Separated Parents [SRSP] 2014) took place from 7 August to 30 September 2014 and involved a sample of parents whose separations took place between 1 July 2012 and 31 December 2013 (n = 6,079).
The Court Outcomes Project (Court Outcomes)

Court Outcomes Project involved three studies:

- an analysis of administrative data obtained from the three family law courts, to assess patterns in filings in parenting matters and other relevant issues, including filings in relation to Form 4 Notices/Notices of Risk (Court Administrative Data Study);

- an analysis of court files ($n = 1,892$) involving matters resolved by judicial determination and consent both pre-reform ($n = 895$) and post-reform ($n = 997$), allowing a rigorous comparison of outcomes in these two time periods (Court Files Study) to examine patterns in orders for parental responsibility and care time, and a range of other relevant issues, including the prevalence in the files of allegations about family violence and child abuse; and

- an analysis of published judgments to examine how the legislative amendments were being applied in court decision-making (Published Judgments Study).

The findings from these three studies are described in detail in three separate reports, with a synthesis report drawing together the findings from each of the three studies comprising the Evaluation of the 2012 family violence amendments ("the Evaluation"). The discussion in this article will present a summary of key findings from each of the studies comprising this Evaluation. When considering these findings it is important to keep in mind that these findings reflect practice some two years after the 2012 family violence amendments were implemented, which is a comparatively short period of time for change to unfold. Evidence of limited effects in some areas (such as patterns in parenting arrangements) in the context of more significant changes in other areas (such as screening) suggests that further effects of the amendments are still to emerge.

### Identifying family violence and child safety concerns since the 2012 family violence amendments

Data from each component of the Evaluation suggested an increased emphasis on the identification of family violence and child safety concerns across the family law system, particularly among lawyers and courts.

### Increases in professionals asking about family violence and safety concerns

The ESPS identified statistically significant increases in the proportions of parents reporting in the SRSP 2014 that they had been asked about both family violence and safety concerns when using a formal family law pathway (FDR/mediation, lawyers or courts) to resolve their parenting arrangements (see Table 1). Notwithstanding this change in professional practices, the ESPS study also identified that

---

### Table 1: Whether professional asked about family violence or safety concerns, by main pathway used and parent gender, 2012 and 2014

<table>
<thead>
<tr>
<th>Whether professional asked</th>
<th>Formal pathway (%)</th>
<th>Not-resolved/informal pathway (%) a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fathers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mothers</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes:
- Data have been weighted. The "don’t know" and "refused" responses (3–5%) were excluded from the analysis. Parents who had contact with at least one family law service in relation to their separation were asked: "At any time during this process, have any of the professionals involved, ever asked you about your possible experience of family violence or any safety concerns for <child>-?", and then if necessary, interviewers probed for clarification: "Were you asked about family violence, the safety of <child>, or both?" a This included parents who reported that either their arrangements were still being resolved, that their main pathway was discussions with other parent, or that parenting arrangements "just happened", but they had been in contact with family law professionals at some stage. b In the SRSP 2012, participants could also choose "something else", but this option was not available in 2014. Percentages may not total 100.0% due to rounding. Statistically significant differences between 2012 and 2014 within a given population are noted: * p < .05; ** p < .01; *** p < .001. Statistically significant differences between mothers and fathers within a given population (years) are noted: † p < .05; †† p < .01; ††† p < .001.

Source: ESPS report, Table 5.3, p. 91
a substantial minority of parents in the SRSP 2014 reported seeking advice from family law professionals but not being asked about family violence (resolved by formal pathway: 29%; not resolved/informal pathway: 43%).

The RFV study indicated changes in professional practices involving a greater emphasis on identifying and assessing concerns about family violence and child abuse, with self-assessments by lawyers and non-legal professionals indicating shifts in advice-giving practices in a direction consistent with the intention of the 2012 family violence amendments, although this shift was evident among lawyers to a greater extent than among non-legal professionals (RFV report, Table 2.10). While the RFV study indicated that professionals were more confident in their own capacity to identify family violence and child abuse/child safety concerns since the reforms (RFV report, Tables 4.3 and 4.4, and Figure 4.3), this did not translate into high levels of confidence among the aggregate sample of professionals in relation to the system’s general capacity to screen for these concerns (see Table 2). Professionals participating in the RFV study also raised concerns about the limited effects of the amendments, including the level of resources required to assess family violence and child abuse concerns, the need for improvements in training and practice tools, and the complexities associated with the family law system, including overlaps with and inconsistencies between the family law system and state/territory child protection and family violence responses (RFV report, sections 4.2–4.3 and 6.2–6.3).

**Increases in parents disclosing concerns**

The ESPS findings suggest an increase in the proportion of parents disclosing concerns when comparing parents’ reports in the SRSP 2012 and the SRSP 2014. A small but statistically significant increase emerged in the proportion of parents who reported experiencing family violence to one of a range of services and organisations from 53% in the SRSP 2012 to 56% in the SRSP 2014 (ESPS report, Table 5.1). In relation to family law services specifically, the proportion of parents who reported disclosing family violence to these services increased by approximately three percentage points, with this representing a statistically significant increase between the SRSP 2012 and the SRSP 2014 (see Table 3, page 11). Nevertheless, substantial minorities of parents still reported not disclosing family violence or safety concerns (38%; ESPS report, Table 5.10), with this being more marked for family violence than safety concerns (ESPS report, Table 5.9). In both the SRSP 2012 and the SRSP 2014, mothers were more likely to report disclosing family violence and safety concerns than fathers to a statistically significant extent (ESPS report, Table 5.7), although the reforms were associated with a statistically significant increase in fathers disclosing these concerns to lawyers (ESPS report, Table 5.9). The increases in parents disclosing family violence or safety concerns across each of the formal pathways were lowest for parents using FDR and highest for parents who used courts (ESPS report, Tables 5.5 and 5.6).

Consistent with this, data from the Court Files Study in the Court Outcomes Project indicated that allegations of family violence and child abuse were made in court proceedings to a greater extent since the 2012 family violence amendments (see Table 4, page 11). The data from the Court Files Study also indicated a greater emphasis on identifying concerns about family violence and child abuse in matters proceeding to court, with evidence of more discussion of risk assessment in Family Reports (CO report, Table 3.16), and more evidence

<table>
<thead>
<tr>
<th>Table 2: Agreement that since the 2012 reforms, the legal system has had the capacity to screen adequately for family violence and child abuse, by professional group, 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial officers</strong></td>
</tr>
<tr>
<td><strong>No.</strong></td>
</tr>
<tr>
<td>Strongly agree</td>
</tr>
<tr>
<td>Mostly agree</td>
</tr>
<tr>
<td>Mostly disagree</td>
</tr>
<tr>
<td>Strongly disagree</td>
</tr>
<tr>
<td>Cannot say</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Notes: Professionals were asked: “Thinking about the period since the family violence reforms were introduced, to what extent do you agree or disagree that the following statements describe your view? The legal system has been able to screen adequately for family violence and child abuse”. Percentages may not total 100.0% due to rounding.

Source: Survey of Practices 2014, RFV report, Table 4.1, p. 47
relating to family violence and child abuse on court files, including evidence concerning engagement with state child protection agencies (CO report, Tables 3.19 and 3.22). The Court Administrative Data component of the Court Outcomes Project also indicated a substantial increase in cases where Form 4 Notices/Notices of Risk were filed following the reforms (see Figure 1, page 12), although the effect of this increase on statutory child protection services has been identified as a cause of concern across the family law system.

While the RFV study suggested the refinement and development of identification practices in the court and non-court based context and in the educative effect associated with the wider definitions of family violence and abuse introduced as part of the 2012 amendments, the repeal of the “friendly parent” criterion and s 117AB (which provided for the court to make costs orders where a party was found to have knowingly made a false statement in proceedings) were not measures associated with the encouragement of disclosures of family violence and safety concerns (RFV report, Table 3.4 and Figure 3.1).

### Patterns in post-separation parenting arrangements since the 2012 family violence amendments

Data from the ESPS suggest subtle changes in the patterns of parenting arrangements since the 2012 family violence amendments. Where parents reported holding safety concerns, there was a trend towards an increase (though falling just short of statistical significance) in parenting arrangements involving 100% mother care time, and where the child spent time with the father during the daytime only from 19% in the SRSP...

### Table 3: Whether parents disclosed family violence or safety concerns, by parent gender, 2012 and 2014

<table>
<thead>
<tr>
<th>Which parent disclosed</th>
<th>2012 (%)</th>
<th>2014 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Fathers</td>
</tr>
<tr>
<td>Family violence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Participant disclosed</td>
<td>34.8</td>
<td>25.8</td>
</tr>
<tr>
<td>Other parent disclosed</td>
<td>0.2</td>
<td>0.5</td>
</tr>
<tr>
<td>Both parents disclosed</td>
<td>1.6</td>
<td>2.3</td>
</tr>
<tr>
<td>Neither parent disclosed</td>
<td>63.3</td>
<td>71.5</td>
</tr>
<tr>
<td>No. of observations</td>
<td>3,124</td>
<td>1,432</td>
</tr>
<tr>
<td>Safety concerns</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Participant disclosed</td>
<td>34.5</td>
<td>27.6</td>
</tr>
<tr>
<td>Other parent disclosed</td>
<td>0.2</td>
<td>0.4</td>
</tr>
<tr>
<td>Both parents disclosed</td>
<td>0.9</td>
<td>1.3</td>
</tr>
<tr>
<td>Neither parent disclosed</td>
<td>64.4</td>
<td>70.8</td>
</tr>
<tr>
<td>No. of observations</td>
<td>3,126</td>
<td>1,434</td>
</tr>
</tbody>
</table>

Notes: Data have been weighted. Percentages may not total 100.0% due to rounding. Parents who had contact with at least one family law service in relation to their separation were asked: “Did you ever raise or disclose any issues about family violence with these professionals?”, followed by: “Did you ever raise or disclose any concerns about the safety of <child> with these professionals?”. Responses were not read out, but interviewers could record instances where parents volunteered information about the other parent disclosing. Statistically significant differences between 2012 and 2014 within a given population are noted: * p < .05; ** p < .01; *** p < .001. Statistically significant differences between mothers and fathers within a given population (years) are noted: † p < .05; †† p < .01; † † † p < .001.

Source: ESPS report, Table 5.5, p. 95

### Table 4: Allegation of family violence and child abuse, pre- and post-reform

<table>
<thead>
<tr>
<th>Allegation of family violence * and child abuse</th>
<th>Pre-reform (%)</th>
<th>Post-reform (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both family violence and child abuse</td>
<td>8.2</td>
<td>17.0 ***</td>
</tr>
<tr>
<td>Family violence alone</td>
<td>18.2</td>
<td>18.9</td>
</tr>
<tr>
<td>Child abuse alone</td>
<td>2.8</td>
<td>4.9 *</td>
</tr>
<tr>
<td>Neither</td>
<td>70.8</td>
<td>59.2 ***</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of cases</td>
<td>895</td>
<td>997</td>
</tr>
</tbody>
</table>

Note: a Includes family violence order raised. Percentages are based on weighted data. Statistically significant differences between pre- and post-reform periods are noted: * p < .05; ** p < .01; *** p < .001.

Source: CO report, Table 3.10, p.42

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2004–05 to 2013–14

Figure 1: Number of Notices of Risk filed, FCC, FCoA and FCoWA, 2004–05 to 2013–14

Notes: Data have been weighted. In cases where both parents of a focus child participated (2012: n = 539; 2014: n = 523), data from one parent were randomly selected for inclusion. Statistically significant differences between 2012 and 2014 were not found.

Source: ESPS report, Figure 3.17, p. 53

Figure 2: Care-time arrangements made in the presence of safety concerns associated with ongoing contact with focus parent, 2012 and 2014

Notes: Data have been weighted. In cases where both parents of a focus child participated (2012: n = 539; 2014: n = 523), data from one parent were randomly selected for inclusion. Statistically significant differences between 2012 and 2014 were not found.

Source: ESPS report, Figure 3.17, p. 53

2012 to 23% in the SRSP 2014 (see Figure 2). More generally, parents who disclosed family violence and/or safety concerns were more likely to have care time involving little or no contact with a father compared to parents who did not disclose such experiences, save for fathers in the 2014 cohort who disclosed family violence (ESPS report, Figures 5.7 and 5.8). These findings suggest that the greater emphasis on identifying family violence and child safety concerns has supported modest, positive shifts in the making of parenting arrangements in the period subsequent to the 2012 family violence amendments. Nevertheless, there was a reduction in reports of parenting arrangements involving supervision between the SRSP 2012 and the SRSP 2014, (ESPS report, Table 2.7), together with a decline in reports of no-time orders where parents reported safety concerns with a parent (see Figure 2).

The Court Files Study component of the Court Outcomes Project similarly suggested subtle shifts in court orders for parenting arrangements, which varied according to whether the orders were made by judicial determination, by agreement between the parties subsequent to the commencement of proceedings or filed with the court for endorsement as consent orders. Judicially determined orders for shared parental responsibility decreased after the forms (from 51% to 40%: CO report, Table 3.25) but changes to care-time orders were limited in the judicial determination sample. Of note, negligible changes were apparent in the making of shared care-time orders by judicial determination in matters involving family violence and/or child abuse allegations (see Table 5, page 13). On the other hand, in cases resolved by consent after proceedings were issued, orders for shared parental responsibility did not change substantially after the reforms but orders for shared care-time were less frequent to a statistically significant extent (CO report, Table 3.31; and see Table 7, page 14). Orders for children to spend majority time with mothers were more frequent to a statistically significant extent in the post-reform sample (CO report, Table 3.31). Orders for supervised time remained stable at 4% in both the pre- and post-reform file samples (CO report, Figure 3.2) and orders for no-time were rare in both samples—with the highest occurring in relation to no-time with fathers, being 2% in the pre-reform sample and 3% in the post reform sample (CO report, Table 3.26).

Overall, the findings relating to court orders for the total sample indicate that the frequency of orders for shared parental responsibility did not change substantially after the 2012 amendments but orders for shared care time
were less common to a statistically significant extent in cases involving allegations of both family violence and child abuse (see Table 6, page 13).

Findings from the Published Judgments study component of the Court Outcomes Project suggested that the effects of s 60CC(2A) on outcomes in parenting cases varied according to the way in which the court analysed the facts of a case and applied its discretion in the context of the Part VII decision-making framework. In some contexts, s 60CC(2A) appeared to operate as a tie-breaker when making parenting orders that prioritised the protection of children from harm, in some cases it supported an unacceptable risk analysis, and in other cases it tipped the balance in favour of an outcome restricting or ceasing contact between a child and a parent. As noted above, the inclusion of s 60CC(2A) was intended to provide a means of resolving the tension between the two primary considerations, yet the analysis of published judgments suggested that this provision has had limited effect, especially where courts found there to be ambiguity associated with the allegations of family violence or child abuse, or in the way in which one parent had behaved in relation to the other parent’s relationship with the child. The judgment analysis suggested that when making parenting orders, judicial decision-makers sought to maintain children’s relationships with both parents post-separation, with orders for sole parental responsibility and limited or no care time with the other parent tending to be made in cases where a very severe history of family violence had been established and the behaviour of one parent was clearly deficient compared to the behaviour of the other. In less clear-cut circumstances, particularly where the parent’s motivation for raising allegations of family violence or child abuse was questioned, care-time decisions were more likely to favour arrangements that maintained the child’s relationship with both parents.

The evidence of limited changes in the datasets described above is consistent with the findings in the RFV Study regarding the limited effect

| Table 5: Children with shared time and shared parental responsibility, by allegation of child abuse and family violence and determination type, pre- and post-reform |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
|                                 | Judicial determination | Consent after proceedings | Consent without litigation |
|                                 | Pre-reform | Post-reform | Pre-reform | Post-reform | Pre-reform | Post-reform |
| Children from cases with allegations of both family violence and child abuse | | | | | |
| Shared care time | 8.6 7.8 | 24.9 12.4* | -- | -- |
| Shared parental responsibility | 53.6 32.3'' | 83.1 88.1 | -- | -- |
| No. of children | 95–101 | 239–252 | 87–91 | 171–179 | -- | -- |
| Children from cases with allegations of either family violence or child abuse | | | | | |
| Shared care time | 7.3 10.6 | 19.4 15.4 | -- | -- |
| Shared parental responsibility | 45.1 33.8 | 92.8 95.8 | -- | -- |
| Children from cases with no allegations of family violence or child abuse | | | | | |
| Shared care time | 9.8 11.4 | 28.5 13.0*** | 21.4 | 26.4 |
| Shared parental responsibility | 54.1 55.7 | 96.8 95.3 | 90.9 | 91.4 |

Note: Results for children from consent without litigation cases with any allegations of family violence or child abuse are not shown as sample sizes are too small (16 or fewer). Percentages are based on weighted data. Statistically significant differences between pre- and post-reform periods are noted: * p < .05; ** p < .01; *** p < .001.

Source: CO report, Table 3.33, p. 64

| Table 6: Children with shared care time, by whether there were allegations of family violence and/or child abuse, pre- and post-reform |
|---------------------------------|-----------------|
|                                 | Pre-reform (%)  | Post-reform (%)  |
| Both family violence and child abuse | 18.9 | 10.6* |
| Either family violence or child abuse | 17.4 | 14.9 |
| Neither family violence nor child abuse | 22.2 | 21.7 |

Note: Percentages are based on weighted data. Statistically significant differences between pre- and post-reform periods were tested using chi-square tests: * p < .05; ** p < .01; *** p < .001.

Source: CO report, Table 3.29, p. 62
Findings from each of the studies in the Evaluation support the observation that the amendments have been associated with longer resolution time frames for resolving parenting arrangements among parents in cases characterised by family violence.

Patterns in service use since the 2012 family violence amendments

Findings from the ESPS indicate continuing consolidation of the aims of the 2006 family law reforms with the ESPS evidencing a shift towards more agreements being reached in FDR, including by those parents who were not affected by family violence (ESPS report, Table 4.13). Approximately half of the participants in both the SRSP 2012 and the SRSP 2014 reported that they contacted FDR providers and lawyers and 20% of parents reported contact with the court system (ESPS report, Table 4.1). More specifically, in relation to parents participating in the SRSP 2014 who had sorted out their parenting arrangements, approximately 10% reported using FDR/mediation as their main pathway, while approximately 6% used lawyers and 3% used courts as their main pathway (ESPS report, Table 4.8). The findings from the SRSP 2014 also indicate a strong association with the use of formal pathways and the experience of family violence and that parents, particularly mothers, were more likely to also report using family law services as their main pathways to sort out their parenting arrangements (ESPS report, Figures 4.1 and 4.2).

Findings from each of the studies in the Evaluation support the observation that the 2012 family violence amendments have been associated with longer resolution time frames for resolving parenting arrangements among parents in cases characterised by family violence. The ESPS indicated an increase in the number of parents in the SRSP 2014 who reported that they had not resolved their arrangements at the time of the survey as compared to the SRSP 2012 (see Table 7). The Court Files Study data also indicated that time frames for the resolution of matters resolved by judicial determination or consent prior to or during trial had doubled, on average, from around 4 to 8 months (CO report, Table 3.4). While the views of professionals participating in the RFV indicate that these changes were at least in part linked to the need for a greater level of scrutiny of family violence and child abuse arising from the 2012 family violence amendments, other influences such as court resourcing and the evaluation sampling method also emerged as relevant considerations.

Unintended consequences

Although changes associated with longer resolution time frames were identified in the Court Files component of the Court Outcomes Project (discussed above), the Evaluation data indicate that the 2012 family violence amendments did not, in general, worsen parents’ experiences of the family law system. The ESPS data suggest positive views in most areas and measures of efficacy increased between the SRSP 2012 and the SRSP 2014. While fathers in both surveys were less satisfied with the family law system than mothers, the disparity remained similar in the SRSP 2014, supporting the conclusion that no generalisations can be made about whether the amendments favoured mothers or fathers.

The ESPS data suggested marginal improvement in the views of parents affected by family violence, though this was true to a greater or lesser extent according to the measure and whether the experience involved was physical violence or emotional abuse (ESPS report, section 6.1 and Table B.5). Differences among these groups are evident in different areas, suggesting an uneven effect of the reforms, consistent with findings reported in relation to

<table>
<thead>
<tr>
<th>Table 7: Status of parenting arrangements, by parent gender, 2012 and 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012 (%)</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Yes, sorted out</td>
</tr>
<tr>
<td>In process of sorting out</td>
</tr>
<tr>
<td>No, not sorted</td>
</tr>
<tr>
<td>No. of observations</td>
</tr>
</tbody>
</table>

Notes: Data have been weighted. The “don’t know” and “refused” responses were excluded from this analysis (<1%). Percentages may not total 100.0% due to rounding. Statistically significant differences between 2012 and 2014 within a given population are noted: * p < .05; ** p < .01; *** p < .001. Statistically significant differences between mothers and fathers within each of the two cohorts are noted: † p < .05; †† p < .01; ††† p < .001.

Source: ESPS report, Table 4.4, p. 66

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service responses to the disclosure of family violence and child safety concerns. In general, less positive findings emerged in relation to safety concerns, with the experience of parents with safety concerns for themselves or their child (or both) in some areas changing little, if at all, with some indication of a negative shift for some sub-groups (ESPS report, section 6.1). These findings suggest a particularly mixed set of views and experiences among these parents.

As noted in previous sections, systemic pressures were identified by professionals participating in the RFV Study, together with concerns about the capacity of the family law system to facilitate the identification of concerns relating to family violence and child abuse and concerns associated with the complexity of the legislation and family law system and the need for more effective education and training.

Summary

The RFV Study indicated that the 2012 family violence amendments were perceived positively by a majority of family law system professionals, with strongest support evident among non-legal professionals compared with lawyers and judicial officers and registrars. While there was a greater emphasis on identifying family violence and child abuse, the SRSP 2014 data did not suggest that this translated into more parents reporting that their concerns were dealt with appropriately after the 2012 amendments. The ESPS samples and Court Files Study together with the RFV Study suggest that these amendments have had a greater influence on identification and screening practices than on patterns in parenting arrangements. As foreshadowed at the outset of this article, these findings reflect practice some two years after the 2012 family violence amendments were implemented, and it is likely that greater effects will be identified as practice continues to evolve over time.

Endnotes

1 s 60D(2) and s 63DA(5) of the FLA provide that an adviser is: (a) a legal practitioner; or (b) a family counsellor; or (c) a family dispute resolution practitioner; or (d) a family consultant.

2 s 67BA(4) provides that an interested person includes parties to proceedings and Independent Children’s Lawyers (ICLs).


References


Rachel Carson is a Research Fellow at AIFS with expertise in family law. Rae Kaspiew is a Senior Research Fellow and manages the AIFS Family Law and Family Violence Research Program. Jessica Dunstan (Senior Research Officer), Lixia Qu (Senior Research Fellow), Briony Horsfall (Senior Research Officer), John De Maio (Research Fellow), Sharnee Moore (Research Fellow), Lawrie Moloney (Senior Research Fellow), Melissa Coulson (Research Officer) and Sarah Tayton (Research Officer) were all part of the family law and family violence team at the Australian Institute of Family Studies.
Background

There have been multiple significant amendments to the *Family Law Act 1975* (Cth), but two of the three most recent major legislative changes, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), have, at their core, aspirations aimed at privileging the wellbeing of children, reinforcement of the legitimate place of both parents in the lives of children and the protection of children and former partners from family violence (Moloney, Weston, & Hayes, 2013). A further aspect of these reforms, provided as part of the 2006 family law reforms, required separating parents in dispute to attempt family dispute resolution (FDR) by registered FDR practitioners (family mediators) before proceeding to court. These changes resulted in a 25% decrease in court filings in parenting matters (Kaspiew, R., Moloney, L., Dunstan, J., & De Maio, J., 2015).

