

University of New England



The Australian Family Courts vs the Royal Commission into Institutional Responses to Child Sexual Abuse: Recognising and Responding to the Sexual Abuse of Children

Tarryn Corlet

BSocSci(Hons) First Class, Southern Cross University

A thesis submitted for the degree of Doctor of Philosophy at the University of New England in 2024

School of Humanities, Arts and Social Sciences

This research has been conducted with the support of the Australian Government Research Training Program Scholarship.

Abstract

This thesis presents a discourse analysis of 10 judgements concerning allegations of child sexual abuse published by Australian courts exercising family law jurisdiction, in the first six years following the conclusion of the 2013 Royal Commission into Institutional Responses to Child Sexual Abuse. By examining the adjudicative outcomes in the Federal Circuit Court, the Family Court of Australia and recently formed Federal Circuit and Family Court of Australia, this research highlights a critical disjunction between judicial practices and the recommendations of the Royal Commission for handling such allegations.

Employing a series of case studies, the research scrutinises the underlying discursive practices within each judicial decision, identifying a reliance on heavily contested pseudoscientific theories and myths about the credibility of women and children. Within the judgements, identified practices include narrative approaches that tend to normalise and minimise child sexual abuse alongside the use of judicial coercion and threats against those reporting child sexual abuse, which effectively control future narratives and prevent ongoing reporting of abuse. This analysis determines that such practices are prevalent because judicial officers and other family law professionals remain influenced by the established norms and values of family law discourse, which starkly contradict the evidence-based responses to child sexual abuse identified by the Royal Commission. Employing a critical feminist discourse analysis, the thesis challenges the formalist legal notion of objectivity, highlighting the ways in which the application of legal power disproportionately affects women and children. This theoretical approach, underpinned by a Foucauldian conception of discourse, stresses the political nature of discourse in shaping power dynamics within legal contexts. A historical overview situates the evolution of family law discourse within broader sociopolitical changes in Australia since the 1970s, examining legislative reforms and numerous inquiries that have attempted to enhance the family courts' capacity to protect vulnerable individuals from abuse.

The thesis reviews the significant findings and recommendations of the Royal Commission, using these benchmarks to assess the family courts' responses to child sexual abuse allegations. The methodology involves grouping the analysed cases by theme to uncover the prevalent discursive practices and assumptions that permeate judicial narratives. This detailed analysis contrasts these practices with the Royal Commission's findings, providing a critique of the psychosocial and pseudoscientific theories that some judges and other legal professionals apply in these cases. Despite decades of academic literature and the emphatic findings and recommendations of the Royal Commission regarding the identification of child sexual abuse and best-practice responses to it, the thesis finds that the family courts remain resistant to adopting research-based approaches to child protection, thus failing to effectively safeguard children within their jurisdiction. The study asserts that this failure has severe implications for the life trajectories of children subjected to ongoing abuse under judicial oversight.

Declaration/Certification by Author

This thesis *is composed of my original work, and contains* no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

I have clearly stated the contribution of others to my thesis as a whole, including statistical assistance, survey design, data analysis, significant technical procedures, professional editorial advice, and any other original research work used or reported in my thesis. The content of my thesis is the result of work I have carried out since the commencement of my higher degree by research candidature and does not include a substantial part of work that has been submitted *to qualify for the award of any* other degree or diploma in any university or other tertiary institution. I have clearly stated which parts of my thesis, if any, have been submitted to qualify for another award.

I acknowledge that an electronic copy of my thesis must be lodged with the University Library and, subject to the policy and procedures of the University of New England, the thesis be made available for research and study in accordance with the *Copyright Act 1968* unless a period of embargo has been approved by the Dean of the Graduate Research School.

I acknowledge that copyright of all material contained in my thesis resides with the copyright holder(s) of that material. Where appropriate, I have obtained copyright permission from the copyright holder to reproduce material in this thesis.

Tarryn Corlet

16 September 2024

Candidate Name

Acknowledgements

I wish to extend my deepest gratitude to my supervisor, Associate Professor Dr Jo Coghlan, whose unwavering support and profound expertise have been pivotal in the completion of this thesis. Her patience, dedication and insight have greatly enriched my research journey.

Most of all, to my children, I am so grateful for your presence in my life.

Table of Contents

Abstract.....	i
Declaration/Certification by Author.....	ii
Acknowledgements	iii
Table of Contents	1
Chapter One – Introduction	6
1 The Prevalence and Impact of Child Sexual Abuse in Australia	12
1.1 ‘False Allegations’ of Child Sexual Abuse.....	15
1.2 The Royal Commission into Institutional Responses to Child Sexual Abuse: Establishment, Scope and Impact.....	18
1.3 The Establishment and Scope of the Royal Commission	23
1.4 Terms of Reference.....	24
1.5 The Failure of Institutional Responses to Child Sexual Abuse in Australia.....	27
1.6 The Study: Research Design, Theoretical and Methodological Approaches.....	29
1.7 Research aims and case selection rationale.....	33
1.8 Chapter summary	37
Chapter Two – Theoretical Frameworks: Discourse, Narrative and Feminist Analysis of Family Law	39
2 Introduction.....	39
2.1 Defining Discourse	39
2.2 Critical Discourse Analysis.....	44
2.3 Narrative	47
2.4 Master Narrative	49
2.5 The Unreliable Narrator.....	51
2.6 Feminist Perspectives on Narrative.....	53
2.7 Analysing Australian Legal Discourse	54
2.8 Contesting Legal Positivism	57
2.9 Normative Prescriptions and Gendered Legal Discourse	62
2.10 Gender and the Criminal Justice System	66
2.11 Feminist Responses.....	71
2.12 Challenging law	76
Chapter Three – The Social History of Australian Family Law	79
3 Introduction.....	79
3.1 Foundations.....	79