Cases involving family violence were specifically exempt from the requirement to attend FDR prior to court, although in reality the majority of separating parents were encouraged to attempt FDR first. This development was supported by the concurrent introduction, between 2006 and 2008, of an extensive network of community sector Family Relationship Centres offering free FDR services. If upon assessment or during the FDR process an FDR practitioner found that a case was unsuitable due to family violence (or other contra indicator) a certificate could be issued allowing the case to proceed to court (s 60I *Family Law Act 1975* (Cth)).

In the past decade, there has been a series of reports and reviews from academics and practitioners about the various amendments to the *Family Law Act 1975* (Cth), including the Chisholm review (Chisholm, 2009); the Family Law Council review (Family Law Council, 2009); the Australian Institute of Family Studies (AIFS) evaluation (Kaspiew et al., 2009) and the Bagshaw research (Bagshaw et al., 2010). Much of the attention of these reviews has
been focused on family violence and many of the recommendations were followed by the 2011 series of amendments (Alexander, 2015).

In June 2012 the Family Law Act was reformed with the passage of the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)). While the background to this second shift is largely beyond the scope of the present paper, it is important to note that the intention of the amendment was to respond to some of the perceived unintended consequences of the 2006 amendments—in particular, the apparent privileging of shared parenting over the safety of children and parents (McIntosh, 2009).

The main elements of the 2012 family violence reforms involved introducing wider definitions of “family violence” and “abuse” and clarifying that, in determining the best interests of the child, greater weight is to be given to the protection of the child from harm where this conflicts with the benefit to the child of having a meaningful relationship with each parent after separation (Kaspiew, Carson, Qu et al., 2015). The Act also identified the witnessing of family violence by a child and the serious neglect of a child as “abuse”. The amendments broadened the definition of family violence to include “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful” (s 4AB(1)). The previous reference to a subjective test that a person needs to “reasonably fear for ...” was removed and a list of examples of acts considered to constitute family violence was provided in the amended definition (s 4AB(2)).

In addition to more traditional examples of family violence such as physical and sexual assault, stalking, damage to property and harm to an animal, the list makes specific reference to acts that relate to verbal, emotional, psychological and economic abuse. These include:

- (d) repeated derogatory taunts; …
- (g) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; …
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; …
- (j) unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty. (Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) s 4AB(2))

The amendments brought into clear focus the importance and relevance of verbal and emotional abuse as well as socially and financially controlling behaviour and the exposing of children to these broader concepts of family violence.

In 2012, an evaluation of the 2012 family violence amendments was commissioned and funded by the Australian Government’s Attorney-General’s Department (AGD). AIFS has now released three project reports, which together, comprise their evaluation of the amendments. The Synthesis Report (Kaspiew, Carson, Dunstan, Qu et al., 2015) sets out the overall findings of the evaluation of the 2012 amendments. The report relating to the Court Outcomes Project provides empirical data on the extent to which changes reflecting the aims of the 2012 family violence amendments are evident in court-based matters. Two samples of court files from the four participating family law courts were analysed for this study—one sample that passed through the system prior to the 2012 amendments and one post the reforms. These data provide insight into the extent to which family violence and child abuse concerns were raised in court proceedings before and after the 2012 reforms, and the extent to which any changes were evident in patterns in court orders (Kaspiew, Carson, Qu et al., 2015).

The Experiences of Separated Parents Study (ESPS) (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015) provided an important and rare insight into the lived experience of separating individuals transiting through the family law system. The results found that family violence is a common experience among separated parents, with a majority of participating parents in both cohorts (pre- and post-reform groups) reporting either physical or emotional abuse. Mothers reported experiencing emotional and physical abuse in greater proportions than fathers, both in the before/during separation time period and, with a small but statistically significant decrease, in the post-separation time period. The 2014 cohort’s reports showed the most commonly reported form of emotional abuse was insults with the intent to shame, belittle or humiliate (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015). The findings indicate similar profiles in the nature and frequency of family violence and safety concerns in the two samples.

However, the Court Outcomes Project court files study data showed an increase in allegations of family violence and indicated that allegations of family violence and child abuse were raised more frequently in court-based
matters post-reform. The proportion of cases in which allegations were raised increased from 29% in the pre-reform sample to 41% in the post-reform sample. The proportion of cases in which both family violence and child abuse allegations were raised increased from 8% to 17%, which would tend to suggest that the reforms around definitions and the various changes intended to support disclosure have been influential (Kaspiew, Carson, Qu et al., 2015).

The ESPS showed that there were statistically significant increases in the proportions of parents who reported being asked about family violence and safety concerns when using a formal pathway, such as FDR/mediation, lawyers and the courts, with increases of approximately 10 percentage points in the latter two groups. However, close to 30% of all parents in the 2014 cohort reported having never been asked about either of these issues in each formal pathway, indicating that the implementation of consistent screening approaches has some way to go (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015). Although more parents reported being asked about violence and safety concerns, substantial numbers of parents indicated that they had not been asked about this by any of the primary services (29% of formal services and 46% of informal pathways) (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015). This was highest for those seeking assistance from lawyers (46%) and lowest for those attending FDR (31%).

Similarly, for those who experienced emotional abuse 53% were not asked about emotional abuse by their lawyers or the court, whereas 31% and 23% were not asked by FDR and FRC services respectively. Similar percentages of clients reported not being asked about safety concerns. These results are clearly of concern and suggest that many family law professionals are not undertaking the crucial task of simply enquiring about family violence and safety issues when engaging with their clients. This is not a question of what assessment tool is best or most appropriate—it is a question of initiating any enquiry about family violence. This issue will be returned to below.

A further complication revealed by the ESPS study is that a substantial minority of clients who experienced family violence did not disclose this to their family law professionals. In the 2014 sample, 38% of those with family violence or safety concerns chose not to disclose. When asked why, the majority reported that they did not have concerns about the violence at the time they engaged with the professional. Others did not disclose because the violence was not physical and/or did not affect the focus child or they felt the violence was not serious enough to warrant disclosure. A small but concerning subgroup (5%) reported they did not disclose because they were concerned about the consequences of disclosure, including the possibility of escalating the situation.

These non-disclosing clients were asked what might have assisted them to disclose their family violence experience. A substantial proportion reported that simply being asked would have led to disclosure. An even larger group reported that had they been asked in a different manner, they might have been better able or more willing to disclose. Some suggested more thorough questioning; others indicated a more nuanced approach would have helped—perhaps one that was less direct. A number of clients suggested a screening questionnaire would have elicited disclosure. Still others reported that disclosure was inhibited by the presence of the other parent during the interview. Collectively, these responses reveal the complexity facing family law practitioners who are assessing and assisting family violence affected clients.

Implications for screening and risk assessment of family violence

This series of studies has highlighted some fundamental concerns facing the family law sector as it grapples with the complexities of dealing with family violence among the myriad of other issues that come with family breakdown. There are a disturbing number of family violence affected clients who reported not being asked about family violence when seeking the assistance of family law professionals. Equally troubling, a significant minority also reported not disclosing family violence even when asked (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015).

Together, the Synthesis Report and the ESPS identified a number of issues continuing to face family law professionals working within the context of family violence. Firstly, the decision as to whether family violence affected clients are suitable for FDR is complex and ill defined, a situation that is made all the more problematic by a lack of confidence in the assessment processes themselves. One of the better known assessment tools in Australia is the Family Law Detection of Overall Risk Screen (DOORS) (McIntosh & Ralfs, 2012), which has been developed specifically for professionals working in family law and has
been validated against an Australian sample (McIntosh, Wells, & Lee, 2016). However, in a large survey of family law professions, as part of the AIFS evaluation of the 2012 amendments, Kaspiew and colleagues found “only a minority of professionals reporting that they use the DOORS tool, and a range of concerns raised about the extent to which it represents a workable approach in day-to-day practice” (Kaspiew, Carson, Coulson, Dunstan, & Moore, 2015, p.188). Secondly, this situation is exacerbated by the relatively high number of cases that reported not being asked about family violence and/or choosing not to disclose (Kaspiew, Carson, Coulson, Dunstan, & Moore, 2015).

Each of these areas of concern requires attention. However, it is worth noting that these findings are by no means unique to the Australian family law system. Recent overseas research has identified remarkably similar patterns. Although screening for family violence is normal practice in most family law jurisdictions, detection rates vary. For instance, Ballard, Beck, Holtzworth-Munroe, Applegate, and D’Onofrio (2011) found that, despite pre-mediation preparation, mediators did not report the presence of family violence in more than half the cases in which the parties themselves reported violence. Another study found that, although approximately 60% of divorcing couples attending mediation reported physical violence on a screening measure, only 7% of these couples were screened out of mediation (Beck, Walsh, Mechanic, Figueredo, & Chen, 2011). Thus, research suggests that screening for family violence among mediation clients has not been very effective, and there is a lack of clarity about how family violence patterns should influence decisions about mediation. There exists significant disagreement as to the best screening practices for mediation, let alone for the wider family law system (Bingham, Beldin, & Dendinger, 2014; Holtzworth-Munroe, Beck, & Applegate, 2010). There is also widespread evidence that victims of family violence often choose not to disclose, both within the family law context (Bingham et al., 2014) and more broadly within the health system (Spangaro, Zwi, & Poulos 2011).

Facilitating disclosure of violence

This paper will now consider what evidence and practice impacts the disclosure and screening for family violence. Studies that have directly interviewed victims to explore what may assist disclosure have produced some consistent results. A clear and unsurprising finding was that disclosure is difficult for those who have experienced abuse. The psychological impact of abuse can lead a victim to lose a sense of self and of reality, which, in turn, inhibits responses to screening questions (Bingham et al., 2014; Bailey & Bickerdike, 2005). Bingham and colleagues (2014) undertook a qualitative study of women who had recently left abusive relationships; asking them what they felt would inhibit or enhance disclosure during screening. Barriers to disclosure included: a general lack of awareness by victims of the seriousness of the violence they had experienced in the past or were experiencing at the time of assessment; a fear of repercussions from the abuser if the violence was disclosed; a concern that the screening process would itself re-traumatise the victim; and a fear of being judged (Bingham et al., 2014). When victims were asked what might assist disclosure, they emphasised the need to be questioned directly, despite the potential risk of re-traumatisation. However, a qualifying and somewhat contrary view was voiced—namely that the assessor needed to respond to the needs of the presenting client and tailor the interview to avoid re-traumatising vulnerable clients. A vulnerable client might need indirect questioning to assist disclosure and avoid re-traumatising. In addition, victims stressed the importance of building rapport and trust with the assessing professional to enable them to feel confident to disclose. When commenting on the screening tool offered, some victims supported the presence of repeated questions about violence but suggested that a screening tool that was too long could be experienced as intimidating. It has been argued elsewhere that a lengthy family violence assessment can be time consuming and a burden on clients (Pokman et al., 2014).
Mediating in the shadow of family violence

Parental separation does not necessarily mean an end to violence, and for many women in abusive relationships, the separation phase is the time of greatest risk of partner violence and homicide (Beck, Walsh, Ballard et al., 2010; Campbell, 2005). The findings from the ESPS (Kaspiew, Carson, Dunstan, De Maio, Moore et al., 2015) described above, support the need for further improvement in the identification of family violence. Within the family mediation services, there have been ongoing concerns about whether clients with a history of family violence are able to negotiate on an equal footing, and a perceived threat of violence by the abusive partner may not be evident in the mediation process but may produce unfair agreements and endanger victims (Beck, Walsh, & Weston, 2006; Holtzworth-Munroe et al., 2010; Pokman et al., 2014). Research suggests that family violence is not always recognised by mediation practitioners (Johnson, Saccuzzo, & Koen, 2005; Kaspiew et al., 2009) and that even when it is recognised, appropriate actions aimed at creating or preserving safety are not always taken. Analysis of communications within court-based dispute resolution has found a disturbing pattern of marginalisation of allegations of harm by practitioners during mediation (Trinder, Firth, & Jenks, 2010). Practitioners and commentators continue to express concern about the high percentage of families presenting with disclosed problems of family violence (Bagshaw et al., 2010; Moloney et al., 2013). For instance, 90% of couples attending divorce mediation reported partner violence in one study and only about 7% of cases were actually screened out of mediation (Beck, Walsh, Mechanic, & Taylor et al., 2010).

It is not practical or desirable for all family violence cases to be screened out of FDR. The high prevalence of family violence would leave very few cases to be dealt with in mediation and place an unsustainable burden on court resources. One of the original proposed advantages of family mediation was that the process can yield better agreements for parents in dispute than a legal approach and one that is more equitable in terms of cost and timing (Beck & Sales, 2001). Given this high prevalence of family violence in the separating population, a more practical approach is to detect and discriminate between forms of family violence to determine which presentations can be safely and effectively referred to family mediation. Of course, this in turn requires a corresponding understanding of what forms of family violence render a case inappropriate for family mediation, and from the mediation perspective, what processes need to be implemented to ensure a family violence affected case can be safely and effectively dealt with in mediation.

Mediators need to use an assessment process that will discriminate between those family violence affected clients who cannot participate for reasons of safety or capacity (Bailey & Bickerdike, 2005) and those who can participate within a suitably modified process. Mediators also need to exercise considerable judgement when deciding how to accommodate a family violence affected client into the mediation process. Modifications within their repertoire include shuttle and video mediation, the inclusion of a support person for victims, lawyer-assisted processes, a co-mediation gender-balanced team, tight process controls, frequent separate sessions and many subtle and not so subtle adaptions to the process (Bailey & Bickerdike, 2005). In order to decide whether to provide mediation and then, if so, what type of service, mediators need to assess and understand the nature, extent and impact of family violence. Put simply, cases presenting to family mediation need to have their family violence status detected, the profile and history of any violence understood and the appropriate service or response designed and delivered to match their needs. This will lead to the screening out of cases deemed unsuitable because of the nature of the family violence experience.
Approaches to screening in mediation

A key factor in effective detection of partner violence histories among mediation clients is the availability of valid and reliable screening measures of the full range of family violence behaviours and patterns. This section will briefly consider international screening tools, before focusing on some of the Australian measures. The Revised Conflict Tactics Scale (CTS2) is one of the most widely validated measures, and assesses the extent to which specific acts of violence have been enacted by both of the partners (Straus, Hamby, Boney-McCoy, & Sugarman, 1996). To date, it has not been widely used in family mediation contexts. Subscales measure psychological aggression, physical assault, injury, negotiation and sexual coercion; however, the scale has been criticised for insufficient sensitivity to circumstances and context (Moloney et al., 2007). For instance, the psychological abuse scale does not adequately measure more subtle controlling behaviours and the consequences that may come with a coercive control pattern, such as those that engender fear and intimidation. These aspects are important when assessing appropriateness for couple interventions such as family mediation (Holtzworth-Munroe et al., 2010). As a result, it is common for researchers to modify the CTS2 to meet the needs of particular studies (Kimmel, 2002), or supplement the scale with additional measures of aspects of violence and the contexts in which they occur (Pokman et al., 2014).

Beck and colleagues developed the Relationship Behaviour Rating Scale (RBRS) to measure more differentiated aspects of coercive and intimidating partner abuse among couples participating in divorce mediation (Beck et al., 2009). The measure comprised 41 items with six validated subscales: psychological abuse, coercive control, physical abuse, threatened and escalated physical violence, sexual assault, intimidation and coercion. It was used to assess violence profiles in a large epidemiological study of divorcing couples attending mediation. Nearly all couples reported some form of coercive control and psychological abuse, and males were found more likely to perpetrate severely coercive patterns of partner violence. The RBRS was revised and further validated, confirming better discrimination of types of controlling abuse compared with the CTS2 (Beck, Menke, & Figueredo, 2013).

A small number of other instruments have been recently developed to screen for abusive behaviour in mediation settings, but have a number of limitations. The Domestic Violence Evaluation (DOVE) is a 19 item, interview-based instrument that assesses risk in mediation settings, but it has been criticised as excessively long and lacking detailed behaviourally specific questions (Beck et al., 2013; Pokman et al., 2014). Holtzworth-Munroe et al. (2010) developed another screening tool for mediation settings, the Mediator’s Assessment of Safety Issues and Concerns (MASIC), which contained seven subscales and was found to be easy and quick to administer. However, while MASIC asks participants about their partner’s behaviour, it doesn’t measure abusive behaviour by participants themselves against their partner.

Two recent Australian initiatives were the AVERT Family Violence: Collaborative Responses in the Family Law System (Attorney-General’s Department, 2010) and the DOORS Detection of Overall Risk Screen (McIntosh and Ralfs, 2012), which attempted to improve practices in relation to screening and responding to risks and harm factors in the family law system context. Both instruments are well constructed (see DOORS validation in McIntosh et al., 2016) and have received extensive promotion within the Australian family law sector; however, the Responding to Family Violence Study (Kaspiew, Carson, Coulson et al., 2015) found that, although there were some positive comments, 51% of the lawyers and 69% of the non-legal professionals participating in the study reported that they rarely or never used the DOORS tool. As mentioned above, qualitative data reported mixed views on the DOORS approach to screening and assessment and its workability in everyday practice. Some participants emphasised the utility of the client interview process and the significance of professional skill, knowledge and experience in identifying risks and harm factors in this context (Kaspiew, Carson, Coulson et al., 2015).

Effective screening should include strategies that enable victims to feel safe enough to disclose abuse experiences so the mediator may make appropriate decisions regarding the process of mediation and whether mediation should proceed (Bingham et al., 2014). Research indicates that when family violence victims are asked directly about abuse, are provided safety from the abuser and institutional control and are asked these questions by a person that they trust, they are much more likely to choose to disclose their abuse during screening (Spangaro et al., 2011; Bailey & Bickerdike, 2005). Accordingly, mediators may prefer to use interviews because of the opportunity they provide for rapport-building with clients (Holtzworth-Munroe et al., 2010). However, as
discussed above, some research has shown that when relying on semi-structured interviews, mediators miss a significant amount of family violence that is identified on standardised, behaviourally specific questionnaires (Ballard et al., 2011).

Beck and others (2011) found that when mediators used semi-structured interviews, about a third of the couples they identified as not having family violence reported on a questionnaire as having experienced threatening or escalating violence or sexual intimidation, coercion or assault. A study of a law school clinic found that although the director and mediators were confident they were detecting family violence through review of court files and interviews, among other methods, they missed about 50% of cases detected by a questionnaire (Holtzworth-Munroe et al., 2010).

Lessons from a recent study

In order to address some of these issues, the authors undertook a research project to examine the prevalence, types and severity of partner violence among separated individuals (n = 121) attending a number of family mediation services (Cleck, Schofield, Axelsen, & Bickerdike, 2016). The study examined the reliability and validity of both the widely used and validated Conflict Tactics Scales (CTS2) and three newly developed scales that measured additional aspects of interpersonal violence—Intimidation, Controlling and Jealous Behaviour, and Financial Control. Clients attending mediation were assessed along these dimensions at pre-mediation, post-mediation and six-month follow-up. The study also examined the prevalence and inter-correlations of various forms of partner abuse and included financial abuse as another form of non-physical controlling violence that involves preventing a partner from knowing about or having access to family income and controlling the victim’s ability to become self-sufficient (Hall et al., 2012). It was hoped that these findings may inform the development of more targeted screening processes as well as guide decisions about how to manage family violence affected cases within the family court, family lawyers and family mediation contexts.

The results of Cleak et al. (2016) confirmed that the CTS2 subscales of negotiation, psychological aggression and physical assault were highly reliable in a family mediation sample; and, more importantly, new scales measuring intimidation, controlling and jealous behaviour and financial control were found to have very good reliability and validity for abuse by partner, and moderate reliability and validity for self-reported abuse by the participant. Most clients disclosed a history of at least one type of violence by partner: 95% reported psychological aggression and 35% physical assault. Rates for violence against partner were 76% for psychological aggression and 17% physical assault. For the newly validated scales, 72% of partners were reported to demonstrate controlling and jealous behaviour, and 50% financial control. These data add to the limited empirical research that explores how financial abuse is interconnected with the other dimensions of family violence.

These three new scales measuring controlling behaviour by partner hold promise as screening measures in the family mediation context and may well have wider applications for couple interventions. The Intimidation scale contains six items that assessed the current and recent climate of fear, intimidation and domination by partner (“I feel dominated/intimidated by my former partner”, “I am currently afraid of my former partner”). The Controlling and Jealous Behaviour scale consists of seven items that assess the level of obsessive controlling behaviour such as monitoring and checking of activities, repeated false accusations of infidelity and limiting access to friends. The four-item Financial Control scale identifies whether one party restricted and controlled access to money. The utility of all these scales is enhanced by their brevity and by their robust internal reliability, and, as a result, may be able to meet the objective of providing an effective and discriminating yet “workable approach in day-to-day practice” for family law professionals.

For those assessed as family violence affected but appropriate for family mediation, the type and nature of family violence needs to inform practice decisions. Client scores on these measures directly address the issue of suitability for mediation because the variables measured are indicative of a victim’s consequent emotional and psychological state (“I am afraid and dominated”) and the suitability of their former partner (controlling, punitive and intimidating) to participate in a facilitative process. The measures also inform potential process modifications. Even shuttle mediation, in which clients do not meet, may not be sufficient to overcome current concerns of fear and intimidation, whereas past experiences of controlling money and restricting access to friends, without concurrent concerns about intimidation, may allow for mediation with a support person within mediation and legal support outside mediation. These relatively brief assessment tools provide
the mediator with a family violence profile to inform practice model decisions to enable family violence affected clients to safely and effectively participate (Bailey & Bickerdike, 2005).

A way forward

Clearly, screening and risk assessment processes must be designed to be user friendly and suited to the skills and expertise of the practitioner and the circumstances of the client. To this end, they must balance the need to be comprehensive and consistent, with the need to be sufficiently brief to enable the various types of practitioners in the family law and relationships services sector to incorporate them into their work. The process needs to be tailored to the purpose of the family law intervention and expertise of the practitioner (legal advice, family dispute resolution, family counselling, specialist family violence services) and responsive to the needs and circumstances of the presenting client. The screening and risk assessment process must also be designed to maximise the likelihood of disclosure. Research has shown that eliciting disclosure is more than simply asking the right questions (although, clearly, asking is a necessary first step that is too often absent). Clients may require persistent and direct questioning that is first accompanied by an explanation as to why the questions are important. Others may require a level of trust and rapport to be built with the practitioner before they are willing to disclose. Still others would prefer to complete a separate written questionnaire prior to interview and, when interviewed, reassurance that the process is safe and their partner is not present. Some may be fearful of disclosing or reluctant due to feelings of shame. Assessment will be further complicated by the psychological state of those who have been abused, who are likely to be traumatised and their emotional and cognitive functioning compromised. These complexities and, at times, contradictory requirements suggest that a standardised instrument is not necessarily suitable across all family law services.

Finally, screening and risk assessment processes must be able to discriminate between various types of family violence in order to inform service processes and outcomes. In FDR a practitioner must decide whether a family violence affected family is suitable for FDR or whether to provide a certificate that allows them to proceed to court. A decision whether to proceed to FDR must necessarily include complex judgements of the impact of the family violence on their capacity and safety to participate in the FDR process and the capability of the FDR process to adapt to accommodate any consequences of the family violence experience (shuttle mediation, gender balanced co-mediation team, support person for the victim, and safe environment). Similarly, family lawyers must also decide whether to refer clients to FDR, to other specialist family violence services and/or directly to court. These decisions can only be made if the assessment is sufficiently discriminating and the practitioner has the knowledge and skills to use the resulting information to make appropriate judgements.