3.2	Creation of the Family Court	83
3.3	Early Coordinated Responses to Family Violence.....	85
3.4	Keating and Howard: Attitudes Towards Family Violence and Child Sexual Abuse	89
3.5	Developments Since 2000.....	91
3.6	Current Developments: The Tragic Filicide Cases	96
3.6.1	The filicide of Braddon Park.....	97
3.6.2	The Dalton family court filicides	98
3.6.3	The Farquharson filicides.....	100
3.6.4	Darcey Freeman: Another family court filicide	101
3.6.5	Kyla Rogers: A post-separation familicide	103
3.6.6	Heather Glendinning: A mother's filicide-suicide	107
3.6.7	Luke Batty's death: A lifelong struggle for protection	111
3.6.8	The Edwards filicides and suicides	114
3.7	Social Context of the Royal Commission	121
3.8	Conclusion of the Royal Commission	126
Chapter Four – The Development of Australian Family Law: Legislative Reform, Major Reports, Inquiries and Initiatives		128
4	Introduction.....	128
4.1	The Early Reforms.....	128
4.2	The Early 21 st Century: A Renewed Focus on Family Violence	131
4.3	Family Law Reform Against the Backdrop of the Royal Commission	148
4.4.1	National Principles for Child Safe Organisations	158
4.4.2	Family Law for the Future	159
4.4.3	The Commonwealth Child Safe Framework.....	161
4.4.4	Inquiry into Domestic Violence with Particular Regard to Violence against Women and their Children	161
4.4.5	Gendered Violence in Parliament House	162
4.4.6	Merging of the Federal Circuit Court and Family Court	163
4.4.7	Inquiry into Family, Domestic and Sexual Violence.....	164
4.4.8	Joint Select Committee on Australia's Family Law System	166
4.4.9	National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030.....	168
4.4.10	The National Framework for Protecting Australia's Children 2021–2031	170
4.4.11	The National Plan to End Violence against Women and their Children, 2022–2032	171
4.4.12	The Family Law Act Amendments, 2023	172
Chapter Five – Case Studies		175

5	Introduction.....	175
5.1	<i>Ainsley & Ainsley</i>	175
5.2	<i>Belton & Braim</i>	177
5.3	<i>Bentleigh & Bentleigh</i>	178
5.4	<i>Fletcher & Littlemore</i>	181
5.5	<i>Hammond & Hammond</i>	182
5.6	<i>Martin & Payne</i>	185
5.7	<i>Palmeter & Kagan</i>	187
5.8	<i>Tabano & Yabon</i>	190
5.9	<i>Welby & Raine</i>	192
5.10	<i>Zaida & Badouri</i>	195
Chapter Six – Analysis: Comparing the Family Courts’ Responses to Allegations of Child Sexual Abuse with the Best-practice Recommendations of the Royal Commission		198
6	Introduction.....	198
6.1	Interpreting and Understanding the Disclosure of Child Sexual Abuse	199
6.1.1	<i>Ainsley & Ainsley</i>	201
6.1.2	<i>Bentleigh & Bentleigh</i>	201
6.1.3	<i>Belton & Braim</i>	203
6.1.4	<i>Tabano & Yabon</i>	203
6.1.5	<i>Zaida & Badouri</i>	207
6.2	Children’s Disclosures to Their Mothers	208
6.2.1	<i>Fletcher & Littlemore</i>	209
6.3	Reliance on Erroneous Beliefs.....	211
6.3.1	<i>Palmeter & Kagan</i>	212
6.3.2	<i>Ainsley & Ainsley</i>	214
6.3.3	<i>Welby & Raine</i>	216
6.4	Erroneous Beliefs about the Comorbidity of Family Violence and Child Sexual Abuse ...	217
6.4.1	<i>Bentleigh & Bentleigh</i>	218
6.4.2	<i>Welby & Raine</i>	219
6.4.3	<i>Martin & Payne</i>	220
6.5	The Use of Pseudoscience.....	222
6.5.1	<i>Ainsley & Ainsley</i>	222
6.5.2	<i>Hammond & Hammond</i>	225
6.5.3	<i>Zaida & Badouri</i>	227

6.6	‘Parental Alienation Syndrome’: Allegations as a Form of Psychological Abuse	227
6.6.1	Tabano & Yabon.....	231
6.6.2	Ainsley & Ainsley.....	231
6.6.3	Bentleigh & Bentleigh	232
6.6.4	Welby & Raine.....	233
6.7	Psychometric Testing.....	234
6.7.1	Palmeter & Kagan.....	235
6.8	Identifying Perpetrators of Child Sexual Abuse	239
6.8.1	Belton & Braim.....	241
6.8.2	Palmeter & Kagan.....	243
6.8.3	Zaida & Badouri.....	250
6.9	Normalising and Excusing Child Sexual Abuse	254
6.9.1	Hammond & Hammond.....	255
6.10	Assigning Responsibility for Child Sexual Abuse.....	256
6.10.1	Palmeter & Kagan.....	257
6.10.2	Hammond & Hammond.....	259
6.10.3	Belton & Braim.....	261
6.11	Punitive Responses to Reports of Child Sexual Abuse.....	261
6.11.1	Ainsley & Ainsley.....	263
6.11.2	Zaida & Badouri.....	264
6.11.3	Tabano & Yabon.....	265
6.12	Retraction of Allegations	265
6.12.1	Bentleigh & Bentleigh	266
6.12.2	Welby & Raine.....	268
6.12.3	Martin & Payne.....	269
6.13	Preventing Further Disclosures and Reporting	270
6.13.1	Welby & Raine.....	271
6.13.2	Palmeter & Kagan.....	274
6.13.3	Ainsley & Ainsley.....	274
6.13.4	Bentleigh & Bentleigh	275
6.13.5	Tabano & Yabon.....	278
6.14	Summary of Case Studies	279
Chapter Seven – Conclusions.....		281
7.1	Disparities between Evidence and Family Law Practices.....	282
7.2	The Royal Commission’s Influence on Institutional Reforms and Child Protection.....	285

7.3	Exploring the Reasons behind Family Law’s Resistance to Evidence-based Practices.....	287
7.4	Consequences of Limited Oversight in Family Law Decisions.....	292
7.5	Systemic Issues in Family Law and the Role of Discourse	293
7.6	The Construction of ‘Truth’: A Foucauldian Perspective on Power Dynamics and Judicial Reasoning.....	296
7.7	Perpetuation of Erroneous Beliefs in Family Law Discourse	297
7.8	Final Reflections on the Need for Reform in Family Law Discourse.....	300
Bibliography		302
Appendix A: Major Inquiries Conducted this Century of Relevance to the Safety of Children within Australia’s Family Law System.....		335
Appendix B: Recurring Findings and Recommendations of Inquiries of Pertinence to the Protection of Children Within the Family Law System.....		351
1	Risk Assessment and the Facilitation of Disclosure	351
2	Protecting Families with Complex Needs.....	352
3	Improved Integration of the Family Law, Family Violence and Child Protection Systems ...	353
4	Educating Communities.....	356
5	Educating Legal and Allied Family Law Professionals	357
6	Non-adversarial and Child-focused Decision-making	359
7	Increased Transparency.....	360

Chapter One – Introduction

This thesis presents a discourse analysis of 10 judgements concerning allegations of child sexual abuse published by Australian courts exercising family law jurisdiction, in the six years since the conclusion of the 2013 Royal Commission into Institutional Responses to Child Sexual Abuse (hereinafter the ‘Royal Commission’). In analysing these judgements, this research contrasts the practices of the Federal Circuit Court, Family Court of Australia and recently merged Federal Circuit and Family Court of Australia (hereinafter the ‘family courts’) in evaluating allegations of child sexual abuse with the findings and recommendations of the Royal Commission. In doing so, the project reveals a disconnect between family law practice and established best-practice responses to child sexual abuse, leading to judicial decisions that facilitate ongoing contact between children and the adults that they have disclosed have sexually abused them and, in some cases, removing these children from the care of the adults who reported the abuse to the family courts and placing them in the care of the alleged abuser.

Through an analysis of published family law judgements, this thesis evaluates the primary discursive practices underpinning judicial determinations regarding children’s contact with adults alleged to have sexually abused them. The discursive practices identified include reliance on gendered and culturally erroneous psychosocial theories about the credibility of men, women and children, narrative practices that normalise, minimise and excuse child sexual abuse, the deployment of coercion and threats in response to disclosures and allegations of child sexual abuse, and devices to control the future narrative, thereby ensuring that future allegations of child sexual abuse are not reported. The research posits that these discursive practices permeate Australian family law practice. It is suggested that such a distinct deviation from evidence-based responses to child sexual abuse occurs when judicial officers rely on the norms and values of family law discourse, many of which directly contradict the best-practice framework established by decades of mainstream academic research into child sexual abuse, and by the Royal Commission itself.

Child abuse and family violence represent part of the “core business” of the family courts.¹ Studies of child sexual abuse, in particular, estimate that allegations are present in approximately 10% to 20% of Australian family law cases involving parenting matters.² Notably, these figures represent only the cases in which abuse is reported, and do not necessarily reflect the actual extent of child sexual abuse in Australian families engaged with the family law system. A Family Law Council report into the family courts’ responses to family violence—which includes child sexual abuse—states that the issues “visible in the family law system [are] only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia”.³

Despite the prevalence of allegations of child abuse within family law settings, academic literature consistently highlights the gross inadequacy of the responses of Australia’s family courts and allied institutions to child maltreatment.⁴ Australia’s family law system has long been criticised as disregarding the extent and impact of family and sexual violence on women and children.⁵ Despite numerous attempts to improve family law responses to family violence at legislative, governmental and judicial levels, survivors report feeling unprotected, because family courts continue to respond poorly to reports of interpersonal violence.⁶ The 2019 Australian Law Reform Commission inquiry, *Family Law for the Future*,⁷ identified numerous concerns with the family courts’ approach to allegations of physical and sexual violence,

¹ T Brown et al., 'Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes' (2000) 24(6) *Child Abuse and Neglect* 849–859, 852.

² Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007), cited in Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 14.

³ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 7.

⁴ Sarah Ailwood, Patricia Easta and Jessica Kennedy, 'Law's Indifference to Women's Experience of Violence: Colonial and Contemporary Australia' (2012) 35(2) *Women's Studies International Forum* 86–96, 86; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 13.

⁵ Dale Bagshaw et al., 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49–61, 49; Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 7; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) ix–x.

⁶ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6.

⁷ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019).

stating “children are not consistently protected from harm; nor are people experiencing family violence”.⁸ The 2019 inquiry was just one of a litany of inquiries into the operation and impacts of the family courts held at state and federal levels since the inception of Australia’s family court system, the resounding results of which have been that “the family law system does not deal well with violence”.⁹ A summary of major reports and inquiries relevant to the safety of children within Australia’s family law system is detailed in this dissertation. An inability, within the family law system, to adequately respond to allegations of child sexual abuse can have stark impacts on the children involved. Webb et al. determined that in an estimated two-thirds of fully contested cases of alleged child sexual abuse proceeding to trial in the Family Court of Australia from 2012 to 2019, children’s time with alleged perpetrators of child sexual abuse was *increased* by the court in nearly two-thirds of cases.¹⁰ Children were subject to court-ordered changes of residence that ordered them to live with the alleged perpetrator in 17% of these cases.¹¹ These actions contrast starkly with the literature on best-practice responses to child sexual abuse, as detailed throughout this thesis.

This study seeks to identify discursive practices that could account for the difference between the family courts’ handling of child sexual abuse allegations and the findings of the Royal Commission, and mainstream academic research, regarding the prevalence of false allegations and best-practice responses to reports of child sexual abuse. In pinpointing the gap between research and practice, and highlighting the factors enabling it, the project aims to protect child survivors of sexual abuse involved in the family law system from court orders that, in some instances, promote further abuse.

⁸ Ibid 23.

⁹ Ibid 27.

¹⁰ N=233 (63%): Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 11 (table 6), 13.

¹¹ N=63 (17%): *ibid* 11 (table 7), 13.

Research consistently shows that child sexual abuse is both prevalent and underreported in Australia,¹² and that false allegations of child sexual abuse and family violence are exceedingly rare, including within family law settings.¹³ Yet, studies of the beliefs of Australian judges and family law professionals demonstrate high rates of belief that child sexual abuse is uncommon and subject to numerous false allegations, particularly in post-separation contexts.¹⁴ Decisions in the Family Court of Australia, in particular, echo ‘parental alienation’ theories in relying on heavily gendered notions of mothers as “coaching children in allegations of CSA [or child sexual abuse], vindictive, highly manipulative, and mentally ill”.¹⁵ This is echoed more broadly in legal responses to gendered crimes of violence, as numerous studies of Australian judicial responses to allegations of child sexual abuse, adult sexual assault and family violence have identified a “culture”, “dialogue” or “climate” of disbelief operating to minimise or even exclude survivors’ reports of abuse in the legal sphere.¹⁶

¹² Ben Mathews (coordinating author), 'The Australian Child Maltreatment Study: National Prevalence and Associated Health Outcomes of Child Abuse and Neglect' (2023) 218(S6) *Medical Journal of Australia* S1–S51, S13, S27; Antonia Quadara et al., *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies, June 2015) 6–8.