Conclusion

Family violence is a common presentation within family law services. The majority of clients attending FDR are affected by family violence. It is the normative experience, not the exception; therefore, professionals working with separating couples and their families need to be looking for evidence of the absence of family violence, and to be suspicious and sceptical if they find none. Indeed, such a finding needs to be re-examined on a continuing basis throughout service provision as family violence can occur as a consequence of the experience of separation.

Family law clients must be screened and, it follows, that clients entering the family law system must all be assessed for a history of family violence. The prevalence of clients reporting that they were not asked about family violence is of concern. In addition to instructing
family law service providers to always assess for family violence, it might be interesting to consider what barriers might be inhibiting them from doing so. Some have argued that the tools are too burdensome and difficult to fit into day-to-day practice, or unsuitable to the client presentations they encounter. The assessment tools and processes must be tailored to fit the skills of the assessor and the type of service being provided. Some family law service providers are questioning whether a lengthy social science based, proceduralised approach is suitable for legal advisers (Kaspiew, Carson, Coulson et al., 2015). A one size fits all screening approach, while appealing for policy-makers, may not result in the desired outcome, namely that the maximum number of clients possible are provided with a safe and effective family law service tailored to their needs.

Disclosure is important but the findings of the ESPS suggest that simply asking about family violence may not elicit disclosure, with one third of family violence affected clients choosing not to disclose. Previous Australian research has produced similar findings (Keys Young, 1996; Bailey & Bickerdike, 2005). Non-disclosure clearly limits the service providers' ability to recommend safe and effective pathways for a client. While it is arguable that clients have a right to choose whether to disclose family violence, the barriers to disclosure require careful examination. Assessment processes must be designed in such a way as to promote safe and voluntary disclosure in contexts that facilitate appropriate supports and responses. Evidence suggests (Spangaro et al., 2011; Bailey & Bickerdike, 2005) that a number of factors will assist clients to disclose, including:

- an explanation of why disclosure is important;
- the development of a trusting relationship with the assessor;
- a thorough and sometimes repetitive approach to questioning that includes enquiry into all types of abuse and coercion;
- a process that is not burdensome in length;
- a safe environment without the presence of the abuser;
- a process that is sensitive to the emotional and psychological impact of abuse on the abused; and
- enough information that allows for tailored responses based on the outcomes of the assessment.

It might also assist some to complete an additional written questionnaire. These requirements suggest that the assessor needs to possess significant engagement skills and

the process needs to be adapted to respond to the circumstances of the clients and nature of the service sought.

Mediation screening processes must be exacting. Mediators need to apply an assessment process that discriminates between those family violence affected clients who cannot safely participate in FDR and those who can. The screening tools and processes must be capable of assessing safety and capacity to determine whether a victim is able to participate effectively and safely and what mediation process modifications must be implemented. To do this they must articulate a family violence profile that, in addition to physical and psychological abuse, examines issues of trauma, jealousy and control, emotional abuse, financial abuse and intimidation (Cleck et al., 2016). The assessment process should also determine whether the other abusing party can appropriately participate in mediation and what processes need to be enacted to ensure this occurs (Bailey & Bickerdike, 2005).

Future research and commentary must explore the success of screening processes to discriminate family violence profiles, and whether the mediation process modifications purported to respond to these profiles are indeed providing family violence affected clients with a safe and effective mediation process and outcome.

References

**Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)**


**Dr Helen Cleak** is Associate Professor at the School of Public Health and Social Work, Faculty of Health, Queensland University of Technology. Dr Andrew Bickerdike is Chief Executive Officer with Relationships Australia Victoria.

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Laying the guideposts for participatory practice
Children’s participation in family law matters

Kylie Beckhouse

The legal representation of vulnerable children is conceivably the most critical role played by lawyers in the family law system. Perhaps reflecting the importance of the role performed by these legal representatives for children’s best interests (called Independent Children’s Lawyers or ICLs) the last decade has seen a flurry of research around children’s participation from the perspectives of children, their families, academics and the legal profession.

The genesis of this article was a study tour undertaken to examine child legal representation schemes in North America, Canada and the United Kingdom in 2014 on a Churchill Fellowship. The resultant report described developments and initiatives taking place internationally and made recommendations to improve approaches to child legal representation in Australia (Beckhouse, 2015).

This article draws on some of the themes from that report as well as practical challenges around participatory practice in Australia. It considers how children’s voices in family law court proceedings are heard, analyses different approaches and attitudes to an ICL’s engagement with a child, identifies some structural impediments that may inhibit participatory practice, and outlines some enhancements that could be made to improve children’s participation in the Australian family law system.

It argues that while greater awareness of participatory practice has been achieved, there are challenges posed by children’s participation for both ICLs and courts that remain unresolved. Behind the surface of cases, that at face value appear to be limited to a narrow parental conflict, lie a complexity of issues and needs. Often this sees a child rights doctrine on a collision course with the need for a more individualised approach to child participation.

It is argued that reform has the potential to improve the experiences of children in the family law system. However, change needs to be informed by more research to assist people working in the family law system to better understand what processes and practices
improve children’s experiences and when and how they should be employed.

How are children’s voices heard?

Article 12 of the United Nations Convention on the Rights of the Child (UNCROC) obliges Australian courts to facilitate the participation of children in proceedings relevant to their care and to ensure that their views are heard. This has been incorporated into the objects and principles of the Family Law Act 1975 (Cth) (“the Act”) at section 60B (4).

In parenting proceedings under the Act the views and voice of the child can be facilitated via two principal methods. A child may meet with an expert social scientist, who prepares a child and family assessment. In addition, they might have an Independent Children’s Lawyer (ICL) appointed to represent their best interests. In 2015–16 there have been approximately 4,800 cases across Australia that have benefited from the participation of an ICL. It is estimated that each year Legal Aid Commissions across Australia engage almost 550 Independent Children’s Lawyers to undertake this important work (National Legal Aid, 2016).

Research conducted by the Australian Institute of Family Studies (AIFS) on Family Law Court filings (Kaspiew, Moloney, Dunstan, & De Maio, 2015) tells us that the proportion of contested parenting matters filed in family courts involving families with complex needs increased over a nine-year period. This includes a significant number of parenting matters where there is a combination of family violence, child abuse, drug and alcohol dependency and/or serious mental illness. As the complexity of the subject matter has increased, so has the number of ICLs appointed to represent children in contested cases involving a combination of these risk factors.

In 2013 a report from AIFS on the use of ICLs in the family law system (Kaspiew et al., 2014) found that the ICL’s role is a multi-faceted one with three principle aspects: to facilitate children’s participation (the participatory function), to gather evidence and to manage the litigation and play “honest broker” by bringing a child focus to proceedings (see pp. 29–31). The report also found divergence in practice amongst ICLs around Australia, particularly in terms of meeting children. But, importantly, it found that the area where practice is most variable and contested is in relation to the function of supporting child participation (Kaspiew et al., 2014).

The AIFS ICL study perhaps confirmed the conclusions of other Australian research conducted in the decade before. In 2008 Cashmore and Parkinson undertook a study of lawyers to understand how children are heard in family law proceedings. They found that while lawyers were supportive of children’s participation, they often viewed it as risky (Cashmore & Parkinson, 2009). The lawyers in their study also expressed a desire to protect children from parental conflict and the burden of the responsibility for making decisions (Cashmore & Parkinson, 2009). Ross (2012), who undertook empirical research into the practices of children’s lawyers in NSW, concluded that a discourse on children’s participation was in its infancy in the family law courts.

In 2012, at the same time that the AIFS research on ICLs was commencing, 150 child representatives, judges and social scientists gathered in NSW to consider, for perhaps the first time, their practices around child participation in the family law and child protection legal systems. Four years on (and four child representation conferences later), there have been many state and national initiatives aimed at awareness-raising and at improving the participatory practices of ICLs. In 2011 the Legal Aid NSW’s Best for Kids website (www.bestforkids.org.au) introduced legal information, videos and brochures to provide children and families with access to resources on family separation and the role of ICLs. The participation of children in family law processes (aimed at the development of a more informed discourse on participation) is a recurring theme of training programs and conferences. The most recent initiative is a national ICL website (www.icl.gov.au), which was launched in 2016. The website importantly provides ICLs across Australia with access to high quality resources (including social science content provided by AIFS), forums, news, training and access to mentoring. The website also allows members of the public to access a range of new national resources on the role of ICLs.

However, changing the long-standing practices of lawyers around children’s legal representation remains a challenge. And one of the reasons cited for this is a lack of more direct and practical guidance as to how the participation function ought to be undertaken by legal professionals (Bell, 2015).

Why don’t ICLs always meet with the child?

Although ICLs are required to meet with the children whose interests they represent...
Changing the long-standing practices of lawyers around children’s legal representation remains a challenge, and one of the reasons cited for this is a lack of more direct and practical guidance.

(and are paid to do so) there is a discretion attached to this. The Act (sections 68L, 68LA and 68M) provides legislative direction about the role of the ICL, and Guidelines for Independent Children’s Lawyers (“Guidelines”; Family Court of Australia, 2013) provide even greater detail on expectations. Part 6 of the Guidelines instructs the ICL to meet the child unless “the child is under school age or there are exceptional circumstances, for example where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child” (p. 6).

It is important to pause and consider the application of the term systems abuse to ICL practice at this juncture. As public awareness about the complexity of child abuse was emerging in the 1990s, the scope of the ICL role was being defined in both case law and through the development of national guidelines. James (1994), writing on the prevention of child abuse and neglect at this time, observed a heightened legal and academic discussion as to what parameters child abuse included. Cashmore, Dolby, and Brennan (1994), in the same year, introduced into the discourse the term “systems abuse” defined as:

harm done to children in the context of policies or programs that are designed to provide care or protection. The child’s welfare, development, or security are undermined by the actions of individuals or by the lack of suitable policies, practices and procedures within systems or institutions. (p. 10)

The Guidelines (Family Court of Australia, 2013) arguably have expanded the 1994 Cashmore et al. definition, now describing systems abuse as occurring when “a child is further traumatised by the systems (courts, child protection or other State Welfare Authority), which he/she encounters or which are appointed to make decisions about the child” (p. 17).

While the term “systems abuse” does not appear in the Act, the notion seems to be endorsed by section 68LA (5)(d), which obliges the ICL to endeavour to minimise the trauma to the child associated with proceedings.

Notwithstanding the many measures introduced to improve the participatory aspect of ICL practice, my personal experience is that some ICLs cite the possibility of systems abuse as a reason why they have not met with a child. And as the volume of parenting matters involving families with complex needs has increased (Kaspiew et al., 2015) the “exceptional circumstances” referred to in Part 6 of the Guidelines has arguably become the ordinary circumstances of many matters in which an ICL is appointed.

My observation is that the factual circumstances of cases where systems abuse is raised as a concern are varied but fall roughly into three groupings.

1. Repeatedly interviewing a child can cause trauma

In matters where there are allegations of abuse or risk of harm, through the swinging doors of the conflict arrive a variety of professionals tasked with investigating or reporting on the child and family; doctors, child protection workers, police, hospital staff, psychiatrists, social workers, therapists, school counsellors, teachers, family consultants and the ICL. In these situations the ICL might argue that it is better to avoid seeing the child, as multiple interviews could be both confusing and traumatic for them.

Recently, an ICL (whose practices were incidentally under investigation) advised that he had not met with the subject children before the final hearing because there was no evidence to suggest that their views had changed since his meeting with them eight months prior. His concern was the potential for "systematic abuse". To be clear, I don’t endorse the view, but it demonstrates the impact the term can have on the participatory practices of ICLs.

2. To meet will potentially contaminate the evidence

In matters involving allegations of violence or child abuse, some ICLs express concern about meeting with children because (in the event that the allegations involve actions that could lead to criminal proceedings) there is potential for the evidence to be contaminated.

3. Involving a child intimately in the decision-making is a form of abuse

Some ICLs have expressed a concern that meeting with a child could be tantamount to systems abuse (Ross, 2012) because the child will become intimately involved in the decision-making. It is argued that the child should not be drawn into “choosing sides”. In doing so, they could be subject to pressure or manipulation by a parent thereby perpetuating the trauma and creating loyalty conflicts and anxiety. Ross (2012) described the ICLs that she observed expressing similar sentiments as taking a “protectionist” stance in their representation as a way of insulating the child from the conflict.
Should an ICL have direct contact with a child in all cases?

Recent studies and enquiries involving children in the family law system have highlighted a need to question current approaches and attitudes to children’s participation. No more powerful argument can be found than in the case of Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens 2016. At the age of 17, Grace Cuzens reflected in an open letter to coroner Barry King that:

The Family Court of WA has been a part of my life as long as I can remember. My parents separated when I was a toddler and were both actively involved in the Family Court until 5 December 2011. It ended only because I lost my sisters and my mother.

Throughout this period of my life, from 2001 when I was 3 years old to 2011 when I was 13 years old, I was interviewed by more social workers, counsellors and psychologists/psychiatrists than I can recall, had inconsistent contact (and sometimes no contact) with my father and was placed in the care of my mother who loved me greatly but could never separate herself from the Family and Supreme Court cases. My overall experience of the Family Court has been one of immense negativity, distress and trauma. (Clarke, 2016, “Grace Cuzens’ Statement” paras 1–5)

While the tragic outcome of her case is thankfully extreme and rare, the course the proceedings took and the issues raised are alarmingly common. The prolonged litigation involved family violence, allegations of child sexual abuse, mental health issues and changes of residence. In his judgement, Chief Judge Thackray observed:

Grace’s letter is a plea for all children involved in Family Court proceedings to have someone independent to talk to them about what is happening in the proceedings and to be their voice. This is one of the reasons the court appoints an independent lawyer to represent children where there are serious allegations of abuse. (para. 41, p. 8)

ICLs should by now appreciate that a lack of direct contact with a child may increase stress levels and lead to a lack of faith and trust in the court system. Indeed the ten children interviewed in the AIPS ICL study were all involved in family law proceedings where their safety was in issue (Kaspiew et al., 2014). They described expectations of the ICL listening to them, protecting them, advocating for them and helping them. Some wanted to see the ICL several times, and were dissatisfied with only one meeting. For most of these children their expectations about the role of the ICL were not met.

When Neale (2002) undertook research with 117 children about their post-separation arrangements she reported that for those in the cohort who had experienced neglect or disrespect:

Specialist support, an independent voice and legal representation were seen as crucial to a child’s wellbeing. Children will clearly assert their rights to self-determination where their family relationships are oppressive or abusive. (p. 469)

Neale’s commentary is consistent with Parkinson and Cashmore’s (2008) findings that children want to participate to a greater extent where violence or abuse is a feature of the case. Interestingly, the application of the systems abuse doctrine to participatory representation practices seems to be an Australian phenomenon that is absent from practice discourse in the USA, Canada and the United Kingdom. In America, formal training and specialist accreditation for children’s legal representatives is delivered with the assistance of a seminal text edited by Duquette and Haralambie (2010), referred to as the “Red Book”. Two chapters of the book are devoted to the topic of working with child clients. On this topic the Red Book notes that many child clients will have had prior involvement with courts or government bodies:

These prior encounters may have been unpleasant or even traumatic for the child, leaving the child with a distrust of adults in the system. Knowing this, and approaching the representation of the child client with consideration of his or her past and/or concurrent involvement in other matters, will help the attorney establish the trust necessary for a positive attorney–client relationship. (Duquette & Haralambie, 2010, pp. 111–112)
The Red Book makes no reference to “systems abuse”—quite the opposite in fact. It refers to the “heightened duty” that a child representative has to ensure that their client understands the relevant issues, and notes that representation “starts with really listening to the child and understanding the short term and long term consequences of any positions taken on the entire fabric of the child’s life.” (Duquette & Haralambie, 2010, p. 122)

Can child representation practices traumatise children any further?

The AIFS ICL study proposed that when child representation is done badly, it has the potential to further traumatise a child (Kaspiew et al., 2014). But this begs the question of what good practice for an ICL looks like. Accepting that at a minimum an ICL is obliged to meet with all children to explain the legal processes they are involved with, a more challenging aspect of good ICL practice is determining what level of participation is appropriate for the child. Meeting a child empowers the ICL to manage the litigation in a way that focuses on the child’s best interests.

If there is a risk that participation could be distressing or detrimental to the child, a good ICL will put in place a case plan to manage that risk. But challenges generally arise in cases involving children who have rejected a parent or who resist spending time with that parent. They are often angry children who take a rigid approach to the deficiencies of the other parent. They are uncomfortable with a best interest model and seek access to processes that allow them to directly participate. They are often the outspoken critics of the family law system who argue that their experience was a poor one.

For these children, working out the best approach to representation is difficult. And arguably an assessment of what is needed is the task of a social scientist, not a lawyer. While ICLs seek out good referral sources for therapeutic intervention, therapy is generally not what the child is seeking. It can also be dangerous—especially where abuse allegations are made or surface during the assessment process (as they often do). Altobelli (2011) argues that for some of these children participatory practices make therapeutic intervention potentially more difficult:

To give a voice allows them to “buy in” to this potentially harmful process, or to “take sides”, and to engage in the “tribal warfare” that so typically occurs in these cases. (p. 197)

Child representatives in Ontario, Canada, have developed their approach to child representation with some of these concerns in mind. Their child representatives are expected to listen to the voice of a child contextually over several meetings when first appointed. It is a three-pronged process called the “contextual approach” and it is said to avoid the paternalistic or “protectionist” lawyer who says something like “she said ‘X’ but I know what is best for a child of this age”. McSweeney and Leach (2011) who champion this model argue that “advocating uncritically the influenced and manipulated views of children is unhelpful and irresponsible” (p. 15).

But this should not be read as justifying a decision to not meet with the child. In my experience this approach inevitably leads to high levels of dissatisfaction and anger on the part of the child. This is supported by the data from interviews with children participating in the AIFS ICL Study, which reported that the lack of meaningful direct contact from ICLs caused disappointment and a lack of faith in the family law process. Bell, undertaking a literature review of practices and approaches to child representation, concluded that to fail to even meet with a child at a minimum “may further silence and disempower children” (Bell, 2015, p. 39).

Greater participation in court processes

The question of judicial meetings with children tends to polarise views amongst professionals in the family law system. The practice is rare
in Australia (Fernando, 2013), in contrast to the more regular participation of children in courts throughout the USA, Canada and the United Kingdom as observed during my study tour (Beckhouse, 2014). Instead of judges, Australian family courts use ICLs and report writers (such as family consultants) to facilitate the involvement of children and ascertain their views. And there is a range of practical measures that can be used to ensure that children understand the manner in which their views are considered by a judge. Recently, a child represented by an ICL from Legal Aid NSW asked for a letter of advice on our role and the practical operation of the best interests principle. While not usual practice, the ICL did provide the letter and developed a highly participatory relationship with the child. Another colleague arranges for children to tour a family law court complex before a final hearing. While the process is done without the involvement of a judicial officer, it is an example of another participatory practice that can provide children with a better understanding of court processes, and may lead to them having greater confidence in the family law system.

Research with children (Kaspiew et al., 2014; Parkinson & Cashmore, 2008) suggests that children may feel that they have had their views acknowledged if they are afforded the opportunity to visit the court and/or meet the judge. And, from practical experience, there are cases where judicial meetings with children should be considered as another valuable way of involving them. This is a position advocated by Justice Benjamin (2012) of the Family Court of Australia who argues:

It is not a panacea and is not useful in all cases, but it seems to me to be an effective tool in some parenting proceedings. (p. 107)

While the Guidelines provide ICLs (and the family law system more broadly) with valuable direction as to their role, the same cannot be said for the existence of guidance around judicial meetings with children in Australia. In order to manage the expectations of children meeting with judicial officers, an important consideration may be providing a clear explanation of the manner in which these views are to be considered and the role that they play in the decision-making process. In the USA, Canada, the United Kingdom and New Zealand, the involvement of children is supported by guidelines promulgated to give some direction on the participation and attendance of children in family courts (Beckhouse, 2015). These guidelines articulate the purpose of the child's attendance, but they also guide all the participants, reducing judicial discretion and arguably leading to a greater comfort in the process.

Drawing on international approaches and her own survey of the attitudes of judges in Australia, Fernando argues that guidelines giving direction on how judicial meetings should be conducted are a “logical step” (2012, p. 215). Whether you support the practice or not, the development and adoption of guidelines on how and when judicial meetings with a child should be conducted in Australia are overdue.

New resources for ICLs have been greeted enthusiastically from many in the family law system, especially the children represented. But there are more significant movements in the form of national forums and committees focused on system-wide improvements. In South Australia, they will soon commence trialling a Young Peoples Family Law Advisory Group. This is another emerging form of participation for children in the family law system via feedback processes such as children's reference and advisory groups where children are directly involved in providing feedback about their experiences. Hearing the views and experiences of children in the family law system can only serve to improve our approaches.

Reform

As the previous sections have highlighted, while ICLs accept the important participatory role that they play, there is some confusion and tension brought about by the current framework. This is supported by the AIFS ICL Study and leads Kaspiew et al. (2014) to conclude:

engaging with children and young people may have a participation-related purpose or a forensic purpose: there is some tension in this area that leads to a lack of clarity in practice about the role, purpose, function and impact of ICLs having direct contact with children and young people. (p. 32)

More research is needed to better support ICLs and help strengthen our ability to provide appropriate and responsive models of practice. Ideally, that research would consider whether the current Guidelines and the legislative framework are promoting the appropriate level of participation of children in family law processes, as well as promoting community confidence in the family law system more broadly.

In international jurisdictions the requirement that a lawyer meets with a child is often legislated (see e.g., section 6, Care of Children Act 2004, New Zealand, and Colorado Children's Code, C.R.S Title 19). While different jurisdictions understandably adopt diverse approaches to
representation, most are able to articulate clear expectations about their processes for meeting with children. Often this includes frequency, location, who is to be present, how old a child should be to order a meeting, how soon after the appointment a meeting should occur, and ongoing contact (Beckhouse, 2015).

There is a risk that section 68LA (5)(d) of the Act (which requires the ICL to endeavour to minimise the trauma to the child associated with proceedings) inadvertently acts as a further barrier to participatory practice for the reasons outlined earlier. It is time to consider whether section 68LA should impose a duty on the ICL to meet with the child, similar to the compellability created by section 9B(2) of the Family Courts Act 1980, New Zealand.

Section 60CC(3)(a) of the Act places a legislative imperative on family courts to consider a child’s views but there is no requirement to address the reasons why orders would be made contrary to those views. In a contested matter, this can be addressed in a judgment. But as we strive for more participatory frameworks we should also consider other approaches such as judgments written for children or letters. Judge Altobelli did this recently in the case of Gaylard & Cain (2012) when he commenced his reasons for judgment with the words:

Dear X and Y,

After your mum and dad separated they could not agree about where you were to live. You were 10 and 6 at the time. As a judge it was my job to make this decision. I had a lot of help from the lawyer who was representing you, and each of your parents, as well as an expert child psychiatrist. Even with all of this help it was a hard, sad case to decide. This letter is to try to explain my decision to you, even though you probably won’t read it for many years. (p. 1)

The failure of judges to give reasons when making orders contrary to the views of a child is raised occasionally by ICLs frustrated that parents have reached a settlement that conflicts with a child’s express wish. Perhaps a solution to this should be considered in the context of a more participatory framework.

In addition to the adoption of guidelines or procedural documents on judicial meetings with children, representative bodies in family law systems internationally have promulgated charters to support child inclusive and participatory practices in their systems. For example, in the United Kingdom, the Family Justice Young People’s Board produced a “National Charter” (2014) and, in the USA, the “Children in Court Policy Statement” (2012) was adopted by the National Council of Juvenile and Family Court Judges. The time has arrived for the Australian family law system to develop a set of principles to guide decision-making about the participation of children in legal processes. While the extent of a child’s participation should be determined on a case-by-case basis, guidelines need to be developed and refined to inform our approaches. These guidelines should articulate appropriate procedures to ensure that children are allowed to participate in a safe, transparent and child-inclusive manner.

A “best interests” approach to child representation

Tobin (2012) argued that “children’s rights can no longer be dismissed as a marginal consideration reflecting the utopian aspirations of international law” (para. 9). And he is right. However, we have to also ensure that any discourse on children’s rights in the context of ICL practice does not overlook the importance of designing a model of representation that is appropriate for each particular case, and one that respects the individual child’s own ability and willingness to participate.

A child’s perspective on the extent to which their participation was facilitated, is very much dependent upon the relationship that they develop with the ICL, their experiences with a range of professionals in the family law system and the capacity that an ICL has to use creative and occasionally innovative mechanisms to involve them in the process. There is no textbook to guide this, and there can’t be. The ongoing development of resources, training and support mechanisms are useful, however, and a vast improvement on previous approaches.

Case representation, in a similar way to case management, depends on the individual circumstances of a case. However, this analysis of the participatory practices of ICLs and the challenges we face hopefully serves to highlight the gaps in our knowledge. Partly due to these gaps, Legal Aid NSW is currently participating in a research project with children about their experiences and feelings of meeting with ICLs. We hope to gain a better understanding of what ICL practices work best for the children we represent.

But more research is needed, particularly of the experience of children from families where there are allegations of family violence, child abuse, parental rejection and/or mental illness. Such research would allow us to better understand the validity of the notion of systems abuse in child representation practice. It would also allow us to consider whether there should be different models of representation or case
management approaches depending on the type of conflict, or perhaps more appropriately, the child’s wishes.

Over the last 5 years, the family law system has travelled a long way down the road of participatory practice. Now is the time to lay down guideposts to ensure that these practices best support the children who come into contact with the family law system.

Endnotes
1 The term “family courts” is a collective name used to describe the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia.
2 Personal communication, name withheld.

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Kylie Beckhouse is the Director of Family Law services at Legal Aid NSW and manages the largest ICL practice in Australia. She is an Accredited Specialist in family law and an independent children’s lawyer. In 2014 she travelled widely with the support of the Winston Churchill Memorial Trust to report on child representation schemes internationally and acknowledges the Trust for their support. The views expressed in this article are personal views that do not necessarily reflect those of Legal Aid NSW. The paper draws on material from the author’s Churchill Report.
The Family Law DOORS (FL-DOORS) is a whole-of-family, first level risk screening framework designed for use across the family law sector. It was released in Australia in March 2013. During the summer of 2013–14, the Australian Institute for Family Studies (AIFS) surveyed the sector about its use and views of FL-DOORS, as part of a broader evaluation of the 2012 family violence amendments. AIFS published the findings in October 2015 in the Responding to Family Violence Report (RFV) and concluded, “At this stage, there is evidence of limited take-up of the FL-DOORS risk assessment tool in the family law system and some participants held concerns about the implications of its use in legal settings” (Kaspiew, Carson, Coulson, Dunstan, & Moore, 2015, p. xx). The data published in the RFV were sourced more than 30 months ago, and when read alongside other comments in the RFV, may give the impression that FL-DOORS failed to reach its potential. Here we provide a series of updates on current use of and research with the FL-DOORS, referring to data from over 7,200 cases. We restate the rationale of FL-DOORS and address specific critique about the framework reported in the RFV. We consider the possibilities of universal screening in the family law sector, including the place of the Family Law DOORS as the only validated whole-of-family risk screening tool, applicable across the whole family law system.

**Background**

The Australian Institute for Family Studies (AIFS) conducted a wide-ranging review of the 2012 Family Law Act amendments, analysing the impact of the increased legislative emphasis on family safety (Kaspiew, Carson, Dunstan, Qu et al., 2015). Components of the review include the Responding to Family Violence Report (RFV, Kaspiew, Carson, Coulson et al., 2015), incorporating an online Survey of Practices (SOP) with family law professionals; and the Experiences of Separated Parents Study (ESPS, Kaspiew, Carson, Dunstan, De Maio et al., 2015). Drawing on the SOP, the RFV reported that despite widespread practitioner confidence in their own risk screening practice, “close to 30%
of parents ... reported having never been asked about [family violence and safety concerns]” (Kaspiew, Carson, Dunstan, De Maio et al., 2015, p. xviii). One repeated conclusion in the report was that, “implementation of consistent screening approaches has some way to go” (Kaspiew, Carson, Dunstan, De Maio et al., 2015, pp. xix, 133, 189). In this context, AIFS asked the SOP respondents about their use of and views on the newest risk-screening framework in Australia, Family Law DOORS (Family Law Detection Of Overall Risk Screen [FL-DOORS]).

The Family Law DOORS: Description and update

FL-DOORS (McIntosh & Ralfs, 2012a) is a three-part screening framework. It was designed to support all professionals in the family law system to identify, evaluate and respond to safety and wellbeing risks in separated families. Uniquely, FL-DOORS screens for both violence victimisation and perpetration risks. It also appraises infant and child developmental and safety risks.

Given the data reported in RFV predate significant growth in FL-DOORS’ use, detailed below, we provide an up-to-date synopsis of its application and efficacy. FL-DOORS is the first externally validated instrument of its kind, tested on a pilot sample of over 600 cases (McIntosh, Wells, & Lee, 2016), demonstrating excellent scale properties and, importantly for practitioners, predictive reliability against external, objective indices of risk. Validation and reliability of the screening tool have now been replicated and extended, on a sample of more than 6,500 cases (Wells, Lee, McIntosh, in preparation).

The FL-DOORS whole-of-family screening system is now used universally in all family law services operating within Relationships Australia, South Australia services. It is used widely in several other Australian relationship services and law firms, and is under pilot in at least three other countries (Norway, Sweden and Singapore) and in several states in the USA. Current use and utility of FL-DOORS has certainly changed from the picture painted in the Survey of Practices reported in the RFV.

Comments on AIFS survey methodology

The accuracy and utility of any set of survey findings rests on a study’s methodology, and findings need to be understood in that light. Aside from now being dated, views presented in the RFV about FL-DOORS reflect aspects of the methodology used to derive respondent reports. We briefly explore the context of the Survey of Practices data collection below, and the resultant impact on the RFV findings.

Survey findings reflect their informants’ expertise

SOP survey findings pertaining to use of FL-DOORS are from 259 legal and 236 non-legal professionals. Seventy-eight practitioners who used FL-DOORS provided comments on how they implemented the tool. These samples are a small proportion of the nearly 2,000 registered family dispute resolution practitioners in Australia,1 2,500 lawyers registered with the Family Law Council’s Family Law Section,2 and an even smaller proportion of the wider array of Australia’s 60,000 lawyers, 31,000 psychologists,3 and para-legal and allied practitioners whose practices concern family separation (and are therefore concerned with family safety and the family violence amendments).

While the overall RFV sample was targeted to informants who could reliably address the broader impacts of the amendments, it is not equally apparent that these participants were reliable informants about screening, or about FL-DOORS. Over half (53–54%) of those surveyed “could not say” whether the reforms had led to an improvement in screening (Kaspiew, Carson, Coulson et al., 2015). Eighty-eight per cent (88%) of those who commented on FL-DOORS reported either never or rarely having used it (59.4%), or “could not say” if they had used it (28.3%).

There are limitations in relying on reports from a sample with little experience of the pertinent issues. Though the RFV report does not present this as a representative sample, it is nonetheless presented as representing the sector. Later in this article we contrast the findings of this report with similar results from an organisation (Relationships Australia, South Australia) that has commenced use of FL-DOORS for universal risk screening.

Survey findings reflect what is asked

Among many questions, SOP participants were invited to provide “self-assessments of their current practice approaches” (Kaspiew, Carson, Coulson et al., 2015, p. 7) including being asked, “Are you using the Family Law Detection of Overall Risk Screen (DOORS) tool?” The question response options did not distinguish those who hadn’t yet tried it from those who didn’t know what it was, or from those who had tried the tool and opted not to use it. As
Table 1: FL-DOORS usage in RASA May 2016 compared to RFV respondent usage December 2013–February 2014

<table>
<thead>
<tr>
<th>Are you using FL-DOORS? How often?</th>
<th>RFV lawyers (%, n = 259)</th>
<th>RFV non-legals (%, n = 236)</th>
<th>RASA practitioners (%, n = 29)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>Not asked</td>
<td>Not asked</td>
<td>69.0</td>
</tr>
<tr>
<td>Almost always</td>
<td>1.9</td>
<td>5.1</td>
<td>24.1</td>
</tr>
<tr>
<td>Often</td>
<td>5.4</td>
<td>2.1</td>
<td>6.9</td>
</tr>
<tr>
<td>Sometimes</td>
<td>6.6</td>
<td>3.4</td>
<td>0.0</td>
</tr>
<tr>
<td>Rarely/never</td>
<td>51.0</td>
<td>68.6</td>
<td>0.0</td>
</tr>
<tr>
<td>Cannot say</td>
<td>35.1</td>
<td>20.8</td>
<td>0.0</td>
</tr>
</tbody>
</table>

The accuracy and utility of any set of survey findings rests on a study’s methodology, and findings need to be understood in that light.

Given the FL-DOORS release closely followed the 2012 amendments, the SOP focused exclusively on practitioner attitudes to this framework. Participants were asked to list other screening methods they were using, but not to compare, contrast or otherwise comment on utility relative to FL-DOORS or other methods. A question first asking participants to nominate the risk framework they used, then asking them to comment on its drawbacks and merits, would have resulted in different information.

Survey findings are of their time

Findings from the SOP reflect the earliest uptake of FL-DOORS in late 2013–early 2014, during the first months following initial dissemination of the handbook (McIntosh & Ralfs, 2012b) by the Australian Government Attorney-General’s Department. At that time, the field necessarily had limited familiarity with the framework. Other than a half-day seminar program provided by the Family Law Section of the Law Council of Australia in late 2013, neither marketing nor in-person training had commenced. The online training program created by Relationships Australia, South Australia (RASA)3 was launched later in 2014, and subsequent training workshops and presentations have been conducted throughout Australia and overseas.

Given all FL-DOORS users in SOP were “early adopters” with limited experience in applying FL-DOORS, a future survey might also address growth in practice over time. Such insights seem directly relevant to the AIFS Research Questions about changes in practice since the 2012 amendments, yet are largely unaddressed by the 2015 report.

Contrasting example of a universal roll out of FL-DOORS

In contrast to the SOP sample and context, RASA has employed FL-DOORS in universal screening practices since 2013 in all its family-law related services. FL-DOORS was developed over many years in collaboration with RASA, the largest provider of relationship services in South Australia. The developers were later commissioned by the Attorney-General’s Department to refine and roll out the tool nationally.

RASA represents a large service community with the most organisational experience in the use of the FL-DOORS in Australia. In this light, its lessons learned about the development of a practice culture supportive of universal risk screening are instructive. To support roll out, RASA combined practitioner training in universal screening with new infrastructure support, internal and external supervision, and post-implementation feedback to staff. During roll out, RASA researchers explored the effects of FL-DOORS implementation with 29 experienced post-separation practitioners (mostly mediators), in an anonymous survey, using the same question about FL-DOORS usage reported in the RFV (Kaspiew, Carson, Coulson et al., 2015) with the addition of an “Always” response category in anticipation of standard practice, to explore full variation in response. Table 1 shows the results.

While the RASA sample is smaller in absolute numbers than the SOP sample, it represents 83% of eligible post-separation practitioners at RASA, in 2016. The culture at RASA is important to understand. The numbers simply illustrate the difference that time makes, together with
a facilitating organisational environment, and a carefully managed process around the introduction of universal screening. Screening is not an administrative impost at RASA, but a universal process of supportive engagement with clients around noticing family safety and wellbeing. It is a service culture in which the benefit of early screening is offered to all clients, rather than a hierarchical imposition for practitioners to screen. As a consequence of this approach, there is high participation in screening. Between June 2012 and August 2016, RASA post-separation clients have completed over 7,200 FL-DOORS.

Responding to RFV reported concerns about FL-DOORS

RFV reported qualitative comments from SOP participants including concerns about FL-DOORS structure or methodology, which may have held them back from trialling it (Kaspiew, Carson, Coulson et al., 2015). We address the main concerns below.

Complexity and length of FL-DOORS

RFV cited a number of individual concerns about the complexity and length of FL-DOORS (Kaspiew, Carson, Coulson et al., 2015). Some background here is relevant. A full DOOR 1 contains 10 domains, with a total of 109 “yes/no” questions, and takes about 15 minutes to complete using paper and pencil or computer methods. The 10 domains in the DOOR 1 tool synthesise a large amount of complex information about the prior and current safety of infants, children, parents, victims and perpetrators, and allows that some domains may not be relevant for all clients. (For example, clients without infants would not complete the infant domain. As elaborated by McIntosh, Wells, and Lee (2016), the FL-DOORS was designed to reliably indicate these complex whole-of-family domains, using a minimum number of well structured questions, to avoid under-reporting violence risks (see Ballard et al., 2011; Pokman et al., 2014).

There is no padding in FL-DOORS. Of all items, 64 questions form 11 reliable scales (McIntosh, Wells, & Lee, 2016). The other 45 questions offer useful background information (“Who initiated the separation?”) or potentially crucial, isolated information (“Do you have access to a gun or weapon?”). FL-DOORS also offers many shortcuts. For example, McIntosh, Wells, and Lee (2016) found that its screening scales of infant, child and adult mental health risks, while very brief, have concurrent validity with the much longer gold standard measures in each domain respectively (BITSEA: Briggs-Gowan, Carter, Irwin, Wachtel, & Cicchetti, 2004; SDQ: Goodman, 1997; and K-10: Kessler et al., 2002).

It’s hard to imagine a quicker process or shorter tool, given the breadth and complexity of the territory covered.

Screening or assessment?

Some comments from SOP participants, like many in the field, suggested confusion between the concepts of screening and assessment, specifically attributing the function of assessment to the FL-DOORS (e.g., p. 62–63, p. 63–64). Beyond semantics, these distinctions are important, as articulated in public health domains. For example, faecal blood screening is now universal, but a colonoscopy is an assessment that only follows when risks are indicated. Many potentially life-saving assessments are triggered by identification of minor symptoms. Equally of comfort, those without symptoms are not required to undertake invasive procedures.

DOOR 1 is a structured screening tool, designed to identify antecedent and immediate factors associated with spiralling mental health and family violence risks. Risk assessment practices are different. The FL-DOORS framework (McIntosh & Ralfs, 2012a) explicitly separates screening from risk assessment, foreshadowing subsequent best practice recommendations from the Association of Family and Conciliation Courts (AFCC, 2016), which also reinforce the differences between screening and assessment, and the need for both. In FL-DOORS, DOOR 1 is the universal, structured risk screen that provides a DOOR 2 report, which then supports the practitioner to elaborate on red flag areas with the client, and to decide if detailed risk assessment is required. Crucially, only when a client screens positive at DOOR 2 for a risk do practitioners then assess that risk in detail.
If needed, DOOR 3 provides resources for assessment. This stepped approach through each metaphorical door with its metaphorical screen means that “doing FL-DOORS” is only as detailed or as lengthy as it needs to be for each client. Moreover, FL-DOORS makes it possible for screening to be available at each point of entry into the family law system, and indeed to be a shared responsibility across legal and social sectors.

**Structure and flexibility in screening**

While DOOR 1 is highly structured, DOOR 2 is highly flexible and DOOR 3 gives considerable scope for divergence in assessment practice. There is nothing to prevent a practitioner from using the FL-DOORS framework within a “process of semi-structured interviews” or within a conversational approach to screening, as mentioned in RFV (Kaspiew, Carson, Coulson et al., 2015, p. 65).

Research leaves no doubt that structured screening questions matter to the detection of risk. While some RFV respondents clearly felt client disclosure was best enabled by a warm, relatively unstructured, face-to-face conversation, this practitioner-led style is associated with lower discloser of safety concerns (Holtzworth-Munroe, Beck & Applegate, 2010).

**Differing views on what needs to be screened**

Practitioners need to be clear on what they are screening for, and why. Some may use MASIC (Holtzworth-Munroe, Beck, & Applegate, 2010) or the Conflict Tactics Scale 2 (Straus, Hamby, Boney-McCoy, & Sugarman, 1996) designed to screen for imminent, serious and lethal risks. One assumption in such measures is that future risk is best predicted by past violence. FL-DOORS begins with a softer, broader screening process, which may lead to evaluation of lethality risks, but only for those where this level of assessment is indicated. The FL-DOORS framework screens dormant risk factors and antecedent triggers that may combine to escalate risk as dispute resolution processes take place, and helps practitioners to identify those who need to progress rapidly to this level of screening and assessment.

**Screening for Indigenous or CALD clients and people with poor literacy**

RFV reported concerns that FL-DOORS, and presumably similar psychological tools such as MASIC, is only suited to literate English-speaking clients (e.g., Kaspiew, Carson, Coulson et al., 2015, p. 65). The claim is hard to support. We are confident that FL-DOORS extends the benefit of screening to often-marginalised groups, including those facing problems with literacy, without being prescriptive as to use. The first domain of the FL-DOORS is devoted to culture and religion, in response to the fact that increased safety risk after separation may occur for migrants, refugees and CALD or Indigenous clients (see McIntosh & Ralfs, 2012b). An audit of over 6,600 RASA family clients found 5.8% of clients reported their culture and/or religion as significant within the dispute. In terms of comprehension and complexity, the expected reading age for a full DOOR 1, based on public domain algorithms for reading ease, is between 12–14 years. A practitioner or interpreter may assist by reading the questions, if needed.

Anecdotaly, many RASA interpreters report it is easier for them to work from a written document such as DOOR 1 rather than interpret a standard verbal interview. Furthermore, clients who struggle with comprehending spoken English are often more likely to understand written English. The FL-DOORS handbook provides detailed suggestions for dealing with literacy or language barriers and asserts that, “ultimately the responsibility for how the FL-DOORS is implemented rests with each service and with individual practitioners” (McIntosh & Ralfs, 2012b, p. 13).

**Engaging clients in monitoring their own wellbeing and safety**

RFV reported a concern that clients would be “turned off” by forms (Kaspiew, Carson, Coulson et al., 2015, p. 62). In our training programs, we have noted that less experienced practitioners tend to mistrust structured, academic-looking forms, and presume their clients will too. Indeed, one RFV respondent called the FL-DOORS a “test”. We have found the opposite to be true; in many cases, clients prefer to reply to a structured tool on a piece of paper than to disclose in person. In an anonymous sample of 141 “just screened” RASA FL-DOORS clients, 68.3% said, “It’s easier to disclose sensitive information on a form than face-to-face” and 95.8% said they were “completely honest when filling out the forms”.

Some practitioners believe structured processes will harm their working alliance with individuals by asking intrusive, private questions. Beneath such concerns appear to be assumptions that structured questioning excludes engagement. FL-DOORS was designed to be an avenue for meaningful engagement, and RASA’s internal research strongly suggests it is. RASA monitors
client engagement through regular anonymous client satisfaction surveys (in accordance with Commonwealth funding requirements). Figure 1 shows the results of these surveys before and after the FL-DOORS launch.

If RASA clients objected to answering the FL-DOORS screen, a drop in client satisfaction might have been expected. Figure 1 shows no overall decline since FL-DOORS implementation. As described by Lee and Ralfs (2015), clients (n = 134) viewed the risk screening process as a typical part of the overall administrative process, and 94% reported benefits in providing detailed information at intake. As a side note, 68% reported that it was easier to disclose personal and sensitive information on a form rather than face to face.

**Concerns that screening may not help**

Some SOP participants alluded to the idea that tools such as FL-DOORS could have an impact opposite to their purpose, namely by adding to rather than alleviating client risk, with one concluding it was “simplistic and fraught with danger” (p. 60). Some SOP respondents also expressed views that “divulging the most serious (risks/harm factors) requires several face-to-face meetings to build up trust that telling us will not make things worse” (p. 62).

We find legal practitioners may feel particularly under-prepared for screening, be worried about their responsibility for risk management when identified, and fearful of losing trust with a client. The latter issues call for ongoing practice reflection. Among them, it seems important to disaggregate role-based dilemmas from the idea that well-conducted screening could be more dangerous than not screening.

Research evidence negates this view. Several studies (e.g., Chang, 2014; Todahl & Walters, 2011; Zeitler et al., 2006) have shown that women, including those from ethnically diverse backgrounds, largely endorse universal domestic violence (DV) screening provided it is done respectfully and in private, with a clearly expressed rationale for screening and a plan for follow-up if a disclosure is made. Liebschutz, Battaglia, Finley, and Averbuch (2008) said that some DV victims were distressed when not asked about DV, when they hoped the likelihood would have been “obvious” to their practitioner. As Chang (2014) suggested, the act of appropriate enquiry about DV may in itself be an intervention for women victimised by DV; asking questions about risk is unlikely to be more dangerous than not asking questions about risk.

**Screening as ongoing engagement**

FL-DOORS is grounded in two realities:

1. *All* clients in the family law system face challenges of varying degrees to their wellbeing throughout the course of their adjustment to separation. For some clients, antecedent and contextual factors combine in the early phases of adjustment to create elevated wellbeing risks, which can be readily managed. For a few, key risks combine and accumulate to create personal or interpersonal safety risks. For a smaller but critical minority, these are potentially lethal risks (for a synopsis of this literature, see McIntosh & Ralfs, 2012b).

2. There are multiple entry points into the family law system, and pivot points within it, whereby appraisal of wellbeing risks and engagement in preventative support is possible. Within Australia, clients enter the family law system via one of several pathways: family relationships services, lawyers, private mediation and courts are key among these. Many clients then move about the system, through adjunct services. Screening cannot be effective if it occurs at only one point in time and is confined to only the non-legal components of the system.

The FL-DOORS framework (McIntosh & Ralfs, 2012a) makes possible a funnelled screening process for all clients of the family law system, by all practitioners within the system, at any
stage of family involvement in that system. The FL-DOORS multimedia educational materials suggest ways in which legal services could safely and meaningfully engage in risk screening. Moreover, the resources in DOOR 2 guide all practitioners in evaluating risks through semi-structured supportive conversations, engaging clients in self-management where appropriate and expediting referral for issues exceeding the practitioner’s expertise or role, whenever a specialist assessment of wellbeing and safety risks is indicated. DOOR 3 provides resources to assist practitioners and services to build a collaborative risk management and referral network. The online training program ties these together, and provides many case examples.

**Risk screening as admissible evidence in court**

Some family dispute resolution practitioners worry that client self-reports on screening tools will become evidence within court, undermining the benefit of non-adversarial dispute resolution. It will be essential to work through these practice-based dilemmas for each practitioner role, including issues of admissibility, before cultural change in risk screening can occur. In time, a seamless family law system might be one in which skilled engagement of clients in appraisal and evaluation of their own wellbeing and risk status is enabled, regardless of the entry point into dispute resolution. Instead of admissible information, gathered while screening for risk, potentially jeopardising a legal position, cross-agency communication about client risk status might be facilitated, and the onus of response and support more transparently shared between services and the courts.