¹³ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

¹⁴ Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 14.

¹⁵ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9.

¹⁶ Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 81; Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 291; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 93; R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 766.

Judicial officers within the Australian family courts frequently hear allegations of child sexual abuse,¹⁷ and their decisions can have lifelong impacts on the children and families involved.¹⁸ Mainstream jurisprudence now largely accepts that the practice of law is neither objective nor merely a matter of legislative interpretation, and that judges' beliefs and assumptions play a significant role in influencing what issues are deemed relevant, which accounts are considered credible and, ultimately, in determining case outcomes.¹⁹ Webb et al. evaluated cases of alleged child sexual abuse heard by the Family Court of Australia from just prior to the commencement of the Royal Commission until two years after it concluded.²⁰ Of the in-scope cases in which the allegations of child sexual abuse were contested throughout the proceedings, the authors found that, far from acting to protect children from child sexual abuse, the Family Court *increased* the amount of time that children were mandated to spend with alleged perpetrators in just under two-thirds of cases,²¹ and ordered changes of residence that required children to live with the alleged perpetrator in 17% of these cases.²²

A prior study by Ferguson et al. of the outcomes of child sexual abuse cases heard by the Family Court of Australia during the early years of the Royal Commission²³ found that only 10% of cases of alleged child sexual abuse were substantiated by judicial officers.²⁴ This accords with Webb et al.'s finding that judges identified a risk of sexual harm to a child in only 12% of fully contested cases.²⁵ Of greatest concern, when the allegation was uncontested—that

¹⁷ Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007), cited in Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 14.

¹⁸ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 363; Michael Flood, "'Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328–347, 333–34.

¹⁹ Margaret Davies, 'Derrida and Law: Legitimate Fictions' in T Cohen (ed), *Jacques Derrida and the Humanities* (Cambridge University Press, 2001) 213–235, 232–233.

²⁰ The authors examined 521 judgements published from 2012–2019: Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 1.

²¹ N=233 (63%): *ibid* 11 (table 6), 13.

²² N=63 (17%): *ibid* 11 (table 7), 13.

²³ The authors examined 156 judgements published from 2013–2015: Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 93.

²⁴ N=16 (10.3%): *ibid* 102.

²⁵ N=47 (12%): Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 9 (table 3), 12.

is, *the alleged perpetrator did not dispute the allegation*—judges only found a risk of sexual harm to a child in 65% of cases,²⁶ and ordered *increases* in children’s time with the alleged perpetrator in 12% of these undisputed cases.²⁷ Further, Ferguson et al.’s study determined that Australian judges in the Family Court were far less likely to substantiate such allegations than their international counterparts,²⁸ and that mothers’ allegations against fathers were disproportionately unsubstantiated.²⁹ These case outcomes are at odds with the vast academic consensus on the prevalence of child sexual abuse in Australia and the veracity of such allegations. This research aims to determine the drivers of this disparity between evidence and practice.

The family courts have long been subject to criticism over their handling of cases involving family violence—defined in the *Family Law Act* as including sexual abuse³⁰—and the work of the courts has been the subject of numerous inquiries and academic studies over the past decades. Most significantly, the Royal Commission exposed the extent of child sexual abuse in Australia and the qualities of institutional cultures that allow it to flourish.³¹ While the Royal Commission did not inquire into the family courts, many of the Commission’s findings are directly applicable to the work of these courts, both in debunking many of the myths plaguing the legal profession in relation to false allegations and the ways in which children disclose sexual abuse, and in clearly prescribing best-practice responses to allegations of the sexual harm of children.

The research project has two primary aims. The first aim is to compare the relevant findings and recommendations of the Royal Commission with the responses of the family courts to allegations of child sexual abuse in cases heard since the Commission concluded. The second aim is to identify and evaluate the discursive practices used by judicial officers when hearing contested cases of child sexual abuse, in particular, exploring those assumptions, reasoning

²⁶ N=46 (65%): *ibid* 9 (table 3), 12.

²⁷ N=8 (12%) *ibid* 11 (table 6), 13.

²⁸ Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 108.

²⁹ *Ibid* 102.

³⁰ *Family Law Act 1975* (Cth) ss 4AB(1)–(2).

³¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 163; *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 250; *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 39.

processes and narratives that support judicial decisions determining children’s contact with alleged perpetrators. Analysis of judicial officers’ reasoning, as described in their narrative presentation of each judgement, is facilitated by this discourse analysis. This allows the project to determine whether decisions around contact with children are motivated by evidence-based best-practice approaches to child protection or based on erroneous beliefs that permeate the discourse.

1 The Prevalence and Impact of Child Sexual Abuse in Australia

Child sexual abuse is common in Australia, as are physical and emotional abuse, and exposure to family violence.³² The Commissioners found that the scale of institutional sexual abuse of children in Australia has reached to tens of thousands of children, spanning generations.³³ Child sexual abuse has occurred “in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities”.³⁴ The Commissioners were clear that the problem of child sexual abuse in Australia “is not a case of a few ‘rotten apples’ ... The problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend”.³⁵ One recommendation of the Royal Commission was that the Australian Government regularly publish a nationally representative study of the prevalence of all forms of child maltreatment, in institutional and non-institutional contexts.³⁶

The first such study, published in 2023, featured interviews with 8,503 survey participants, of which approximately 28.5% reported having experienced sexual abuse as a child.³⁷ Larger proportions of women reported experiencing this form of abuse than men, comprising 37.3% of women and 18.8% of men.³⁸ In comparison, globally, the prevalence of child sexual abuse was estimated to be 12.7%, while a comprehensive study in the UK revealed the rate of

³² Ben Mathews et al., 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(6) *Medical Journal of Australia* S13–S18, S17.

³³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 5.

³⁴ *Ibid* 5.

³⁵ *Ibid* 5.

³⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 3, rec 2.1.

³⁷ The study employed weighted data “representative of the Australian population”, with a 95% confidence interval spanning 27.3–29.8%: Ben Mathews (coordinating author), 'The Australian Child Maltreatment Study: National Prevalence and Associated Health Outcomes of Child Abuse and Neglect' (2023) 218(S6) *Medical Journal of Australia* S1–S51, S13, S27.

³⁸ *Ibid* S15.

experiencing child sexual abuse as 24.1%.³⁹ The *Australian Child Maltreatment Study* also highlighted that children in Australia are more likely to experience forms of maltreatment concurrently, rather than in isolation.⁴⁰ Among the top six most common patterns of multi-type child maltreatment, three include sexual abuse.⁴¹ This underscores the significant overlap of sexual abuse with other forms of maltreatment, such as emotional and physical abuse and exposure to family violence.