With the RFV authors, we agree that discussion of screening in relation to legal evidence and privilege requires further consideration. In the meantime, we suggest two ways to reflect on this with respect to FL-DOORS. First, FL-DOORS screening is not an investigative or evidence-gathering process and, in community contexts, remains confidential. Second, FL-DOORS is not objective evidence but self-report data. It is a structured way of reporting what a client has said about their own wellbeing and that of their family members. On an evidentiary basis, the data could not be treated as anything more than this or different to other communications about risk from a client to a practitioner. In time, some may support its inclusion in a well-structured affidavit.

**Next steps in the dialogue**

Expansion of the family law system’s capacity to effectively screen and respond to family safety and wellbeing during separation is nothing short of a public health matter. The Family Law Act amendments of 2012 are part of a commitment and growing momentum in Australia to interrupt harmful pathways of risk, and to assist family members to establish safer directions in their post-separation recovery. The **RFV report** into family law practitioners’ risk screening practices during the summer of 2013–14 highlighted the difficulties involved in turning such a commitment to family safety into an embedded sector-wide practice.

The report is also now dated with respect to FL-DOORS properties and implementation. The Synthesis Report foreshadows the need for updating the evaluation, referring to the evolution of practice and the effects of the amendments increasing over time (Kaspiew, Carson, Dunstan, Qu et al., 2015). A future study would attempt to contrast screening methodologies, and further explore systemic factors preventing practitioners from supporting whole-of-family risk screening.

There are significant opportunities inherent in FL-DOORS for advancing a common language and methodology at the individual case level, and for a population-level indication of whole-of-family risk. The imperative for coordinated, effective sector-wide engagement with clients around safety monitoring has never been clearer. As evidence from recent Australian tragedies within the family law system graphically attests, no single practitioner or service can bear the responsibility for preventing harm to family members amidst the vulnerability and volatility of conflicted separation. No single risk-screening tool holds the answers to risk prevention. Equally, there is no doubt
that evidence-based, behaviourally specific screening frameworks are more effective than ad hoc individual approaches, and safer than doing nothing. The Family Law DOORS, grounded in Australian and international evidence, provides one validated means for harvesting layers of complex information and reliably indicating wellbeing and safety risks for children and parents, together with a compass for coordinated responses to risk.

Endnotes

1 Sue Harris, Attorney-General’s Department, Canberra. Personal Communication. April 2016.


5 See, for example, <www.readabilityformulas.com>.

References


Jennifer E. McIntosh is Professor at the School of Psychology, Deakin University, Adjunct Professor at La Trobe University, and Director at Family Transitions, Jamie Lee is Principal Researcher at Relationships Australia South Australia and Claire Ralfs is Chief Executive Officer at Relationships Australia South Australia.

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The Responding to Family Violence study's discussion of Family Law DOORS

Rae Kaspiew and Rachel Carson

The Responding to Family Violence (RFV) study was one part of a very significant research program that examined the impact of the 2012 family violence amendments. The core components of the Evaluation were:

- Pre- and post-reform surveys of separated parents: 2012 (n = 6,119) and 2014 (n = 6,079) (Experiences of Separated Parents Study); and
- Pre- and post-reform quantitative studies based on data collected from court files (n = 1,892) (Court File Analysis in the Court Outcomes Project).

The RFV study was another component of the Evaluation. It was designed to examine the views and experiences of family law system professionals, to support understanding of the practice dynamics in the family law system after June 7, 2012.

All components of the Evaluation were designed to support an assessment of what, if any, change had occurred as a result of the 2012 family violence amendments, in the way that matters involving family violence and safety were dealt with in the family law system.

In addition to capturing the views and practices of professionals, the data gathered in the RFV survey were intended to support an interpretation of the findings of the other two primary components of the Evaluation.

The RFV survey was commissioned and funded by the Attorney-General’s Department (AGD). It was open for completion in December 2013 and concluded in late February 2014. The RFV Report was submitted to the AGD on 19 December 2014.

The survey examined an extensive range of issues relating to the effects of the 2012 family violence reforms. While it was undertaken on an ‘opt-in’ basis, recruitment specifically targeted Family and Federal Circuit Court judicial officers/registrars (n = 57), and legal (n = 322) and non-legal (n = 294) family law professionals experienced in the matters covered in the survey. The survey content was determined by research questions specified by the AGD.

The RFV survey sample is not represented as being random, nationally representative or comprising participants selected for their experience using Family Law DOORS (FL-DOORS). Nevertheless, the sample of participants included those who reported knowledge of and/or experience using FL-DOORS, as well as those who had rarely used or who decided not to use FL-DOORS, and those were unaware of FL-DOORS.

Practices and attitudes to screening were only one of several areas of focus. More specifically, AIFS did not intend to evaluate FL-DOORS or its application. Only four survey questions focused specifically on FL-DOORS, in the context of a very substantial survey that was designed to examine the overall impact of the 2012 reforms.

Participants were asked specific questions about FL-DOORS because its release coincided with the time period when the 2012 family violence reforms came into operation. FL-DOORS, which was announced by media release on 31 January 2013, was a new element in the system, and as such it was important to understand how it was being used.

FL-DOORS’ distribution commenced in March 2013, with the government providing $500,000 for the production, distribution and training in FL-DOORS. In the lead-up to the RFV survey, information sessions, webinars and training sessions were held during the period August–November 2013 and face-to-face training sessions funded by the AGD and provided by the Family Law Section of the Law Council of Australia took place between September and November.

The survey questions relating to FL-DOORS asked participants’ whether they were using FL-DOORS, how they were using FL-DOORS and whether they had any comments to make about FL-DOORS. Comments on other screening tools were also sought and are referred to in the RFV Report (Kaspiew et al., 2015a, pp. 66–69) but given that the survey was directed at evaluating the 2012 amendments and not risk screens, there was no capacity in an already very lengthy survey to extend the survey with additional questions.

The use of both closed questions and open-ended text boxes was an approach used throughout the survey so that quantitative insights could be supplemented by more detailed insights supplied by practitioners. These comments provide an important opportunity to understand practitioner thinking about a range of issues including FL-DOORS. Both the quantitative questions and qualitative responses provided insight into views and experiences of FL-DOORS, as it did, for example, about the Form 4 / Notice of Risk.

The overall conclusions from the Evaluation of the 2012 family violence amendments are contained in the Synthesis Report (Kaspiew et al., 2015b), which brings together evidence from all three components of the Evaluation. The RFV report clearly states that the RFV study embodies only one aspect of the Evaluation program. The Synthesis Report stated that:

The evidence considered in this chapter indicates that an increased emphasis on identifying family violence and child abuse concerns was evident across the system, particularly among lawyers and courts. However, the evidence also indicates that refinements in practice in this area are required and the development of effective screening approaches has some way to go. (p. 44)

References

Rae Kaspiew and Rachel Carson are Responding to Family Violence study co-authors.
Donor identification
Victorian legislation gives rights to all donor-conceived people

Sonia Allan

On Tuesday, 23 February 2016, the state parliament of Victoria passed legislation that will enable all donor-conceived people the opportunity to receive identifying information about their sperm, oocyte or embryo donor(s).

Referred to as “Narelle’s Law”, the passing of the legislation honours the memory of a donor-conceived woman who died in 2013 from hereditable bowel cancer. Narelle Grech had searched for her donor for 15 years, and had engaged in extensive lobbying, alongside many others, to create legal change for donor-conceived people to know their biological heritage (Tomazin, 2013).

The model adopted in Victoria is a world first in its application to donor conception. It mirrors the approach taken in Australian states in the 1980s in which legislation was enacted to enable adoptees access to information about their genetic heritage, regardless of when they were born, subject to the ability of persons to place a contact veto (Allan, 2011a; 2011b). Similarly, donor-conceived people will be given access to identifying information, regardless of when a donor donated or when the donor-conceived person was born, subject to people about whom information will be released being able to place a “contact preference statement”.

This article examines these world-first laws. The second section of this article outlines the reasons why information release has been deemed warranted. The third section considers the passage of the Victorian law. The article then details how the Victorian law will operate and the requirements for information release. The concluding discussion highlights laws around the world that have increasingly moved to support information release. It is shown how the Victorian laws are very progressive and may provide a model approach for future release of information around the world.

Why are the changes to the law important?

The history of donor insemination is one that has been shrouded in secrecy (Allan, 2012a). Such secrecy and the resulting anonymity of
The model adopted in Victoria is a world first in its application to donor conception.

Donors has historically been underpinned by the stigma of infertility, the presence of a doctor using an instrument to inseminate the woman, and the implications of donor conception for marriage—including questions of whether the act was adulterous. Donor conception was regarded as against natural law by religious leaders and subsequently condemned. Legal issues regarding inheritance and legal parentage were also raised. More recently, calls to maintain anonymity also seem to reflect the market view that if anonymity is removed, supply may be reduced. Such reasons, however, focus primarily (if not often solely) on the adults involved in the process, or the profit that the fertility industry could make.

In contrast, the decision to release identifying information to all donor-conceived people has centered on the number of increasingly well-known reasons that focus on the people born of such arrangements, including factors relevant to their identity, medical history, risk and/or fear of forming consanguineous relationships, as well as other reasons beyond these. In Australia, as in other jurisdictions around the world, calls for donor identification reform have grown as donor-conceived people have reached adulthood, and have expressed the impact that anonymity has had on them in relation to such matters.

**Identity**

Self-identity involves the “Who am I?” questions that many people ask at various stages of their life. In childhood they may include questions about “Where do I come from?”. In adolescence they may be asked as one develops a sense of individual self. In adulthood, as relationships are formed, marriage occurs and children and grandchildren are born, the questions become relevant in a generational sense, giving a broader picture of who a person is and their identity within and across generations.

Questions regarding biological heritage may therefore involve a desire to know more about oneself. For donor-conceived people such questions are in this sense similar to those asked by those in the general population. However, such questions are made more complex in that donor-conceived people have parent(s) who have reared them but are also the genetic offspring of a sperm and/or egg donor(s). Answering the question becomes more difficult simply because of this fact.

Further compounding such complexity is that there may be a stronger sense of “lost identity” for some donor-conceived people when they are denied access to information due to systems of anonymity (Turner & Coyle, 2000). There is also evidence to suggest that some donor-conceived people who have been told of their conception later in life may undergo a “fracturing” in their identity due to knowledge of their status, and feel significantly deceived about who they are (Dennison, 2008; Ravitsky, 2010).

Perhaps most clear is that, while the small amount of existing research points to varied feelings regarding donor conception and outcomes for families (Golombok et al. 2011; McNair, 2004; Wise & Kovacs, 2014), reasons for searching for information almost always include the desire to know and understand more about the donor, and about oneself.

**Medical history**

Knowing about familial medical history is also important. In fact, knowing familial history of heart disease, diabetes, cancer, mental health issues and/or other heritable diseases is undeniable and strongly encouraged in the present day (Centers for Disease Control and Prevention, 2004).

Donor-conceived people who are denied access to familial medical histories may be placed at increased risk as a result of not having access to information. This becomes very significant as people age. There are many conditions which develop later in life, and a donor who donated in the 1970s or 1980s, when donor conception was shrouded in secrecy, may not have been aware that they were a carrier of these diseases.

Similarly, a donor-conceived person may become aware of a heritable condition, but in an anonymous regime has no way to notify their donor(s) or half-siblings conceived using the same donor gametes. This may have ramifications not just for the person unaware of such information but for generations to come. This was clearly the case for Narelle Grech, mentioned above. Early screening for her, if she had known she was at risk, may have led to early treatment and prevented her death. In addition, it is known that she has at least eight genetic half-siblings, who perhaps if warned, could undergo screening and early treatment if needed.

**Consanguineous relationships**

Another significant driver in the search for information for some donor-conceived people is the fear of unknowingly forming relationships with siblings or possibly their unknown donor (Senate Legal and Constitutional Affairs References Committee, 2011). While the probability of such an occurrence is unknown,
such a risk may be significant within smaller populations, or where there are no controls on the number of families for which the same donor’s gametes may be used (NSW Law Reform Commission, 1984). Although one way to avoid half-siblings forming relationships is to restrict a donor to one donation or to one recipient family, it is clear that this is not, and has not been, the approach to donor conception in most jurisdictions.⁴

The reality is that a significant number of donors are likely to have donated multiple times. Some may also have donated at multiple clinics and in a number of jurisdictions. In many circumstances, donor sperm was used by specific clinics to assist families in a particular area at a particular time. There is good evidence in areas of Australia that multiple half-siblings were born within a small time frame to a variety of families all living in the same vicinity, and a number of stories are emerging in which donor-conceived people have found they went to school with their half-siblings.⁵

Entering consanguineous relationships may have negative legal ramifications.⁶ There is also the chance that such relationships would bear children, leading to the risk of genetic or chromosomal abnormalities (Bennett et al., 2002). The fear of this occurring can cause great distress for some donor-conceived people.⁷

The threat of consanguinity may thus also affect the emotional and social wellbeing of some donor-conceived people (Senate Legal and Constitutional Affairs References Committee, 2011). The chances of such situations occurring and/or the fear of forming consanguineous relationships would be greatly reduced if donor-conceived people and donors were able to obtain information about each other.

**Openness, honesty, and equality**

There are other reasons beyond those above that drive some donor-conceived people to search for information. Some report simply wanting to know a name for their donor; others wish to say thank you; while others want to know whether they have any half-siblings. Cutting across all of these reasons is a desire for openness, honesty and an end to secrecy and lies that have formed the foundation of the donor-conceived person’s life. Simply put, donor-conceived people call for an end to secrecy and anonymity, and an opportunity to choose for themselves whether to pursue access to information about their donor and/or further contact.

Similarly, there have been many recipient parents and donors who have also called for release of information and an end to secrecy (Allan, 2011a). They too wish to be open and honest with the people who are most affected by donor conception practices and to end the secrecy, which they feel they have been forced to maintain. Donors also report wondering about the offspring they have helped to create, and have themselves actively engaged in searching (Allan, 2011a; Adams and Lorbach, 2012).

**Passage of the law in Victoria**

**History of the Victorian Laws**

Victoria is renowned for its early recognition of the interest donor-conceived people may have regarding information about their donors. A number of inquiries held in the early 1980s, chaired by Professor Louis Waller, led to the establishment of the first Central Register for information in the world (Waller, 1982; Waller, 1983a; Waller, 1983b; Waller, 1984). However, changes to laws over time have meant that different people have had different rights to access information in the same state. People conceived with sperm donated before 1988 were not granted access to information; those conceived with sperm donated between 1988 and 1998 were granted access to non-identifying information, but only to identifying information if the donor consented;⁷ and those conceived with sperm donated after 1 January 1998 were granted both identifying and non-identifying information when they turned 18, as the law required the donor to consent to such release prior to donation.⁸ While a voluntary register was also established to allow people to register their desire to share information if they fell outside of the laws that allowed for access, such a register proved not to be the solution people wanted.

Calls for changes to the laws were ongoing and spanned many years.
Increasing calls for change

In February 2011, following a federal inquiry into donor conception, the Australian Senate Legal and Constitutional Affairs Committee handed down a report in which it made 17 recommendations (among others) that related to the preservation, recording and release of records concerning identifying and non-identifying information about donors to donor-conceived people (Senate Legal and Constitutional Affairs Committee, 2011). These included a call for the establishment of a national register of donors to provide donor-conceived people access to identifying information about their donor. The Senate committee’s report left a number of issues open for further debate, including whether the recommended legislation should provide for the retrospective release of information about donors to donor-conceived people. The federal government responded to the Senate committee’s recommendations that while it agreed in principle with many of the recommendations, it ultimately fell to the states to regulate assisted reproduction. Each state/territory was therefore called upon to further consider and/or act on the Senate’s recommendations.

At the time, a state inquiry on donor conception had been underway in Victoria. The Victorian Law Reform Committee had commenced in the 56th parliament, in 2010, and an interim report recommended it proceed into the 57th parliament, which it did in 2011–12. Many people came forward and continued the call for information release.

I undertook to research the issue of retrospectivity, putting forward to the committee(s) that, under Australian law, there was no impediment to passing laws that would grant access to information for all donor-conceived people (Allan, 2010; Allan, 2011a). Instead, it needed to be recognised that such laws are not to be passed lightly, and would only be acceptable after consideration of the possible injustices to one party (some donors who many not want their information released) and whether these are outweighed by the need to rectify injustice to others (donor-conceived people denied information, donors who wanted an end to anonymity and parents who wished to share information with their children). It was to this end that I also explored the question of “contact vetos” as a way to balance the rights of donor-conceived people to access information with the right to privacy of any donor about whom such information would be released, ultimately concluding that this would be a fair and balanced approach.

The legal issues raised, however, were complex—there were issues regarding the rights and interests of donor-conceived people to information, the right to privacy of donors, whether there existed a contract for anonymity, how to balance human rights when such rights may conflict, the comparison between the approach taken for the release of information to adoptees and that which might be taken for donor-conceived people and, of course, whether and, if so, how information could be released (Allan, 2011a). To explore such issues further, it was necessary to call upon experts in relevant areas of law and practice, as well as donor-conceived people, recipients and donors, to draw on their experiences, and to research and write articles examining each specific issue raised in more detail (Adams & Lorbach, 2012; Allan, 2012a; Blyth, Crawshaw, Frith, & Jones, 2012; Cahn, 2012; Chisholm, 2012; Rees, 2012; Tolbin, 2012; Johnson, Bourne, & Hammarberg, 2012). The outputs of such research were provided to the Victorian inquiry.

The inquiry received a total of 77 written submissions, with the majority (52 submissions) supporting the release of information to all donor-conceived people. Public hearings conducted by the Victorian Law Reform Committee also reflected preferential support for full release of information to all donor-conceived people.

The committee, however, said it was most significantly influenced in its decision making by the evidence given by donor-conceived people, the recipient parents and donors. Some told stories of devastation and grief; others tales of successful relationships being forged between donors and their offspring. Mostly, there were consistent and heartfelt appeals for equality, truthfulness and openness in the law. It also became apparent that while not all donor-conceived people may want information, and/or contact with their donor, having the personal choice was of utmost importance. It was their lived experience that demonstrated the need for change.

Considerations concerning donor anonymity, and the balancing of interests of donors who had been promised anonymity and were opposed to information release also weighed heavily on the committee. While such donors did not appear to be in the majority, their interests in privacy needed also to be respected.

Ultimately the committee chairman, Clem Newton Brown, said:

When the Committee commenced this Inquiry, it was inclined toward the view that the wishes of some donors to remain anonymous should take precedence—
as they made their donation on that basis—and that identifying information should only be released with a donor’s consent. Upon closer consideration, however, and after receiving evidence from a diverse range of stakeholders—donor-conceived people, donors, parents, medical and counselling professionals, department representatives, and academics—the Committee unanimously reached the conclusion that the state has a responsibility to provide all donor-conceived people with an opportunity to access information, including identifying information, about their donors.

However, the Committee also recognised the importance of ensuring that there will be no unreasonable interference in donors’ lives should donor-conceived people have access to identifying information. Consequently, one of the Committee’s recommendations is that donors, and donor-conceived people, have the ability to place a veto on contact from each other. It is also important that donors, and all of the people affected by donor-conception, have comprehensive counselling and other support services available to them.

As such, the Victorian Law Reform Committee inquiry resulted in recommendations that all records in Victoria be opened, upon request by a donor-conceived individual for information about their donor, regardless of when they were conceived, pursuant to adopting the suggested contact veto system (Victorian Law Reform Committee, 2012).

Narelle Grech lived to see the handing down of the committee’s report but not the final changes to the law.

Interim changes

The changes to Victorian laws were moved forward by Labor MPs Jane Garrett and Anthony Carbin, who introduced a private member’s bill to parliament in 2014. However, full enactment of the Victorian Law Reform Committee’s recommendations were not initially forthcoming. While the laws again changed in Victoria on 29 June 2015 to allow all people conceived with gametes donated in the state before 31 December 1997 to access identifying information, they would allow access to identifying information only if the donor gave his or her consent. The law as it applied to those born between 1988 and 1998 was therefore extended retrospectively to apply to all people conceived with donated gametes prior to 1998. The extension of the law also applied to donors seeking information about the donor-conceived offspring.

The two-tiered system, however, retained differential treatment based upon whether a person was conceived with sperm donated pre-or post-1998. Great disappointment among the donor-conceived community, their parents and donors ensued. Nevertheless, they continued to speak with government, appeared in the media and shared their stories in the hope that there would be further change. A young aeronautical engineer, Lauren Burns, was profiled on a popular documentary, Australian Story, sharing her incredible journey of seeking her donor father (Australian Broadcasting Corporation, 2014); Sarah Dingle, a reporter and NSW donor-conceived person
whose records were tampered with to remove the donor code—thus destroying her chances of finding information—made public her plight (The Sydney Morning Herald, 2014); many other lived experiences were again shared (e.g. see Fuss, 2014; Howie, 2014).

**The new laws**

In 2015, with an election due, the Victorian Labor Party made an election promise that it would give full effect to the Law Reform Committee's recommendations if they gained power. Donor-conceived people, recipients and donors continued to share their stories. A national conference held in 2015 in Victoria, and a subsequent campaign about being donor-conceived (Are You Donor Conceived Campaign, 2015), further drew attention to the issues they faced. It remained the case that unless laws were changed, people born in Victoria had unequal access to information. The lack of equal treatment was seen as unacceptable.

Following the Labor Party’s success at the ballot poll, and further public debate, a Bill to rectify such inequality was introduced into the Legislative Assembly in late November 2015, where it was passed with a free vote of 56 to 27. It moved to the Legislative Council in February 2016, and again was shown bipartisan support via another free vote. The Bill was read into law. Emphasis in the passage of the bill was given to honouring the guiding principles of the Victorian ART Act, that “the welfare and interests of persons born or to be born as a result of treatment procedures are paramount” and that “children born as the result of the use of donated gametes have a right to information about their genetic parents”. Donor-conceived people, their parents, donors, children and their supporters watched from the galleries. Members of Narelle Grech’s family were also there to see the passing of the laws.

The Victorian Minister for Health, Jill Hennessy, made the following pertinent statements:

> We believe all donor-conceived people should have the right to know about their genetic heritage, no matter when their donors donated … If this information is available, it shouldn’t be kept from them. (Premier of Victoria, 2016)

The new laws will come into force on 1 March 2017.

**How the Victorian law will work**

Understanding how the Victorian law will work is integral to understanding the way that the system balances interests and also provides for support for all.

**Information release**

As noted above, the changes to the Victorian law will enable persons born as a result of the use of gametes donated before 1 January 1998 to obtain identifying information about their donor(s). This gives those persons equal rights to all donor-conceived people in Victoria to access information. The new laws also allow for the provision of information to a person descended from a person born as a result of a donor treatment procedure irrespective of when the gametes used in that treatment procedure were donated. If the applicant is a child, the disclosure will be made if the applicant’s parent or guardian has consented to the making of the application or a counsellor has provided counselling to the applicant that has established that the applicant is sufficiently mature to understand the consequences of the disclosure.

In order to balance the privacy interests of people about whom information will be released, including donors, donor-conceived people and any other children of the donor, the law enables such people to lodge a contact preference statement detailing the sort of contact (if any) they would be willing to engage in. The applicant for information must give an undertaking to comply with the contact preference before any information is released. There is a maximum penalty of approximately $7,500 if this undertaking is breached. (Contact preferences are further detailed below.)
Registers

Central and Voluntary Registers will continue to be maintained but their management will be transferred from the Registrar of Births, Deaths and Marriages to the Victorian Assisted Reproductive Treatment Authority (VARTA)—a government authority established under the ART Act 2008 (Vic.). The Act specifies what information must be kept on the Central Register, including but not limited to identifying information about the donor of gametes, the number of births resulting from the use of donated gametes and other prescribed information. The Central Register will also hold results of any genetic testing undertaken to establish relatedness.

The Voluntary Register will continue to allow the following persons to place information on the voluntary register and express wishes for contact: persons born as a result of donor treatment procedures; the descendants of persons born as a result of donor treatment procedures; donors; women who have undergone donor treatment procedures and their partners, if any; and the relatives of all such persons. This may be particularly important when records have been destroyed. In addition, there is new provision for a person to enter any photograph, toy, jewellery or other item approved by VARTA onto the Voluntary Register. The law will continue to provide for counselling before the disclosure of information in the Voluntary Register.

Provision of information to the Central Register

Registered ART providers will be required to report the information specified within the ART Act, relevant to pre-1998 donor conception, to VARTA for inclusion in the register. In addition, persons other than registered ART providers may report information they hold about pre-1988 donor treatment procedures to VARTA. Persons who forward information under the law will not be liable for prosecution of an offence, or to a civil action, for providing the information.

VARTA will have access to records transferred to the Public Records Office from the Prince Henry’s Institute of Medical Research that relate to persons born as a result of pre-1988 donor treatment procedures. In addition, if VARTA believes on reasonable grounds that a person other than a registered ART provider is in possession of or has control of relevant records, VARTA may request the person to locate and give the records to VARTA. If within 90 days such records are not produced, VARTA may apply to the magistrates’ court for a production order to provide the records, or copies of them, to VARTA.

The law provides that it is not a reasonable excuse for a person to fail to comply with a production order on the grounds of medical professional privilege or on the grounds that complying with the order would constitute unprofessional conduct or a breach of professional ethics.

VARTA will also have authority, under a new section 56M, to request genetic test results of an adult blood relative of a suspected donor if the suspected donor person cannot be located.

Insufficient information about donor: DNA testing

If an application has been made by a person born of a pre-1998 donor treatment procedure and there is insufficient information to determine whether a person whose name is entered on the Central Register is the donor of gametes used in the procedure, VARTA may, for the purposes of establishing a genetic link, request that the person undergo genetic testing at a place specified by VARTA; consent to the comparison of the results of that genetic testing with a DNA profile or genetic test results relating to the applicant; and consent to the results of the comparison being given to VARTA.

VARTA will also have authority, under a new section 56M, to request genetic test results of an adult blood relative of a suspected donor if the suspected donor person cannot be located.
is deceased, is considered missing, or VARTA considers there are exceptional circumstances justifying a request of the adult blood relative. An example of what may constitute “exceptional circumstances” is where the applicant is diagnosed with a hereditary terminal illness and wishes to identify their donor in order to notify any donor siblings of the potential to inherit the same illness. In such circumstances VARTA must make all reasonable efforts to give notice of the intended request to the person whose name is on the Central Register. That person may apply within 28 days for a review of the decision to the Victorian Civil and Administrative Tribunal.

Disclosure of information

Before disclosing information, VARTA must be satisfied that a person whose name is on the Central Register and a donor-conceived person are related. If VARTA intends to disclose information under the Act relating to a pre-1998 donor, or to a donor-conceived person, VARTA must make all reasonable efforts to inform them that an application for identifying information has been made and by whom. The person will then be informed that he or she may lodge with VARTA a contact preference and that they may undergo counselling before lodging a contact preference.

Where the applicant is a donor-conceived person, information about a donor will generally be released within four months. This includes if the donor cannot be located within four months of the application being made, or if the donor is deceased, provided the applicant has provided an undertaking to the secretary not to contact the donor. In such circumstances, the applicant must also undertake to provide VARTA with any information he/she subsequently receives from a source other than VARTA from which the pre-1998 donor may be directly or indirectly located. If VARTA receives such information, VARTA must make all reasonable efforts to inform the pre-1998 donor that their identifying information has been supplied to an applicant, and that the donor may lodge a contact preference with VARTA and may undergo counselling by a counsellor on behalf of VARTA before lodging a contact preference.

VARTA is provided with the discretion to delay the disclosure of a pre-1998 donor’s identifying information for a further period of up to four months in exceptional circumstances. This discretion applies both where the pre-1998 donor is served with notice and where VARTA is not required to give notice to the pre-1998 donor.

Contact preferences for pre-1998 donors

In relation to donors, the new law provides that if an application is made for the disclosure of the identifying information about a pre-1998 donor, the donor may lodge with VARTA:

- a written statement setting out the donor’s wishes about being contacted by the applicant for the disclosure of the information;
- a written statement setting out the donor’s wishes about the donor’s child being contacted by the applicant for the disclosure of the donor’s information.

A contact preference may state either that the pre-1998 donor does not wish to be contacted by the applicant, or that the donor wishes contact with the applicant to occur only in a specified way (e.g., via email, letter, phone call or intermediary).

A contact preference may also be lodged regarding a pre-1998 donor’s child (i.e., a child legally recognised as the donor’s child) and may similarly state that the donor does not wish for the child to be contacted by the applicant or that the donor wishes contact between the child and the applicant to occur only in a specified way. In the case of a contact preference regarding a donor’s child, VARTA may have regard to the child’s wishes, and whether the donor’s wishes are reasonable in the circumstances.

A contact preference must be in an approved form and must be lodged with VARTA before
any contact between the donor and the applicant to whom the contact preference relates has taken place. If a donor chooses not to lodge a contact preference prior to the release of identifying information to the applicant, the donor can still lodge a contact preference at a later date provided there has been no contact between the donor and the applicant.

Once a contact preference has been lodged, the new laws require VARTA to give the applicant a copy of a contact preference as soon as practicable after its being lodged.43 VARTA must also keep records of contact preferences lodged.

Amendment of a contact preference
A contact preference may be amended by written notice to VARTA provided there has been no contact between the donor and applicant to whom the contact preference relates.44 VARTA must again, as soon as practicable, notify the applicant to whom the amended contact preference relates of the amendment and its particulars.

Withdrawal of a contact preference
A pre-1998 donor may withdraw by written notice a contact preference. A donor may not lodge a subsequent contact preference in relation to the applicant if there has been contact between the applicant and the donor.45 VARTA must as soon as practicable after the contact preference is withdrawn, notify the applicant.

Expiration of contact preference
A contact preference lodged continues in force for five years from the date it is lodged or five years after it is extended (which may be done via written request).46 In the case of the contact preference relating to a child, it expires on the day the child turns 18 years of age. Before a contact preference expires VARTA is required to make all reasonable efforts to give the pre-1998 donor who lodged the contact preference written notice as to when the contact preference will expire and that it may be extended. VARTA must, as soon as practicable after a contact preference expires or is extended, notify the applicant to whom the contact preference relates.

Contact preferences lodged by donor-conceived people
Victoria’s new laws will also continue to allow for the release of information about donor-conceived people to their donor. However, the new law also provides that if an application is made for the disclosure of the identifying information of a donor-conceived person, the person or, if the person is a child, the person’s parent or guardian may also lodge a contact preference statement.47

Note, if the donor-conceived person is a child, VARTA may have regard to the child’s wishes in relation to the lodgement of the contact preference, and if the child’s wishes are different to the wishes of the parent or guardian, comply with the wishes of the parent or guardian only if VARTA considers it reasonable in the circumstances.48

Contact preferences in relation to donor-conceived people must again be in the prescribed form and must be lodged prior to any contact occurring.49 There is also a requirement that VARTA offer counselling before the contact preference is lodged. Contact preferences again remain in force for five years and may be extended for a further five years.50 They may also be amended or withdrawn in writing. As soon as practicable after a contact preference expires or is withdrawn, VARTA must notify any applicant to whom the contact preference relates.

If the preference is lodged by the parent or guardian of a donor-conceived person and is in force on the day on which the donor-conceived person turns 18 years of age, the contact preference expires six months after that person turns 18 years of age.51 Before the contact preference expires, VARTA must make all reasonable efforts to give the donor-conceived person written notice as to when the contact preference will expire. The person may amend52 or withdraw the contact preference,
or withdraw the contact preference and lodge another contact preference.53

Requirements for counselling

Section 61 of the ART Act (Vic.) sets out the requirements for counselling prior to the disclosure of information recorded on the Central Register. These requirements will be maintained under the new law. Information may be disclosed to a person who makes an application under the Act only if in the case of the disclosure of non-identifying information—the Registrar has offered the person counselling by a counsellor; or in the case of identifying information—the Registrar is satisfied the person has received counselling, from a counsellor, about the potential consequences of disclosure of information from the Central Register.

Notification of donor-conceived status

To promote greater openness, Victoria implemented an addendum provision to the birth certificate of donor-conceived people born after 1 January 2010, which records the status “donor-conceived” on the register, and states that further information is available about them on the Victorian Registry of Births, Deaths and Marriages.54 People born post 2010 will continue to be alerted to the fact of their donor conception on application for a birth certificate. Parents have been encouraged, and supported, via various educational seminars led by VARTA to disclose the use of donor conception to their children.55 The new law does not address further notification of pre-2010 donor-conceived children of their status.

Discussion

As donor-conceived people have grown, entered adulthood and, for some, had their own families, the call for information about their donors has become more prominent. There has been increasing understanding of the importance of such information and recognition of the injustice in its denial. A growing number of jurisdictions allow for access to identifying information about donors and prohibit anonymity. This now includes legislation in the Australian states of New South Wales,56 Victoria,57 Western Australia58 and South Australia59; and the countries of Austria,60 Croatia,61 the Netherlands,62 Norway,63 Finland,64 New Zealand,65 Sweden,66 Switzerland,67 the United Kingdom,68 Uruguay,69 Argentina70 and Ireland.71 In these jurisdictions the donor-conceived person who knows they were donor-conceived and wishes to obtain information about their donor(s) may turn to a special register,72 to the clinic73 or hospital74 that assisted in their conception, or apply for judicial approval75 to access information about their donor(s), and possibly siblings. Donors and recipient parents in some jurisdictions may also be able to obtain some information under these laws.

Four jurisdictions—Victoria, Ireland, Croatia and Argentina—also require entry of information about the method of conception on the birth register. Victoria and Ireland explicitly state that such information will be provided to the donor-conceived person on application for their birth certificate at age 18. Croatia mandates disclosure by parents to the child regarding its donor-conceived status no later than age 18, although how such a provision will be enforced is unclear.

In Germany, Supreme Court recognition has been given to donor-conceived people’s rights to access identifying information about their donor, at any age.76

Other nations, including the United States, Canada and Denmark, have seen a greater move to offering open identity gamete donation, albeit those nations still also offer anonymous donors77 (Allan, in press).

There has been added controversy in respect to whether the move to recognise a right to
access information should only be prospective or whether people conceived in the past, when donor anonymity was “guaranteed” by clinicians, should also be given access to information (Allan, 2012b; Pennings, 2012).

One other jurisdiction, Switzerland, provided for retrospective access to information in 2001. There, a register of donor information for children born post 2001 was established, but the law also provides that those born before 2001 can apply to clinics for information—who are obliged to release it. Unfortunately, retrospective access has proven difficult in Switzerland as many files held by clinics were lawfully destroyed pursuant to other laws that only required holding records for 10 years.

Two other nations have allowed for donors to consent to the release of their information for past donations. In the Netherlands, legislation introduced in 2004 allowed access to information for all donor-conceived people conceived after that date; however, all donors that donated prior to that date were also asked to consent to release of information. A voluntary DNA register exists for those not able to access information otherwise. Similarly, laws and practices introduced in the United Kingdom in 2005 to ban anonymity also allowed for people who donated between 1991 and 2005 to “re-register” so as to give their consent to release of information. This again may have provided access for some but not all those searching for information.

Victoria, in comparison, has thus taken a very progressive step. It has recognised that once it is agreed that access to identifying information about donors should be granted to donor-conceived people, it should be granted equally to all. Victoria has adopted a model to allow this to occur. It is the first in the world to recognise rights to access identifying information about donors to donor-conceived people, to move to protect records, to hold all such information on a central register, to allow for further searching for information where records are incomplete (either by orders to produce records, or DNA testing, or both), and to apply the contact veto/preference system to donor-conception to balance the right to information with the right to privacy in circumstances in which a person may not wish to have, or wishes to limit, contact. Detailed consideration of such laws illustrates the careful system that has been put in place.

The passing of such legislation continues to mark the tides of change as access to information by donor-conceived people about their donors is increasingly recognised as a fundamental right, including in relation to donations of the past.

Endnotes

1 Assisted Reproductive Treatment Amendment Act 2015 (Vic.)
2 Assisted Reproductive Treatment Amendment Act 2015 (Vic.), s 2 inserts the following definition into Assisted Reproductive Treatment Act 2008 (Vic.) s 3: “Contact preference is defined as a written statement lodged under section 63C or 63J”. (Hereafter “ART Amendment Act 2015” and “ART Act 2008”).
3 Some jurisdictions limit the number of families to which a donor may donate. For example, in Victoria, the maximum number of families is 10: ART Act 2008 (Vic.), s 29. In New South Wales, the number is five: Assisted Reproductive Technology Act 2007 (NSW), s 27(1). In Western Australia, the number is five: Human Reproductive Technology Act 1991 (WA) (see “Human Reproductive Technology Directions (WA)”, Western Australian Government Gazette (30 November 2004) p. 5434 at [8.1]).
4 See, for example, the story of Bridgette Reynolds, reported in James Purtil, “A Daughter’s Search for her Anonymous Sperm Donor”, RMR1084, JJJ Hack, <www.abc.net.au/triplej/programs/hack/a­daughter’s-search-for-her-anonymous-sperm-donor­father/?2010122> (accessed 23 May 2016).
5 For example, the Australian Marriages Act 1961 (Cth), s 23(1)(b), makes marriages involving “prohibited relationships” void. Section 23(2)(a)–(b) states that “marriages between an individual and their parent and an individual and their sibling, including half siblings” are “prohibited relationships”. State criminal law also makes incest between individuals and their parents and half-siblings a punishable offence: e.g. see Crimes Act 1958 (Vic.), s 44(2), (4).
6 Commonwealth, Senate Committee, Hansard (3 November 2010), oral evidence of donor-conceived individuals.
7 Infertility (Medical Procedures) Act 1984 (Vic.), ss 20 and 23.
8 Infertility Treatment Act 1995 (Vic.), s 17 (repealed); ART Act 2008 (Vic.), s 57 (application for information on Central Register), s 58 (with respect to parents of a person born as result of donor or donor treatment procedure), s 59 (person born as result of donor treatment procedure) and s 60 (person descended from person born as result of donor treatment procedure).
9 Notably there are more than 120 donors on the voluntary register in Victoria, and many donors supported information release.
10 ART Act 2008 (Vic.), s 59
11 Assisted Reproductive Treatment Amendment Bill 2015 (Vic.)
12 ART Act 2008 (Vic.), s 5
13 Reference to the provisions of the amended ART Act 2008 (Vic.) as it will be after this date are noted below according to whether the provision is a “new section” or is “amended”.
14 ART Act 2008 (Vic.) s 59 (amended)
15 ART Act 2008 (Vic.) s 60 (amended)
16 ART Act 2008 (Vic.) s 59 (amended)
17 ART Act 2008 (Vic.) new sections 63C and 63J
18 ART Act 2008 (Vic.) new section 63G
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As donor conceived people have grown, entered adulthood and, for some, had their own families, the call for information about their donors has become more prominent.

References
Access to information by donor-conceived people about their donors is increasingly recognised as a fundamental right, including in relation to donations of the past.
The family law implications of early contact between sperm donors and their donor offspring

Fiona Kelly and Deborah Dempsey

Over the past decade, increasing domestic and international attention has been given to the rights of children conceived using donated sperm, eggs or embryos (Law Reform Committee, 2012; Legal and Constitutional Affairs References Committee, 2011; Nuffield Council on Bioethics, 2013). In particular, concerns have been raised about the psychological implications for donor-conceived people of being unable to access the identity of their donor(s) (Appleby, Blake, & Freeman, 2012; Blyth, Crawshaw, Frith, & Jones, 2012; Rodino, Burton, & Sanders, 2011). Donor linking—the process whereby donor-conceived people, donors and/or recipient parents seek access to each other’s identifying information—has emerged as a key response to these concerns. While Australia lacks a national framework for donor linking, three states (Victoria, NSW and Western Australia) have introduced legislation that prospectively prohibits donor anonymity. The legislation requires that all donors recruited in those states consent to having their identity revealed to their donor offspring when the children reach the age of majority.

While the primary purpose of donor-linking legislation has been to ensure that donor-conceived individuals can access their donor’s identity, the statutory regimes are increasingly being used by the parents of donor-conceived children to make contact with donors while their children are still minors (VARTA, 2015). Donors are not obliged to accept these invitations for early contact, but if a donor consents, contact can be made. In states without donor-linking legislation, early contact is also on the rise. In the absence of legislative options, parents are making early contact with donors through their fertility clinics, which are sometimes willing to serve as intermediaries between donor and parent. Parents are also using a variety of informal mechanisms to identify donors, including social media searches and online voluntary registers and forums.

The increasing prevalence of parent-initiated early contact with sperm donors, in many cases facilitated by state legislation, has proceeded in
the absence of any discussion of the family law implications of the practice. This omission is concerning. If a donor and parent who make contact while the child is a minor subsequently experience conflict, it is possible that the donor may be able to exercise some rights in relation to the child. If the woman is unpartnered, recent case law suggests that a sperm donor may even be able to assert legal parentage. Yet there is little evidence that parents seeking early contact, or even professionals working in the field, are fully aware of the legal ramifications of their choices. This article draws on the donor linking experiences of 25 unpartnered Australian women who conceived using donated sperm or embryos to explore the possible family law implications of early contact.

**Donor linking in Australia**

Donor linking in Australia consists of a complex web of state legislation, clinic-based services and informal linking mechanisms. Three states—Victoria (1998), Western Australia (2004) and NSW (2010)—facilitate donor linking through formal mechanisms created by statute. South Australia and Tasmania are currently considering the introduction of similar legislation. Though not identical, the Victorian, NSW and WA statutes all established Central Registers managed by state government agencies, which record identifying and non-identifying information about the parties involved in donor conception. Donor-conceived people who were conceived after anonymity was abolished in each state, and who are 18 (Victoria and NSW) or 16 (WA), can request their donor's identifying information from the Central Register in their state. In Victoria, parents of donor-conceived children can also apply for identifying information through the Central Register and, in 2015, were the most frequent applicants (VARTA, 2015). Victoria and Western Australia also have Voluntary Registers, which allow donor-conceived people whenever they were conceived, as well as donors and parents, to register voluntarily, enabling “matches” where both parties are open to information exchange. While donor-conceived children must wait until they turn 18 to apply to a Voluntary Register, applications by recipient parents can be made prior to the child turning 18. It is therefore possible for a parent in Victoria or WA to make contact with a donor through the state's Voluntary Register when the child is still a minor. NSW does not have a Voluntary Register. However, donors, as well as donor-conceived people conceived prior to 2010 and who are at least 18 years of age, may voluntarily place their details on the Central Register.

In February 2016, Victoria expanded its donor-linking framework, becoming one of only two jurisdictions in the world to retrospectively open the donor records of anonymous donors. Under Victoria’s new legislation, which will come into force in March 2017, a donor-conceived person who was conceived prior to the abolition of anonymity (1998) will now be able to access their donor's identifying information, provided it still exists. Similarly, a donor may apply for information about any donor offspring. If an application is made, the other party will be informed and given the option of putting in place a “contact preference”, which enables parties to indicate that they do not want contact or to specify the type of contact with which they are comfortable.

The three Australian states with legislation represent some of the most comprehensive donor-linking regimes in the world. However, in jurisdictions without statutory schemes, or where donor records are incomplete, other mechanisms for donor linking have emerged. A recent analysis of donor linking practices conducted across several jurisdictions, including Australia, identified several common forms of informal linking, many of which were initiated by the parents of donor-conceived children (Crawshaw et al., 2015). One of the most frequently used informal practices identified by Crawshaw and colleagues (2015) was where recipient parents or donor-conceived adults requested donor information from their fertility clinic or gamete bank. While many requests were met with blanket refusals, some clinics agreed to act as intermediaries between the applicant and donor. For example, clinic staff were sometimes willing to forward a letter from a recipient parent or donor-conceived adult to the donor or to contact the donor directly to ask if he or she was interested in contact.

A second common form of informal linking identified by Crawshaw and colleagues (2015) was what they termed “offspring and/or donor-conceived people of being unable to access the identity of their donor(s)."
contained in the donor's profile, such as their occupation, where they attended university and the activities in which they are involved. In a similar vein, Crawshaw and colleagues (2015) identified online genealogy websites and direct-to-consumer DNA testing services, such as FamilyTreeDNA, as other online linking tools increasingly used by parents and donor offspring to locate donors (see also Dingle, 2015; Sample, 2005).

The study

Over the past 20 years, Australia has been at the forefront of statutory donor-linking initiatives. It is therefore surprising that there remains a dearth of evidence on how linking is practised “on the ground” in Australia. The aim of this study1 was to begin to fill this gap by producing a qualitative account of the donor-linking practices of a particular subset of Australia’s donor conception community: single mothers by choice (SMCs). While there is no single definition of SMCs, for the purpose of this study they are defined as unpartnered women who choose to conceive a child using assisted reproduction with the intention of being their child’s sole parent from the outset.5 The focus on SMCs was for three reasons. First, they are the fastest growing user group of Australia’s fertility clinics, making up more than 50% of those using fertility services in some states (VARTA, 2015). Researching the donor-linking habits of SMCs is therefore key to understanding current and future trends. Second, while donor linking is increasingly popular amongst all users of donated gametes, SMCs are more likely than any other user group to seek information about donors, and to do so when their children are comparatively younger than the children of other families who engage in donor linking (Beeson, Jennings, & Kramer, 2011; Hertz, Nelson, & Kramer, 2013; Jadva, Freeman, Kramer, & Golombok, 2010). Finally, because of the lack of clarity around the legal status of sperm donors to single women under the Family Law Act 1975 (Cth), donor linking by SMCs raises some unique concerns for family law (Family Law Council Report, 2013; Kelly, 2015).

Women were eligible to participate in the study if they had conceived a child using donated sperm and were unpartnered at the time of conception. The 25 women who participated were largely recruited via the Single Mothers by Choice and Donor Conception Australia Facebook groups and the Solo Mothers by Choice Australia online forum. Interviews were semi-structured, face-to-face and took between 1 and 2 hours. Each interview was recorded, transcribed, manually coded and analysed.

In total, the 25 women interviewed had 36 donor-conceived children. The children ranged in age from 4 months to 18 years, with an average age of 5 years. Twenty-three of the women had conceived using donated sperm, five had also used donated eggs, and two women conceived using embryos created with donated gametes, one in Australia and one overseas. Twenty-three of the women had conceived in Australia. Four states (Victoria, Queensland, NSW and South Australia) were represented within the sample, providing a cross-section of jurisdictions with and without statutory linking. An additional two women conceived overseas using gametes from foreign donors in jurisdictions where donor anonymity is permitted and statutory linking is unavailable.