Child maltreatment of all forms has serious, long-term impacts. It represents the leading preventable risk factor for substance abuse and mental illness.⁴² Child sexual abuse is associated with a range of negative outcomes. These impacts may include an increased risk of developing mental health disorders⁴³ and learning difficulties,⁴⁴ of re-victimisation and of involvement with the criminal justice system later in life.⁴⁵ Survivors may also experience difficulties in forming and maintaining healthy relationships, and in parenting,⁴⁶ and may experience drug or alcohol addiction,⁴⁷ self-harming and suicidal behaviour.⁴⁸ The

³⁹ Ben Mathews et al., 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(6) *Medical Journal of Australia* S13–S18, S13.

⁴⁰ Daryl J Higgins et al., 'The Prevalence and Nature of Multi-Type Child Maltreatment in Australia' (2023) 218(6) *Medical Journal of Australia* S19–S25, S19.

⁴¹ Ibid S23.

⁴² Martin H Teicher et al., 'The Effects of Childhood Maltreatment on Brain Structure, Function and Connectivity' (2016) 17 *Nature Reviews Neuroscience* 652–666, 652; Sarah E Ullman, 'Relationship to Perpetrator, Disclosure, Social Reactions, and PTSD Symptoms in Child Sexual Abuse Survivors' (2007) 16(1) *Child Sexual Abuse* 19–36, 19.

⁴³ David M Fergusson, Joseph M Boden and L John Horwood, 'Exposure to Childhood Sexual and Physical Abuse and Adjustment in Early Adulthood' (2008) 32(6) *Child Abuse and Neglect* 607–619, 607; SA Jumper, 'A Meta-Analysis of the Relationship of Child Sexual Abuse to Adult Psychological Adjustment' (1995) 19(6) *Child Abuse and Neglect* 715–728, 715; DA Neumann et al., 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1(1) *Child Maltreatment* 6–16, 6; VL Banyard, LM Williams and JA Siegel, 'The Long-Term Mental Health Consequences of Child Sexual Abuse: An Exploratory Study of the Impact of Multiple Traumas in a Sample of Women' (2001) 14(4) *Traumatic Stress* 697–715, 697.

⁴⁴ EO Paolucci, ML Genuis and C Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135(1) *Psychology* 17–36, 17.

⁴⁵ RJ Johnson et al., 'Prevalence of Childhood Sexual Abuse among Incarcerated Males in County Jail' (2006) 30(1) *Child Abuse and Neglect* 75–86, 75; James RP Ogloff et al., *Child Sexual Abuse and Subsequent Offending and Victimization: A 45 Year Follow-up Study* (Trends & Issues in Crime and Criminal Justice No 440, Australian Institute of Criminology, 2012) 3–4.

⁴⁶ PJ Isely, J Freiburger and R McMackin, 'In Their Own Voices: A Qualitative Study of Men Abused as Children by Catholic Clergy' (2008) 17(3–4) *Child Sexual Abuse* 201–215, 208.

⁴⁷ DA Neumann et al., 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1(1) *Child Maltreatment* 6–16, 6; Margaret C Cutajar et al., 'Psychopathology in a Large Cohort of Sexually Abused Children Followed up to 43 Years' (2010) 34(11) *Child Abuse and Neglect* 813–822, 813.

⁴⁸ E David Klonsky and Anne Moyer, 'Childhood Sexual Abuse and Non-Suicidal Self-Injury: Meta-Analysis' (2008) 192(3) *British Journal of Psychiatry* 166–170, 166; DA Neumann et al., 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1(1) *Child Maltreatment* 6–16, 6.

consequences of child sexual abuse can be pervasive, affecting various aspects of a survivor's life across their lifespan.⁴⁹ The Royal Commission emphasised the “profound and lasting impacts” of child sexual abuse for many victims.⁵⁰ The Commission found that the complex trauma caused by child sexual abuse can impact the “biological, social and psychological development of a child ... interrupting normal psychosocial development at every critical stage of a child's formative years”.⁵¹ It also noted the cumulative harm that can result when sexual abuse and other forms of harm occur over a long period.⁵² The Commissioners highlighted the interconnected ways in which child sexual victimisation can affect diverse areas of a person's childhood and adult life, encroaching on their mental and physical health, interpersonal relationships, spirituality and connection to culture, their societal interactions and long-term economic security.⁵³ They described the impacts of child sexual abuse as a “cascade of effects over a lifetime”, potentially including addiction, criminal behaviour and suicide,⁵⁴ and causing “ripple effects” that impact the victim's family and community, and even future generations.⁵⁵

While not all individuals who experience child maltreatment develop significant adverse outcomes, many do.⁵⁶ In the *Australian Child Maltreatment Study*, 21.6% of participants who had not experienced any form of child maltreatment were found to have a mental disorder.⁵⁷ This figure more than doubles among those who have experienced maltreatment, with 48% of such individuals reporting a mental disorder.⁵⁸ Furthermore, the prevalence of mental disorders increases to 54.8% among those who have endured two or more types of child maltreatment, highlighting the significant impact of multiple maltreatment experiences on mental health.⁵⁹ Given the established link between child sexual abuse and its frequent co-occurrence with other types of maltreatment, victims are at a substantially increased risk of developing mental

⁴⁹ Ben Mathews et al., 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(6) *Medical Journal of Australia* S13–S18, S13.

⁵⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 23.

⁵¹ *Ibid* 11.

⁵² *Ibid* 29.

⁵³ *Ibid* 10.

⁵⁴ *Ibid* 11.

⁵⁵ *Ibid* 12.

⁵⁶ Ben Mathews, Hannah J Thomas and James G Scott, 'A New Era in Child Maltreatment Prevention: Call to Action' (2023) 218(6) *Medical Journal of Australia* S47–S51, S49.

⁵⁷ James G Scott et al., 'The Association between Child Maltreatment and Mental Disorders in the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S26–S33, S28.

⁵⁸ *Ibid*, S28.