Connecting with the donor

Donor linking was extremely popular amongst the women interviewed, mirroring the findings of previous international research on the donor-linking habits of SMCs (Beeson et al., 2011; Jadva et al., 2010). Sixteen of the women had engaged in some form of linking, though they had not all been successful in locating their child’s donor(s). An additional four, two of whom had newborns, had plans to engage in donor linking in the near future. Fourteen of the 25 women knew the identity of one or both of their child’s donors, and 11 were in contact with a donor and regularly interacted with him or her. Five of the women were in contact with their child’s sperm donor, five with their child’s egg donor, and one of the embryo recipients...
had formed relationships with both donors. As the women, themselves, are required to recruit their egg donor, their identities were known prior to conception. Nine of the women who had made contact with donors had spent time with them face to face (four sperm donors and five egg donors). In all of the families where a donor had been identified, the child was under the age of 18.

Consistent with Crawshaw and colleagues’ (2015) research identifying the multiple pathways to donor linking, the women had used a broad range of mechanisms to identify their child’s donor(s), including formal statutory linking (where available), linking via fertility clinics and informal linking achieved via the Internet.

Statutory linking

Three of the 14 women who had identified their child’s donor had done so via Victoria’s statutory linking regime. Two of the women applied for early contact via the Central Register, while the third made contact using the Voluntary Register. Cynthia, for example, made an application to the Central Register when her son was 1 year. After she underwent counselling to ensure that she understood the process, the register contacted her donor to inform him that a parent had requested his information. The donor agreed to his identity being released. As Cynthia recounted:

I had to go to counselling first and then I got a registered mail and it was so thin. It was two A4 pieces of paper and I thought, oh, it’s a “thank you very much and he’s not interested”. I opened it up and it was literally an A4 piece of paper with a Word table on it with his information. “Thank you for applying for this information. Here it is.” It was full on. And so I sent him a letter that I’d agonised over writing and then he and his wife wrote back.

Cynthia and her son and the donor and his wife now meet approximately twice a year. In a twist to the story, Cynthia donated her unused embryos to a friend, Maneesha, who went on to have a little girl. Maneesha, who was therefore aware of the identity of both her sperm and egg donor prior to conception. She and her daughter also have regular contact with the donor and his wife, which was initially facilitated by Cynthia. Maneesha and Cynthia also share a close relationship and, their children, though young, have been told of their shared genetic heritage.

Clinic-based linking

Two of the women had made contact with their sperm donor via their fertility clinic, though four others had attempted to do so but had been refused by the clinic. The women who made contact had both written a “thank-you letter” to the donor soon after their child was born and requested that the clinic notify the donor of its availability. The women did not necessarily expect the donor to respond but included an email address that did not reveal their identity so he could make contact if he wished. Erica, for example, who conceived at a Queensland clinic and thus had no statutory linking mechanism available to her, decided to send a thank-you letter to her donor just before her son’s first birthday. As she explained:

I just sent it to [the clinic] thinking, you know, if they can pass it on, they can. If they can’t, that’s okay by me. And behold … I got a letter back from him, which included a photo, which is double wow.

Erica, whose son is now 3, continues to exchange regular emails with the donor but they have not met.

Janet also pursued contact with her donor through her fertility clinic, which is located in NSW. Janet had never considered attempting to contact the donor until she attended a meeting of the Donor Conception Support Group and met a couple who had used the same fertility clinic. The couple told her that clinic staff had been willing to pass on a letter for them. Janet decided to send a letter of her own, including an email address and a suggestion of yearly contact. The response was almost immediate:

The letter I sent, with the email included, was replied to really quickly and we just started talking via email, which we did for a couple of years before we met … I met him for coffee when she was 5 years old, on my own, and then [my daughter] met him later in the year with me.
Janet considered herself extremely lucky to have met the donor as his donation was made at a time when anonymity was still permitted, meaning that her daughter had no legal entitlement to identifying information when she turned 18.

**Informal linking**

Three of the women had identified their child’s donor (one egg donor and two sperm donors) via the Internet using information contained within the donor profile, though none of them had made contact. Susie, who had conceived using sperm imported from the United States by a NSW clinic, was part of a group of seven families who had used the same donor and identified each other through the online Donor Sibling Registry. One of the mothers in the group was able to identify the donor using a photograph he provided in which he was wearing an athletics uniform that named his college. This mother told Susie what she had discovered but they decided not to tell the other families or contact the donor. As Susie explained:

*The other mum was going to contact him. I thankfully talked her out of it. I think it would scare the hell out of him, plus it’s kind of stalkerish, which is what would freak me out. So we’re keeping mum about it, but enjoying knowing he’s real and we know enough about him. I’m surprised how easy it was to find him. However, I kind of wonder whether he wanted to be found given the pictures he included in his profile. Of course, if you add stuff like that, people can find you.*

The second woman who identified her sperm donor through the Internet had also found it exceptionally easy. While Australian donor profiles are not nearly as detailed as those from the United States, Helen was able to locate her donor online within minutes, using information about his occupation and the fact that he donated to a small, regional clinic. She even found a newspaper article about him in which he mentioned being a sperm donor.

While neither Helen nor Susie had contacted their donor, both women continued to “monitor” him online. Their donors had already consented to having their identities revealed when the children turned 18, but the women were not confident about the identity release process. Susie, for example, noted that she was already aware of more than 30 donor siblings and was therefore concerned that her children might “miss out” on getting access to the donor.

**Implications for family law**

While the donor-linking habits amongst the women interviewed for this study may not be representative of all single women who use donated gametes to conceive, it is clear that a significant number of them are engaging in donor linking prior to their child turning 18. They are, of course, supported in doing so via legislation in three states. What is less clear, however, is what the family law implications of this new trend might be, particularly for single women. Could previously anonymous sperm donors have parental rights in relation to their donor offspring?

Early contact between sperm donors and their offspring pose two difficult questions for family law. The first is whether the donor could ever be declared a legal parent. The second is whether the donor, even if he is not a legal parent, could still successfully apply for an order to spend time with the child under the Family Law Act (FLA) on the grounds that he is a “person concerned with the care, welfare or development of the child” (FLA, s 65C(c)) and it is in the child’s best interests.

**Is a sperm donor ever a legal parent?**

There is a lack of clarity in Australian family law around the legal status of men who donate sperm to unpartnered women (Family Law Council of Australia, 2013; Kelly, 2015; Millbank, 2014). Section 60H of the FLA defines legal parentage where assisted conception is used. While section 60H expressly states that a sperm donor to a couple (whether opposite or same-sex) is not a legal parent, there is...
no equivalent provision for a single woman who conceives using donated sperm. In fact, assisted conception by single women is not addressed at all in section 60H, leaving judges with little statutory guidance when determining parenthood in such circumstances.

There is only one Family Court decision, Groth v Banks (2013), which has dealt with the legal status of a (known) sperm donor to a single woman, though it draws on a substantial number of cases that interpret section 60H. In Groth, Justice Cronin adopted what is often referred to as the “expansive” approach to section 60H (see Kelly, 2015), which treats the provision as a non-exhaustive definition of parenthood. The expansive approach allows a judge to go beyond section 60H and consider the parenting provisions of the FLA as a whole to determine the “ordinary meaning” of the term “parent”. Applying the expansive approach, Justice Cronin concluded that the ordinary meaning of parent is a biological parent: “The whole Commonwealth statutory concept as outlined in Part VII of the Act is one in which biology is the determining factor unless specifically excluded by law” (Groth v Banks at [14]). Justice Cronin also concluded (at [15]) that because Part VII contains multiple references to the parents of the child as “either” or “both”, the “logical presumption” was that the legislature envisaged two parents. The sperm donor, as the second biological parent, was thus declared a legal parent.

While Groth dealt with the legal status of a known donor, Justice Cronin discussed the implications of his decision for an anonymous donor to a single woman. It was Justice Cronin’s view that his conclusions did not apply to anonymous donors because they do not “intend” to become parents, and that rights and responsibilities only flow to donors with such an intention. Justice Cronin also held that anonymous donors should not be concerned because “the Act does not impose obligations on an unknown person who has donated biological material” (at [12]). Unfortunately, Justice Cronin provides no statutory support for these assertions and neither is easy to sustain. While it may, in most cases, be possible to distinguish between known and anonymous donors on the basis of intention, what a donor intends is not a relevant criterion for determining parenthood under the FLA. Rather, section 60H is based on a series of presumptions that are either applicable or not. It is not the absence of an intention to parent that makes a donor a legal stranger to his offspring when the donation is made to a couple. Rather, it is that section 60H(1)(d) creates a presumption that a donor to a couple is not a legal parent and, notably, makes no distinction between known and anonymous donors. In light of these conclusions, it is difficult to accept that Justice Cronin’s decision in Groth has no implications for anonymous donors because they do not “intend” to be parents. In fact, in Re Mark, a 2003 decision that touched on the legal status of anonymous donors, Justice Brown acknowledged that the expansive approach to section 60H “might lead to the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune” (Re Mark, 2003 at [81]).

Justice Cronin’s second assertion—that the FLA does not impose obligations on an unknown donor—is also difficult to sustain in cases where the woman is unpartnered. As the Family Law Council of Australia (2013) noted in its report on legal parenthood, the FLA is silent on the legal status of any donor to a single woman, whether known or anonymous. Thus, while there may be strong policy reasons for not imposing rights or responsibilities on anonymous donors in these circumstances, the FLA fails to address the issue. In the absence of statutory guidance, an anonymous sperm donor who becomes known to a single mother may well be able to rely on the expansive approach to section 60H, championed in Groth and other related cases, to support an application for parenthood (Family Law Council of Australia, 2013; Kelly, 2015; Millbank, 2014). As the second biological parent of the child, a donor will likely satisfy the “ordinary” meaning of the term parent. Justice Cronin, however, fails to see this risk because he presumes that anonymous donors remain anonymous. As this study demonstrates, that is no longer the case.

Can a donor apply for “parenting time” with the child?

Even if a donor is not a legal parent, it may still be possible to apply to the Family Court for an
order to spend time with the child (“parenting time”). Under the FLA, it is not necessary to be a legal parent to apply for a parenting order. Rather, any “person concerned with the care, welfare or development of the child” may apply (FLA, s 65C(c)). It has been held that this “threshold question” requires more than being “concerned about” or having a mere “interest” in the child. Rather, the “degree or strength of nexus” of the concern will be assessed on the facts (KAM & MJR, 1998 at [3.1.16]; Aldridge v Keaton, 2009 at [83]). While there has not yet been a case involving a previously anonymous donor applying for parenting time under section 65C(c), known donors who play a role in the lives of their donor offspring have had little trouble meeting the threshold test.7

Once it is established that a donor may apply for parenting time, the success of the application will turn on whether such an order is in the child’s best interests. Unfortunately, there is no case law involving formerly anonymous donors applying for parenting time. However, in cases where known sperm donors have applied (typically against the wishes of the child’s mother(s)) they have met with considerable success. In fact, the authors are not aware of a single case in Australia where a known sperm donor has been unsuccessful in seeking orders for time with his donor offspring, with judges often unable to see beyond the genetic relationship. It is therefore likely that an anonymous donor who has developed a relationship with his donor offspring would also be successful.

Conclusion

None of the women interviewed for the study had experienced any conflict with their child’s donor(s). They had each been able to negotiate an appropriate arrangement for contact that satisfied each of the parties. It is unrealistic, however, to presume that this will always be the case. At some point, a donor and mother will experience conflict and the Family Court will be called upon to resolve the legal issues raised. It is therefore concerning that none of the women, even those who engaged in statutory linking, were aware that making contact with their child’s donor may pose some legal risk to their parental autonomy.

This study suggests that early contact with donors is common amongst single mothers in Australia. Even where legislation does not support early contact, mothers are finding ways to identify their child’s donor(s). It is therefore important that they are made aware of the legal risks that early contact might present. It is also important that, where possible, those risks be minimised. As the Family Law Council recommended in its report on legal parentage, the FLA should be amended to clarify that donors to unpartnered women are not legal parents (Family Law Council of Australia, 2013). This will ensure that women who choose to have a child on their own are able to engage in donor linking without putting their sole parentage at risk. It will also ensure that single women who conceive using donated gametes are treated identically to couples in the same situation.

The issue of a previously anonymous donor applying for parenting time is more complex. The purpose of allowing a non-parent to apply for parenting orders is to ensure that an important adult in a child’s life, with whom the child has developed a meaningful relationship, is able to maintain that relationship. It may be that it is in a child’s best interests to have ongoing contact with his or her donor where a positive relationship has developed, even if it is against the wishes of the child’s mother. It is therefore recommended that donors continue to be able to apply for time with their donor offspring as individuals concerned with the care, welfare and development of the child. However, concern remains about the ability of judges to assess these cases in a sufficiently nuanced matter, particularly in light of the increasing prioritisation by Family Court judges of genetic relationships. In light of these concerns, it is vitally important that women engaging in donor linking are made aware that donors may have rights in relation to their donor offspring.

Endnotes

1 Groth v Banks [2013] FamCA 430
2 Assisted Reproductive Treatment Act 2008 (Vic.) s 57–60; Human Reproductive Technology Act 1991 (WA) ss 49(1a), 49(2d) and 49(2e); Assisted Reproductive Technology Act 2007 (NSW), Part 5.
3 Assisted Reproductive Treatment Amendment Act 2015 (Vic.)
4 Ethics approval for the study was granted by the La Trobe University Human Ethics Committee (No. 14–078).
5 SMCs may also become mothers via adoption. However, due to the study’s focus on conception using donated gametes, adoptive mothers were excluded.
6 Pseudonyms have been assigned to participants referred to and quoted in this paper.
7 See, for example, Re Patrick [2002] Fam CA 193; Wilson and Anor & Roberts & Anor (No. 2) [2010] Fam CA 75; Reiby & Meadowbank & Anor [2013] FCCA 2040; Gear & Anor & Faraday & Anor [2015] FCCA 5165.
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Dr Fiona Kelly is an Associate Professor and the Deputy Director of the Centre for Health Law and Society at the Law School at La Trobe University, Melbourne. Dr Deborah Dempsey is a Senior Lecturer in the Department of Education and Social Sciences at Swinburne University of Technology, Melbourne.
Elder abuse in Australia

Rae Kaspiew, Rachel Carson and Helen Rhoades

Introduction

Elder abuse presents a range of complex challenges for the Australian community.

The structures and frameworks in the areas of ageing generally and elder abuse particularly have parallels with those that shape responses to family and domestic violence and child protection, but the range of frameworks is greater and more complex. From a policy perspective, Commonwealth, state and territory governments have intersecting responsibilities in relation to ageing, aged care and health. Local governments also have responsibility for the delivery of services to the aged.

Many of the legal issues potentially raised by elder abuse—such as criminal justice responses and the legislative and organisational infrastructure that deals with matters including substituted decision-making and wills and estates—are the preserve of the states and territories. A range of professions, disciplines and organisations interact with elders and their family members. Professionals from health, law, social work and the banking and financial industry potentially engage with elder abuse in their day-to-day practice, and a range of public, private and non-government organisations provide aged care services in private and public settings.

Against this complex structure and organisational background, this article provides a brief overview of the issues raised by elder abuse in Australia.

What is elder abuse?

In Australia, approaches of organisations concerned with elder issues, such as Council On The Aging Australia (the peak national organisation representing the rights, needs and interests of older Australians), tend to be informed by human rights conceptualisations that emphasise self-determination, autonomy and respect (Department of Health, 2012).

A commonly applied definition locally is that adopted by the Australian Network for the Prevention of Elder Abuse in 1999 (also based
on the Action of Elder Abuse UK definition), which specifies that elder abuse is:

any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.¹

**What defines an “elder”?**

In Australia, for statistical and a range of other purposes, including access to the pension (Australian Bureau of Statistics [ABS], 2012b), 65 is the starting point for status as an “elder”, and 70 is the age for access to aged care services (Cotterell, Leonardi, Coward, Thomson, & Walters, 2015).

The definition of “older” Australian used in this paper is consistent with that used by the ABS, which classifies people over 65 as “older”. It should be noted, however, that some definitions, studies and services concerned with elder abuse use the age of 60 as a starting point. The literature on ageing also distinguishes between “old” people (65–84 years) and “old old” people, aged 85 and above (e.g. Wainer, Owada, Lowndes, & Darzins, 2011). For Aboriginal and Torres Strait Islander peoples, who have a substantially lower life expectancy than non-Indigenous peoples, a lower age for those who are “older” is considered appropriate (e.g., 45–50 years; Cotterell et al., 2015).

**The prevalence and dynamics of elder abuse**

The available evidence suggests that prevalence varies across abuse types, with psychological and financial abuse being the most common types of abuse reported, although one study suggests that neglect could be as high as 20% among women in the older age group (Australian Longitudinal Study on Women’s Health [ALSWH], 2014). Older women are significantly more likely to be victims than older men, and most abuse is intergenerational (i.e., involving abuse of parents by adult children), with sons being perpetrators to a greater extent than daughters. For some women, the experience in older age of family violence, including sexual assault, represents the continuation of a lifelong pattern of spousal abuse (Cramer & Brady, 2013; Mann, Horsley, Barrett, & Tinney, 2014; United Nations Department of Economic and Social Affairs [UNDESA], 2013). Evidence on elder abuse occurring outside of a familial context (e.g., in care settings) is particularly sparse.

At the international level, the World Health Organization ([WHO], 2015) recently reported that estimated prevalence rates of elder abuse in high- or middle-income countries ranged from 2% to 14%, with the following prevalence rates for the most common types of elder abuse:

- physical abuse (0–5%);
- sexual abuse (0–1%);
- psychological abuse, above a threshold for frequency or severity (1–6%);
- financial abuse (1–9%); and
- neglect (0–6%).

These prevalence estimates are based on data sources involving elderly people living in private and community settings and do not include those in institutional care or those with a cognitive impairment. These two latter limitations are characteristic of most prevalence studies, which therefore only reflect a partial view of the extent of elder abuse.

**Australian studies**

In Australia, there are two population-based studies that have yielded some insights into the extent to which older women experience violence, but there are limitations in the measures used and the extent to which they assess concepts relevant to elder abuse. One is a recently published, detailed analysis of data from the Personal Safety Survey (ABS, 2012a) by Australia’s National Research Organisation for Women’s Safety (ANROWS) (Cox, 2015). The age range for “older women” in the Personal Safety Survey was 55 plus, and the analysis was framed to assess violence against women, focusing on sexual assault by any perpetrator, and partner violence involving physical assault, physical threat, sexual assault and sexual threat by a cohabiting or intimate partner. In relation to cohabiting partner violence, 0.4% of women aged 55 and older reported this experience in the preceding 12 months (c. 12,800 women), compared with 3% of 25–34 year old women, the age group where this form of violence is most common. In relation to sexual assault, 0.2% of the sample aged 55 plus (c. 7,000 women) reported experiencing sexual assault in the preceding 12 months, against a national average rate across all age groups of 1%.

The other population-based study to yield approximations of prevalence of elder abuse (for women only) is the Australian Longitudinal Study of Women’s Health (2014), which has measures relevant to vulnerability, coercion, dependence and dejection. This study is based on a random sample of women using a sampling frame from Medicare, with the oldest cohort (n = 5,561) being born between 1921 and 1926. When this cohort was surveyed in
Studies based on data from calls to helplines for elder abuse provide some further insights into the occurrence of elder abuse in Australia. There are three recently published sources from Queensland (Spike, 2015), Victoria (Joosten, Dow, & Blakey, 2015) and NSW (NSW Elder Abuse Helpline and Resource Unit, 2015). They reflect circumstances in which elder abuse is known or suspected and a person concerned has decided to seek advice on the situation.

In Queensland, calls to the Elder Abuse Prevention Unit (EAPU) helpline have increased substantially over the period that it has been operating, from just over 200 in 2000–01 to nearly 1,300 in 2014–15 (Spike, 2015). The EAPU analysis of call data from the past five years provides a profile of the elder abuse concerns notified to the helpline. The calls were mostly in relation to female victims (68% female cf. 31 and male 1% unknown). The most common age group of victims was 80–84 years (23%), followed by 75–79 years (16%) and 85–89 years (15%). Perpetrators were male in 50% of calls and female in 45% (unknown: 5%). Where perpetrator age was known, the most common age group was 50–54 years (17%). Children were the largest groups of perpetrators reported (31% sons, 29% daughters). Otherwise, 10% were “other relatives”, 9% a spouse/partner, and 21% fell into a combined category of neighbours, friends, workers and informal carers.

In 2014–15, the most commonly reported type of abuse to the EAPU helpline was financial abuse, accounting for 40% of reports, compared to 35% for psychological abuse, which had been the most common type up to 2012–13. The next most common types were neglect and social isolation, at about 10% each. Physical abuse was reported in just under 5% of calls, and sexual abuse was referred to in about 1% of calls. Where the perpetrator was a partner or spouse, the most likely form of abuse was psychological (41%). Where the perpetrators were adult children, financial abuse (39%) and psychological abuse (38%) were the most common types of abuse.

In Victoria, a recent study by the National Ageing Research Institute (Joosten et al., 2015), commissioned by Seniors Rights Victoria (SRV), was based on an analysis of data derived from records of calls to a helpline operated by SRV between July 2012 and June 2014. Of 755 calls, 455 involved discussion of a matter that raised elder abuse issues (including some that raised multiple types of abuse), and 236 raised issues not relating to elder abuse. The most common concerns raised in relation to elder abuse were about financial abuse (61%) and psychological or emotional abuse (59%). Physical abuse was raised much less frequently (16%), as were social abuse (9%), neglect (1%) and sexual abuse (0.4%). Elder abuse issues were most commonly reported in relation to female victims (73% females cf. 28% males) and the most commonly reported perpetrators were male (60% males cf. 40% females). The majority of perpetrators of the abuse reported to the SRV helpline were children of the victim (67%), with sons responsible for 40% of incidents reported, and daughters for 27%. Spouses were reported to be responsible in small proportions of cases (5% husbands and 3% wives).

In NSW, two years of call data (n = 3,388) to the NSW Elder Abuse hotline (NSW Elder Abuse Helpline and Resource Unit, 2015) reveal broadly similar patterns to the Queensland and Victorian data. Women were most commonly reported to be the victims (71% women cf. 28% men), and the most common age group of concern in the calls was 75–84 year olds (33%). In 71% of calls, the perpetrators were family members, and the largest group of perpetrating relatives were adult children (26% sons and 21% daughters). Just over one in ten (12%) of perpetrators were spouses. The most common abuse type reported in the calls was psychological abuse (57%), followed by financial abuse (46%), neglect (25%), physical abuse (17%) and sexual abuse (1%).

Three reports completed in the past five years (Clare, Blundell, & Clare, 2011; Miskovski, 2014; Wainer, Darzins, & Owada, 2010) have used data from a range of agencies to assess the extent and nature of elder abuse. The reports by Wainer et al. and Miskovski specifically focused on financial abuse, and this kind of abuse emerged as the predominant concern in the report by Clare et al. Each of these reports illustrated the point that because responses to elder abuse are spread across different legal, policy and practice frameworks, the evidence available from these sources offers a piecemeal empirical understanding of elder abuse.
Risk factors and consequences

The literature indicates that there are different risk factors for different types of abuse. Among the common overall risk factors identified for which the empirical evidence is strong are when the older person has cognitive impairment or another disability, is isolated, or has a prior history of traumatic life events (Acierno, Hernandez, & Kilpatrick, 2010; O’Keeffe et al., 2007; WHO, 2015).