⁵⁹ *Ibid*, S26.

disorders.⁶⁰ Victims and survivors of child sexual abuse also face the highest risk of engaging in health-risk behaviours, such as substance misuse, self-harm and suicide attempts.⁶¹ Compared to victims of other child maltreatment types, those who have experienced sexual abuse are significantly more likely to necessitate overnight hospital admissions,⁶² demanding a greater need for serious and costly medical treatment. Noting that the heaviest burden of child sexual abuse is carried by victims and survivors, the Commission referenced Australian and international research in concluding that child sexual abuse is likely to cost the Australian economy billions of dollars each year in the form of costs to the unemployment, homelessness, health and criminal justice systems.⁶³ They noted that many of these costs could be averted “by preventing child sexual abuse and addressing short and long term impacts”.⁶⁴

1.1 ‘False Allegations’ of Child Sexual Abuse

The literature consistently demonstrates that false allegations of child sexual abuse are exceedingly rare.⁶⁵ This is the case for disclosures made by children,⁶⁶ as well as reports made by adults.⁶⁷ Academic findings pinpoint false allegations of sexual abuse made by children as comprising 2.5% to 5% of all children’s allegations.⁶⁸ In children under six years of age, this falls to just 2%.⁶⁹ In one US study of all reports of child abuse made to the Denver Department

⁶⁰ Ben Mathews, Hannah J Thomas and James G Scott, 'A New Era in Child Maltreatment Prevention: Call to Action' (2023) 218(6) *Medical Journal of Australia* S47–S51, S49.

⁶¹ David M Lawrence et al., 'The Association between Child Maltreatment and Health Risk Behaviours and Conditions Throughout Life in the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S34–S39, S34.

⁶² Rosana Pacella et al., 'Child Maltreatment and Health Service Use: Findings of the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S40–S46, S42.

⁶³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 233–234.

⁶⁴ *Ibid* 234.

⁶⁵ William O'Donohue, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475, 471; Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 3; R Kim Oates et al., 'Erroneous Concerns About Child Sexual Abuse' (2000) 24(1) *Child Abuse and Neglect* 149–157, 149; Catherine Esposito, *Child Sexual Abuse and Disclosure: What Does the Research Tell Us?* (Literature Review, NSW Department of Family and Community Services, 2014) 20.

⁶⁶ R Kim Oates et al., 'Erroneous Concerns About Child Sexual Abuse' (2000) 24(1) *Child Abuse and Neglect* 149–157, 149.

⁶⁷ Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1333.

⁶⁸ William O'Donohue, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475, 471.

⁶⁹ Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007),

of Social Services during a 12-month period (551 cases), 2.5% (14 cases) involved reports of sexual abuse by children that were subsequently deemed to be erroneous.⁷⁰ Of these 14 cases, just eight (1.5% of all reports) were judged to have involved deliberately fabricated allegations by children.⁷¹ Critically for family law jurisprudence, research establishes that the rate of false allegations of child sexual abuse made by adults within the family courts is similarly rare.⁷² False allegations of all forms of child abuse have been identified as occurring at similar rates in family law proceedings as in other contexts.⁷³ One study from Victoria identified false allegations of child abuse generally as occurring at a rate of 9% in cases before the family courts, the same rate as those determined to be false by the state child abuse registry.⁷⁴ Disclosures of child sexual abuse reported to the family courts are frequently met by counter allegations that the child has been ‘coached’ by the alleging parent, usually the mother, to make the allegations.⁷⁵ Although there is little evidence to support ‘coaching’ as a feasible explanation for children’s disclosures of sexual abuse,⁷⁶ coaching is an explanation commonly

cited in Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 30; MD Everson and BW Boat, ‘False Allegations of Sexual Abuse by Children and Adolescents’ (1989) 28(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 230–235, 231.

⁷⁰ R Kim Oates et al., ‘Erroneous Concerns About Child Sexual Abuse’ (2000) 24(1) *Child Abuse and Neglect* 149–157, 151.

⁷¹ Ibid 152.

⁷² Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, ‘Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law’ (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Nico Trocmé and Nicholas Bala, ‘False Allegations of Abuse and Neglect When Parents Separate’ (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1333.

⁷³ Nico Trocmé and Nicholas Bala, ‘False Allegations of Abuse and Neglect When Parents Separate’ (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341; M Hume, ‘The Relationship between Child Sexual Abuse, Domestic Violence and Separating Families’ (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), cited in Kathleen Faller, ‘Coaching Children About Sexual Abuse: A Pilot Study of Professionals’ Perceptions’ (2007) 31 *Child Abuse and Neglect* 947–959, 955; Jodi Death, Claire Ferguson and Kylie Burgess, ‘Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia’ (2019) 94 *Child Abuse and Neglect* 2–10, 9.

⁷⁴ T Brown et al., ‘Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes’ (2000) 24(6) *Child Abuse and Neglect* 849–859, 852.

⁷⁵ Kathleen Faller, ‘Coaching Children About Sexual Abuse: A Pilot Study of Professionals’ Perceptions’ (2007) 31 *Child Abuse and Neglect* 947–959, 947.

⁷⁶ Ibid 947; Nico Trocmé and Nicholas Bala, ‘False Allegations of Abuse and Neglect When Parents Separate’ (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341.

accepted by many professionals working in the sector.⁷⁷ In fact, identified rates of coached disclosures are extremely low,⁷⁸ ranging from 0.5%⁷⁹ to 6%.⁸⁰

The consensus on the rarity of false allegations of child sexual abuse accords with Australian and international research which has resoundingly determined that false allegations of family violence are also uncommon, and are no more likely to be made by women than men.⁸¹ This has been found to be the case for allegations made within the family courts, as well as in the broader community.⁸² In one study, non-custodial parents' (usually fathers) allegations of all types of child maltreatment were found to be more likely to be intentionally false, at 15%, than custodial parents' (usually mothers) allegations, at just 2%.⁸³ In contrast, judicial officers in the Australian family courts have been found to be less likely to substantiate allegations of child sexual abuse made by mothers, than those made by fathers.⁸⁴ Additionally, child sexual abuse allegations are substantiated less frequently in the Australian family courts than in family law courts in other countries.⁸⁵

In evaluating the research on false allegations of child sexual abuse, the Royal Commission emphasised the gross underreporting of child sexual abuse and the many barriers to disclosure.⁸⁶ Research consistently demonstrates that child sexual abuse is not only

⁷⁷ Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 947.

⁷⁸ Lindsay C Malloy, Thomas D Lyon and Jodi A Quas, 'Filial Dependency and Recantation of Child Sexual Abuse Allegations' (2007) 46(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 162–170, 162.

⁷⁹ R Kim Oates et al., 'Erroneous Concerns About Child Sexual Abuse' (2000) 24(1) *Child Abuse and Neglect* 149–157, 152.

⁸⁰ Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341.

⁸¹ Michael Flood, 'Backlash: Angry Men's Movements' in SE Rossi (ed), *The Battle and Backlash Rage On: Why Feminism Cannot Be Obsolete* (Xlibris, 2004) 261–278, cited in *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

⁸² *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

⁸³ Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341.

⁸⁴ Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 102.

⁸⁵ *Ibid*, 108.

⁸⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 52.

underreported by victims, but is also significantly underreported by their families and the agencies and professionals responsible for child protection.⁸⁷

1.2 The Royal Commission into Institutional Responses to Child Sexual Abuse: Establishment, Scope and Impact

In 2012, the Royal Commission into Institutional Responses to Child Sexual Abuse was tasked with investigating the role of Australia's institutions in recognising and responding to child sexual abuse. Over the course of its five-year tenure, the Commission conducted thousands of private sessions and numerous public hearings, revealing the widespread impact of child sexual abuse in Australia. While the Commission did not directly investigate the family courts, its insights are invaluable in highlighting the reasons that child sexual abuse continues to proliferate in Australian institutions, and in identifying standards and processes to improve institutional responses to such abuse. As the family courts serve as pivotal junctures in the trajectory of familial abuse cases, the knowledge gained from the Royal Commission about the nature of child sexual abuse, best-practice responses to it, and the prevention of further abuse, serves as a critical measure of the family courts' efficacy when working to ensure a child's best interests are met.

The Final Report of the Royal Commission stated:⁸⁸

It is now apparent that across many decades, many of society's institutions failed our children. Our child protection and criminal and civil justice systems let them down. Although the primary responsibility for the sexual abuse of a child lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms which were available to regulate and control aberrant behaviour failed.

⁸⁷ K London et al., 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11(1) *Psychology, Public Policy and Law* 194–226, cited in Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 3.

⁸⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 3.

The Royal Commission presented a watershed moment in Australian understandings of, and responses to, child sexual abuse. The work of the Commission provides a valuable benchmark by which to evaluate the practices of the family courts, as it consolidated decades of Australian and international research into child sexual abuse, and generated new evidence-based understandings of the dynamics of this crime through commissioned research and hearings with survivors, to establish best-practice approaches to the prevention, detection and response to child sexual abuse in an Australian context.

The Commission found that child sexual abuse is a pervasive and serious problem in Australia that has occurred in a broad range of settings and institutions, including schools, religious institutions, sporting clubs and government organisations.⁸⁹ The Commissioners stated that Australia's institutions have repeatedly failed to protect children from sexual violence, noting "[t]he problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend".⁹⁰ The Royal Commission defined institutions broadly, encompassing any entity that "provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, *including through their families*".⁹¹ While this definition excluded the family itself, the Commission's Terms of Reference empowered the Royal Commissioners to examine the responses of government departments and agencies, such as police services, to allegations of abuse in other institutions.⁹²

Because the Royal Commission established best-practice in the identification of, and response to, child sexual abuse in Australia, its findings and recommendations offer a contemporary, evidence-based standard by which to evaluate responses to allegations of child sexual abuse within the family law system. The Royal Commission has much to offer Australia's family courts, and the application of its findings to family law decision-making has the capacity to alleviate many of the shortcomings in these courts' responses to allegations of child sexual abuse, as identified by the several decades of inquiries and academic research detailed within this thesis. The Commission identified a range of factors that had contributed to the widespread

⁸⁹ Ibid 2.

⁹⁰ Ibid 2.

⁹¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 17 (emphasis added).

⁹² Ibid 18.

failure of Australia's institutions to protect children from sexual abuse. These include a lack of policies and procedures to prevent abuse, a failure to respond effectively to allegations of abuse, and a culture of secrecy and cover-up within some institutions.⁹³ Specifically, the Commissioners highlighted the failure of government agencies, such as state child protection authorities and police, to believe and investigate children's reports of abuse.⁹⁴ They noted that these concerns continue, and that police failings in response to institutional child sexual abuse are likely comparable to the failings in response to child sexual abuse in other settings.⁹⁵

In their Final Report, the Commissioners noted that child sexual abuse is neither purely historical, nor limited to institutions.⁹⁶ The report noted the importance of ongoing reform at government, institutional and community levels to minimise future harm, both from perpetrators themselves and from dismissive or harmful institutional responses to reports of abuse.⁹⁷ The Royal Commission's findings and recommendations have had some impact on the ways that Australian government agencies respond to allegations of child sexual abuse. The Australian Government handed down its response to the Royal Commission,⁹⁸ established a redress scheme for victims of institutional child sexual abuse⁹⁹ and delivered the *National Apology to Victims and Survivors of Institutional Child Sexual Abuse* in 2018.¹⁰⁰

The National Office for Child Safety, established in response to the Royal Commission, is responsible for the development and implementation of several initiatives formed of the Commission's recommendations, including the *National Strategy to Prevent and Respond to Child Sexual Abuse*, the *National Principles for Child Safe Organisations* and the

⁹³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 64.

⁹⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 5.

⁹⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 32.

⁹⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 3–4.

⁹⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 61–62.

⁹⁸ Australian Government, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2018).

⁹⁹ 'National Redress Scheme', *National Redress* (Web Page, 13 February 2024) <<https://www.nationalredress.gov.au/>>.

¹⁰⁰ Prime Minister Scott Morrison (Commonwealth), House of Representatives, *National Apology to Victims and Survivors of Institutional Child Sexual Abuse* (Speech, 22 October 2018).

Commonwealth Child Safe Framework.¹⁰¹ The *Commonwealth Child Safe Framework* establishes minimum organisational standards to ensure that Australian entities are safe for children.¹⁰² It involves annual risk assessment, staff training, implementation of the *National Principles for Child Safe Organisations* and annual progress reporting.¹⁰³ The Framework mandatorily applies to all Commonwealth non-corporate entities and is encouraged for all other Commonwealth entities;¹⁰⁴ however, the judicial functions of the family courts are exempt from mandatory participation.¹⁰⁵ Of greatest significance, Australian governments at state and federal levels released annual progress reports on their implementation of the Royal Commission's recommendations for five years after its conclusion. All levels of government released their final reports by December 2022.¹⁰⁶ Given that the major work of government in implementing the recommendations of the Royal Commission is complete, any cultural change likely to be sparked within Australian institutions by the Commission is arguably well underway.