Cognitive impairment or other disability

Cognitive impairment and other forms of disability are established in the research literature as having a strong association with being vulnerable to elder abuse (Acierno et al., 2010; Gil et al., 2015; WHO, 2015). The Queensland EAPU analysis of helpline data (derived from calls made predominantly by family members and friends, but also from professionals) established that the incidence of abuse types observed varies according to whether the victim is reported to have dementia (Spike, 2015). Financial abuse is reported to occur at similar rates whether or not the victim has dementia, but psychological abuse (as a primary abuse type) occurs about half as often when the victim has dementia. This suggests that psychological abuse occurs to support financial abuse where dementia is not present, but is no longer necessary where dementia is present.

Social isolation

Social isolation has a well-established association with being vulnerable to elder abuse (Acierno et al., 2010; ALSWH, 2014; O’Keeffe et al., 2007; WHO, 2015). There are several dimensions to the connection between this condition and elder abuse. Isolation renders elders more vulnerable to exploitation for psychological, emotional and physical reasons, and it also means that abusive behaviour is less likely to be discovered due to the absence of social and other networks around the older person.

Traumatic life events

The association between experiences of elder abuse and previous traumatic events, including interpersonal and domestic violence, is evident in a range of sources (Acierno et al., 2010; Mann et al., 2014; UNDESA, 2013) and suggests elder abuse reflects the perpetuation of complex familial dynamics. Acierno et al. observed in their study that these experiences increased the risk of emotional, sexual and financial mistreatment.

Other risk factors

Other factors that have been established as risk factors for the perpetration of elder abuse include the victim’s depression or alcohol and drug misuse, and the victim being in a position of financial, emotional or relational dependence with the abuser (WHO, 2015). More generally, a theme that emerges from the analytic literature on elder abuse, but has not necessarily been directly measured in research, relates to attitudes and values (Gil et al., 2015; UNDESA, 2013; WHO, 2002a, 2015).

Generally, social and individual values that fail to accord respect and consideration to elders and their human rights are considered to create an environment conducive to elder abuse (Peri, Fanslow, & Hand, 2009). Some literature points to an association between gender roles and elder abuse, particularly financial abuse, because under traditional gender role paradigms, women have not expected, or been expected, to take responsibility for financial matters. In this respect, norms that support women’s relinquishment of financial control to others are also seen to be conducive to creating opportunities for elder abuse (Peri et al., 2009).

Consequences of elder abuse

Elder abuse has a range of physical, psychological and financial consequences. It can result in pain, injury and even death, and is associated with higher levels of stress and depression and an increased risk of nursing home placement and hospitalisation (WHO, 2015).
Prevention

Directions in the themes underpinning thinking about prevention have two broad elements locally and internationally. The first is oriented toward changing the values and attitudes among the broader community and among professionals and individuals who interact with elders to address ageist (and sexist) assumptions and attitudes and to develop understanding of ageing processes, including potential cognitive decline. The second is oriented toward mitigating the risk factors for elder abuse, through measures to reduce social isolation, increase autonomy and empowerment, and support retention of control over financial affairs, or at the very least to help elders maintain knowledge of their financial affairs (e.g., Mariam, McLure, Robinson, & Yang, 2015; Wainer et al., 2010).

Particular types of elder abuse

Financial abuse

Of the different types of abuse identified, financial abuse is the most well researched in Australia. There is also some evidence that suggests psychological and financial abuse often co-occur, and that psychological abuse may be a form of “grooming for financial abuse” (EAPU, n. d.; Miskovski, 2014; Wainer et al., 2010).

The WHO (2002a) defines elder financial abuse as “the illegal or improper exploitation or use of funds or resources of the older person” (p. 3). Darzins, Lowndes, & Wainer (2009) estimated that this experience affects between 0.5% and 5% of older Australians. The forms that financial abuse takes are varied, and it is this kind of abuse that is most likely to come to the attention of professionals across various areas (including banking, law and the welfare sector) because it may involve transactions and engagement with institutions and organisations. Financial abuse covers a spectrum of behaviours, and a guide published by Seniors Rights Victoria describes it as existing “in the grey area between thoughtless practice and outright theft” (Kyle, 2012, p. 7).

Several studies and analytic reports have raised concerns about financial management practices that are risky from the perspective of both the elder whose finances are being managed and the person managing them. Assistance in managing financial arrangements may be informal or formal in nature, ranging from informal responsibility for banking and bill payments to substantial responsibility for financial arrangements being assumed. The frameworks and instruments governing formal transfers of financial responsibility are those relating to enduring power-of-attorney instruments, which are executed when a person has capacity, and allow another person (the attorney) to take responsibility for financial matters.

If an enduring power of attorney has not been executed and it becomes necessary for someone else to exercise responsibility for an elder’s financial affairs, then application must be made to a guardianship board or tribunal. It appears that anticipatory execution of enduring power-of-attorney instruments is common, with one study of supported asset management identifying 69% of a sample of 421 Victorians aged 65 and over using an enduring power of attorney (Tilse, 2007, as cited in Wainer et al., 2010).

In 2010, Wainer and colleagues observed that “supported asset management is a common experience for family members and there is much work to be done to understand the dynamics of this form of care, particularly in a multicultural society” (p. 6). In this area, varying societal values about the extent to which assets are considered communal or personal within a family are evident, and it is also evident that expectations are culturally determined (Miskovski, 2014; Wainer et al., 2010).

The study by Wainer and colleagues was based on an analysis of data from a range of agencies whose operations bring them into contact with elder financial abuse in Victoria. The findings of this study showed that, to
Another area where financial abuse was vulnerable because of dementia. The interviews with professionals also confirmed that financial abuse was accompanied by psychological abuse that was intimidating, controlling and fear inducing. Among the ways in which financial abuse was carried out were through misuse of powers of attorney, coerced changes to wills, unethical trading in title to property, and the coercion of people without capacity into signing documents in relation to assets that would result in financial gain for the perpetrator. Concerns were also raised, particularly by professionals from helplines, in relation to situations where adult children were dependent on aged parents for accommodation or financial support by reason of addiction or mental ill health, but failed to fulfil reciprocal expectations in relation to caregiving activities.

Another area where financial abuse was identified was where an adult child held power of attorney and was also the beneficiary of a will and acted to preserve their inheritance by not selling the family home to release funds for an assisted accommodation bond, even though this was needed for their parent.

Wainer et al. (2010) concluded that the legal system was rarely used and unhelpful when trying “to prevent or remedy financial abuse”. There were a number of reasons for this, including privacy issues and the lack of an easily identifiable and accessible mechanism for reporting concerns.

These findings are consistent with those of a multi-dimensional study by Tilse, Wilson, Setterlund, & Rosenman (2005) on practices surrounding the management of older people’s assets. The research found poor understanding of legal obligations and mechanisms in relation to assisted asset management among elder people and those caring for them. It also highlighted “attitudes that suggest entitlement” to the older person’s assets, that together with risky asset management practices, created the conditions for financial elder abuse. Concluding that legal redress is often unattainable for practical reasons (assets are unrecoverable) or personal reasons (the older person decides that maintaining relationships is more important than pursuing justice), the researchers highlighted the need for a cross-sectoral approach involving financial institutions, advocacy organisations and agencies concerned with providing services to older people.

Bagshaw, Wendt, Zanettino, and Adams (2013) examined in separate surveys the views of 209 service providers on the risk factors for elder financial abuse, and the concerns of 114 older people and their family members about financial abuse. Six risk factors were identified by majorities of services providers:

- a family member having a strong sense of entitlement to an older person’s property or possessions (84%);
- an older person having diminished capacity (82%);
- an older person being dependent on a family member for care (81%);
- a family member having a drug or alcohol problem (73%);
- an older person feeling frightened of a family member (73%); and
- an older person lacking awareness of his or her rights and entitlements (72%).

About half of the sample of older people and their family members indicated they did not have concerns about financial management issues. The balance indicated they were “somewhat concerned” (30%), “concerned” (8%) or “very concerned” (18%).

**Sexual abuse**

Sexual abuse appears to be an uncommon form of elder abuse; however, the ANROWS analysis of Personal Safety Survey data suggests it is potentially experienced by thousands of older women annually.

Empirical evidence in this area is limited, but a recent study by researchers at La Trobe University has shed some light on the issue. Mann and colleagues (2014) conducted a study involving professionals concerned with sexual assault, service providers in aged care services, and women over 65 who had experienced sexual assault, their family members and friends. The findings showed that “the sexual assault of older women occurs in a wide range of contexts, settings and relationships. Older women remain vulnerable to sexual assaults by husbands/partners and family members. They can also face threats from service providers that they may rely on for general care, health care and intimate care. Assaults in such settings can be perpetrated by female as well as male staff” (p. 2).

The research highlighted a lack of mechanisms to ensure that professionals such as personal care workers were fit for the responsibilities of working with the aged, and suggested a need for licensing of these workers and a way of conducting background checks analogous to the Working with Children Checks (Child Family Community Australia, 2014). It also revealed mixed views on the question of reporting obligations, with evidence of some support
among professionals for mandatory reporting. Concern was expressed in relation to gaps in reporting obligations. Most significantly, the research highlighted the fact that no statutory reporting obligations apply in aged care services that do not receive Commonwealth government funding. The researchers also expressed concern about the narrow statutory reporting obligations in the *Aged Care Act 1997* (Cth) in relation to Commonwealth-funded facilities, and the implications of the discretion not to report (where reporting would otherwise be mandatory) in circumstances where the reportable act is committed by a person with cognitive impairment.

**Elder abuse in particular contexts**

Insight into elder abuse in particular contexts is limited, including among Aboriginal communities, culturally and linguistically diverse (CALD) communities, rural communities, and gay, lesbian, bisexual, transsexual, intersex and queer (GLBTIQ) communities (Higgins, 2004).

In relation to elder abuse in Aboriginal communities, a 2005 report by the Office of the Public Advocate in Western Australia established that in the Aboriginal context, even at the level of terminology, the conceptualisation of the mainstream concept of elder abuse requires reconsideration. Both the terms “elder” and “abuse” were considered problematic, as “elder” has a specific meaning in Aboriginal communities, and “abuse” may be considered inapt and confrontational. The research indicates that, as in the non-Aboriginal context, the most common type of abuse is financial but that other types of abuse also occur.

Two factors that were identified as having particular implications in the Aboriginal context were cultural obligations and the circumstances of grandparents. From a cultural perspective, Aboriginal norms in relation to reciprocity, the expectation that resources will be shared, and kinship (where a wide variety of relationships are involved in familial and community networks), are dimensions that complicate understandings of whether and how elder abuse is occurring. The extent to which calls on grandparent resources to care for grandchildren are culturally reasonable or unreasonable was also highlighted by the research. Substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among Aboriginal and Torres Strait Islander communities.

In CALD communities, the literature suggests that a number of factors can heighten vulnerability to abuse, including language difficulties for those whose primary language is not English, social dependence on family members for support, and the potential conflict caused by cross-generational expectations in relation to care (Bagshaw, Wendt, & Zannettino, 2009).

Some issues particularly pertinent to people resident in rural areas have been highlighted in the research (Tilse et al., 2006; Wainer et al., 2010). These include the complexity of assets held by families resident in rural areas such as farming properties, lack of access to services that may assist with asset management arrangements and responses to situations where elder abuse is occurring or expected; and the dynamics involved in reporting or disclosing elder abuse in rural communities, where shame and concern to protect the family name potentially play an inhibiting role.

**Disclosure and reporting**

Complex dynamics and structures are relevant to consideration of the questions of disclosing, discovering and reporting elder abuse. Elder abuse is generally considered to remain hidden to a significant extent, and if it is disclosed or discovered, under-reported (Jackson & Hafmeister, 2015; UNDESA, 2013; WHO, 2002b).
The same factors that are associated with vulnerability to elder abuse—social isolation and cognitive impairment—also militate against disclosure or discovery and reporting. Where abuse occurs in the context of familial or caregiver relationship dynamics (Jackson & Hafmeister, 2015), this may inhibit a parent disclosing mistreatment by a child and a spouse disclosing mistreatment by a partner.

The dynamics of dependence are also relevant, since an aged person may be reluctant to disclose abuse by someone on whom they depend for care, since disclosure may mean withdrawal of the care and potentially an unchosen change in living circumstances. Cognitive impairment may also mean that an older person is unable to disclose or is not believed when they do disclose. Shame, embarrassment, fear of negative repercussions and/or a belief that disclosure and/or reporting may result in no consequences or negative consequences may also be relevant.

The question of reporting obligations in Australia is the subject of significant debate. Apart from limited obligations in relation to specific offences for Commonwealth-funded care facilities (Aged Care Act 1997 (Cth), s 63-1AA), there are no statutory mandatory obligations on professionals to report elder abuse. Reporting pathways are acknowledged to be complex and confusing both for members of the community and professionals. Duties in relation to reporting depend on the professional context in which elder abuse is discovered. Some analyses have shown that even professionals providing care and other services to elders are unaware of reporting mechanisms (e.g., Miskovski, 2014).

There are a number of different perspectives on the question of whether mandatory reporting obligations should be introduced. One view is that mandatory reporting is paternalistic and detracts from the autonomy of the elder involved. This position is predicated on the view that the elder is in the best position to make a decision about whether abuse should be reported, and derogating from this position reflects an infringement of their human rights, particularly the right to self-determination (EAPU, 2006).

Although some organisations and individuals suggest that mandatory reporting might be an appropriate response where elders have diminished capacity, the EAPU asserts that existing obligations arising from professional duty of care requirements already impose sufficient reporting requirements on professionals.

Research suggests mixed views among professionals. The Alzheimers Australia NSW (Miskovski, 2014) study found some support for mandatory reporting of financial abuse among professionals. The study by Mann et al. (2014) on sexual assault and older women also found support among some professionals for mandatory reporting of sexual assault in this context, but this was not a universal view.

Inquiry into protecting the rights of older Australians from abuse

On 23 February 2016, the Attorney-General of Australia, the Hon. George Brandis QC, asked the Australian Law Reform Commission (ALRC) to look at existing Commonwealth laws and frameworks that aim to protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The ALRC was also asked to look at the interaction of Commonwealth laws with state and territory laws and to identify "best practice legal frameworks which promote and support older people’s ability to participate equally in their community and protect against misuse or advantage taken by formal and informal supporters or representatives."

As the population ages, and more people become affected by age-related conditions that increase their vulnerability, the potential for elder abuse also increases. The Toronto Declaration on the Global Prevention of Elder Abuse (2002) stated that "[p]reventing elder abuse in an ageing world is everybody’s business."

The two key principles guiding the Inquiry are:
- that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse; and
- that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person.

After a process of submissions and further consultation rounds, the final report of the inquiry is expected in May 2017.
Going forward

The calls for a national consideration of elder abuse are gaining pace (e.g., see Chesterman, 2015a; Lacey, 2014), with widespread recognition among experts in the field that both the existing knowledge base concerning elder abuse and approaches to preventing, identifying and addressing such abuse, however defined, have significant limitations (Clare et al., 2011; Wainer et al., 2010). Community concern is also increasingly evident, reflected in the NSW Parliamentary Inquiry Into Elder Abuse (General Purpose Standing Committee No. 2, 2016), and the House of Representatives Inquiry Into Older People and the Law in 2007.

In the coming decades unprecedented proportions of Australia’s populations will be aged. In 2050, just over a fifth of the population is projected to be over 65 (compared with 15% in 2015), and those aged 85 and over are projected to represent about 5% of the population (compared with less than 2% in 2011).2 With three in ten people over 85 having dementia (ABS, 2013), the numbers of aged people with a primary risk factor for elder abuse are likely to increase substantially. There will be significant cultural diversity among this population (ABS, 2015). Given that women tend to outlive men, it seems reasonable to suggest that a substantial number of widowed women will be living alone in 2050, a circumstance that again reflects a key risk factor for elder abuse. The numbers of aged people with dementia living in assisted care will also be substantial. These factors underline the need to consider the development both of prevalence assessment strategies and future policy responses to elder abuse.

Endnotes

1 See the Definition of Elder Abuse at: <www. arasagedights.com/definition-of-elder-abuse.html>.

2 According to one set of projections developed by the ABS (2013), the proportion of the total Australian population that is aged 65 years and over would increase from 14% in mid-2012 to 22% in mid-2061, while the proportion aged 85 years and over would increase from 2% to around 5%. As the ABS explains, population projections are not predictions. They are based on sets of assumptions concerning future changes occurring in the total fertility rates, mortality (and hence life expectancy) and net immigration. The projections quoted here are based on the ABS “Series B” set of assumptions.

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Dr Rae Kaspiew is a Senior Research Fellow and Dr Rachel Carson is a Research Fellow, both at the Australian Institute of Family Studies. Professor Helen Rhoades is an academic from the Melbourne Law School, The University of Melbourne.

Opening the conference, AIFS Director Anne Hollonds summarised a number of questions that were the focus of this year's event:

- **What is evidence?**
- **Who is the audience?**
- **How do we understand the needs of policy makers and practitioners?**
- **How do we achieve honest critique, reflection and cross-disciplinary dialogue?**

Considering these questions, two of our keynote speakers took us on discomforting—but ultimately rewarding—journeys about our understanding of research evidence, and how it is used (and misunderstood) in the name of achieving evidence-based practices. Professors Greg Duncan and John Lynch both challenged the audience to look behind the data in individual studies (or even meta analyses) of popular programs promoted as being based in evidence to see the broader context, such as how many of the expected outcomes were achieved and across how many different studies were there null findings. They challenged us to look beyond the popularly cited instances where significant impacts had been found.

Professor Duncan explored whether “two-generation programs” (a coordinated combination of parenting-focused programs directed at parents and child-based early childhood/education programs) can best help disadvantaged children. He explained that while both types of programs are effective, the combination is—disappointingly—not synergistically effective. Although there is some complementarity, the programs may, in part, substitute for one another. Parent take-up of services and their engagement in specific programs also is a significant problem and can be compounded when trying to deliver services simultaneously to two generations.

Professor Lynch outlined how Randomised Control Trials (RCTs) are accepted as one of the best forms of research evidence, with the capacity to show causal relationships between interventions (e.g., programs to improve parenting or children’s literacy/numeracy) and outcomes (e.g., measures of child/family wellbeing). But if they are poorly conducted (e.g., not enough participants in particular subgroups of interest to have sufficient statistical “power” to conduct relevant analyses—which is often the case in programs directed towards disadvantaged groups—they won’t assist policy makers in their task of implementing what works and, as a result, we can fail to bring about the expected improvements.

Professor Lynch went on to argue that administrative data are often an untapped goldmine and, when they are explored, can show unexpected results. They can challenge us to think about the context of our “usual care”. Many of the characteristics of early programs targeted at disadvantaged groups are not dissimilar to current universal service delivery in Australia; for example, the number of perinatal visits currently accessed or the number of hours of early childhood education available to all children.

On an even more challenging as well as distressing topic—the exposure of children to sexual abuse in organisational contexts—Justice Jennifer Coate painted a positive picture of the importance of research in undertaking her role as one of six Commissioners to the Royal Commission into Institutional Responses to Child Sexual Abuse. Research data will sit alongside information gained from more than 40 public hearings and over 5,500 private sessions so far, including de-identified data being collected from each private session. The Royal Commission has funded 100 research projects involving over 70 experts from more than 30 research centres and universities, of which 24 have already been published. These will be used to help shape its final recommendations when the Commissioners deliver their final report in December 2017.

A much-anticipated highlight of the conference program was the Q&A panel session “Show me the evidence!” hosted by the inimitable Annabel Crabb, writer and broadcaster with the ABC. After treating us to some of her timely acerbic political wit, in the wake of the federal election the previous weekend, she introduced each of the panelists: Brian Head, Professor of Public Policy at the University of Queensland; Anna Burke, former politician and speaker in the Commonwealth House of Representatives; John Daley, CEO of the independent public policy think tank the Grattan Institute; Penny Armytage, former senior public servant and now a lead partner in professional services firm KPMG; and keynote speaker John Lynch, Professor of Epidemiology and Public Health (University of Adelaide).
During the discussion, two of the key themes the panel touched on were:

- **The role of research evidence:** It can be valuable in defining the problem and in understanding the issue for which there needs to be an intervention or policy solution; however, it needs to be balanced with “practice-based evidence”. Decision-makers (and researchers) also need to maintain a level of scepticism—because if new data emerge, we might need to change our minds. Synthesis of the multitude of existing research is “evidence” in its own right but, as the keynotes from the conference highlighted, we need to consider the context in order to understand and make sense of the data. For policy makers, beside the challenges of using evidence to inform policy decisions are the challenges of implementation. Decision-making is happening all the time at the program or practice level.

- **The need to communicate the science in understandable language** based on dialogue between academia, policy and practice to reflect the “real world” decision-making/operating context. Policy makers and politicians need to make decisions “on the balance of probabilities” considering all elements, to identify the best options within the constraints. Practice-based evidence from the “coal face” is a valuable complement to research evidence from RCTs—it’s about putting all the pieces together in a coherent way.

The “enemies” that get in the way of the effective use of evidence were another strong theme. These include:

- Researchers rarely taking into account the demand pressures of the service system. They often lack pragmatism and sensitivity to the constraints of funding and the reality of the service delivery context. Having data and knowing how to use the data are two different things. The “all things considered” perspective that policy makers require can be challenging for researchers. When delivering the research, many senior decision-makers would prefer face-to-face interaction with researchers, to help them easily make sense of the options being presented. Policy makers experience frustration at the over-cautiousness of researchers (whose main conclusions are the need for further research) divorced from the real world of policy-on-the-run decisions.

- **Timelines:** There is often a timing disconnect between research and policy—so researchers need to have a “back book” of research that can be brought out and used if and when the opportunity arises; it is often too late to start a research program once an issue becomes topical. Policy makers also need to be timely and access any new and emerging information.

How do we help them get access to the “back book” and what’s in the bottom drawers of academics’ desks, and then to make sense of it? Purposeful collaborations or intermediary organisations and “translators” can facilitate this access to people who “know stuff” and have the policy knowledge and skills to toss around the ideas in a pragmatic fashion.

- **Forgetting who we are trying to influence:** Is it the minister? The department head? Or the general public? It is not just about convincing politicians or policy makers—it is also about bringing along the community. Communicating the science to the electorate is critical to effective evidence-based policy. We need to have better narratives about what we are trying to do. Public opinion isn’t a constant. If academics don’t step up, someone else will fill the knowledge void.

One of the key ideas to emerge from the panel discussion was of using greater collaboration and the principles of **co-design** as a future direction for research—developing successful strategies involving integrated policy action based on partnerships with a mutual shared interest in an agreed outcome. An example of where research, policy and practice has “collided” with positive results is road safety. If we can agree on the outcomes, we can empirically test the means (however, it should not be used as a proxy for disagreement about the ends per se). Sharing the pain and difficulty of co-designing policy responses, based on pragmatic realities, is what is needed. However, many of the “drivers” of academia in Australia don’t support this (e.g. the rewards for peer-reviewed journal publications). In the US, the greater level of funding from alumni and philanthropy for universities, institutes and think tanks has shifted the incentives towards more public engagement.

In conclusion, members of the panel stated that researchers often lack the ability to **translate the results of their research** into concrete actions, or to link to current policy issues and public debate. Dealing with research data is an infinitely more secure place than having to influence the public mind. Sometimes the evidence is there but the public is not. Successful alliances have been based on the confluence of advocacy, evidence and rhetorical skills … plus patience.

The world of evidence is no longer a lonely ivory tower. Deployment of “the facts” is a matter of collaborating, gathering intelligence, measuring—and influencing—public appetite, and usefully deploying the evidence. So, the “next steps” for improving the take-up of evidence in policy and practice are to build the “back book” of research in purposeful collaborations, to create nimble platforms (e.g., using administrative data), and to make the process of policy co-design easier.
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