One of the key findings of the Commission was the need for institutions to adopt a more child-focused approach when addressing allegations of child sexual abuse,¹⁰⁷ which includes ensuring that the “safety and best interests” of the child are the primary concerns in all decision-making processes.¹⁰⁸ While the family courts have undergone a range of reforms in recent years, as detailed in following chapters—including new legislative provisions, procedural changes, and training and education programs for legal practitioners, judges and court staff—the case studies presented in this thesis demonstrate that the spirit of this recommendation has not permeated the culture of the family courts. The findings of the research project highlight that the impact of the Royal Commission on family law decision-making has been minimal, at

¹⁰¹ 'What We Do', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do>>.

¹⁰² 'Lead the Commonwealth Child Safe Framework', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do/lead-commonwealth-child-safe-framework>>.

¹⁰³ 'Framework Requirement 4 – Annual Reporting', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/our-work/lead-commonwealth-child-safe-framework/framework-requirement-4-annual-reporting>>.

¹⁰⁴ 'Lead the Commonwealth Child Safe Framework', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do/lead-commonwealth-child-safe-framework>>.

¹⁰⁵ Federal Court of Australia, *Commonwealth Child Safe Framework* (Annual Statement of Compliance, 31 October 2023).

¹⁰⁶ 'Annual Progress Reports', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/royal-commission/annual-progress-reports>>.

¹⁰⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 25, rec 6.5, Child Safe Standard 6.

¹⁰⁸ *Ibid* 139.

best, and inquiries and academic research continue to invoke concerns about the ways the family courts fail to protect children from sexual abuse and other significant forms of harm, as detailed throughout this thesis. While the Royal Commission identified the substantial incidence of child sexual abuse within Australia's institutions, in his opening address to the final sitting of the Royal Commission, the Chair, Peter McClellan J, highlighted the greater presence of child sexual abuse *outside* of Australia's institutions.¹⁰⁹

The Royal Commission has been concerned with the sexual abuse of children within institutions. It is important to remember that, notwithstanding the problems we have identified, the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in institutions.

The work of the Royal Commission was cited in a case heard by the Family Court of Australia during the years the Royal Commission sat. In this case, Benjamin J stated:¹¹⁰

The Royal Commissioners have made it crystal clear that the time, if there ever was such a time, has now well and truly passed where individuals and institutions can turn a blind eye to abuse or possible abuse of children ... Each and every member of the community and each and every organisation are or should be obliged to report, protectively respond and protect children from abuse. That community obligation ... must include State and Federal Courts and Tribunals.

In practice, Australia's family courts are far from meeting this obligation, and intrafamilial child sexual abuse is yet to undergo an examination comparable to that received by Australia's institutions during the years of the Royal Commission. As the case studies demonstrate, the Royal Commission appears to have had little impact on the family courts, as judges, lawyers and allied family law professionals continue to interpret and respond to allegations of child sexual abuse in pre-Royal Commission ways.

¹⁰⁹ Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017).

¹¹⁰ *Stacey & Woden* [2015] FamCA 1107 [3]–[4] (Benjamin J).

1.3 The Establishment and Scope of the Royal Commission

The Royal Commission arose in the context of allegations of child sexual abuse in Australian institutions that emerged over many years.¹¹¹ Survivors' groups had been advocating for acknowledgement of, and reformed responses to, child sexual abuse for decades, and multiple inquiries at federal and state levels had attempted to explore the scope of sexual harm and the nature of institutional responses to such allegations.¹¹² Two inquiries by the Senate Community Affairs References Committee in 2004¹¹³ and 2005¹¹⁴ recommended a royal commission be established to investigate the issues, yet it was not until 2012 that former Prime Minister Julia Gillard announced the establishment of the Royal Commission.¹¹⁵

The Commission conducted around 8,000 private sessions¹¹⁶ and a total of 57 public hearings,¹¹⁷ receiving more than 63,000 calls and pieces of correspondence from stakeholders¹¹⁸ over its five-year term. The Commission not only explored the scope of institutional sexual abuse of children in Australia through the accounts of survivors, their families and institutional stakeholders, but also commissioned new research evidence.¹¹⁹ The Royal Commission resulted in the development of world-class, child safe standards and best-practice approaches to the prevention, detection and response to child sexual abuse that are of great relevance to organisational cultures. The Royal Commission reviewed more than 300

¹¹¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 2.

¹¹² Key federal inquiries include the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, Human Rights and Equal Opportunity Commission, April 1997); Community Affairs References Committee (Commonwealth), Senate, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-Of-Home Care as Children* (Report, August 2004); Community Affairs References Committee (Commonwealth), Senate, *Protecting Vulnerable Children: A National Challenge* (Second Report on the Inquiry into Children in Institutional or Out-Of-Home Care, March 2005), cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 4–7.

¹¹³ Community Affairs References Committee (Commonwealth), Senate, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-Of-Home Care as Children* (Report, August 2004).

¹¹⁴ Community Affairs References Committee (Commonwealth), Senate, *Protecting Vulnerable Children: A National Challenge* (Second Report on the Inquiry into Children in Institutional or Out-Of-Home Care, March 2005).

¹¹⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 2.

¹¹⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Private Sessions* (Final Report, 15 December 2017) vol 5, 10.

¹¹⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 7.

¹¹⁸ *Ibid* 23.

¹¹⁹ *Ibid* 44.

reports published in the past three decades on child sexual abuse in Australian contexts, including abuse of child migrants and children within the child protection system.¹²⁰ Despite the fact that, for Australian survivors, around one-third of first incidents of child sexual abuse are perpetrated by a family member,¹²¹ not one of these inquiries had examined familial child sexual abuse, or responses to this crime by the family courts.

1.4 Terms of Reference

While the operation of the federal family courts fell outside the scope of the Royal Commission, its Terms of Reference remain highly relevant to the work of these courts in several ways. First, the Royal Commission was tasked with inquiring into “institutional responses to allegations and incidents of child sexual abuse and related matters”, particularly:¹²²

- (a) what institutions and governments should do to better *protect* children against child sexual abuse and related matters in institutional contexts in the future;
- (b) what institutions and governments should do to achieve *best-practice* in *encouraging the reporting of*, and *responding to* reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- (c) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;
- (d) what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

¹²⁰ Ibid 289.

¹²¹ Leah Bromfield et al., *Child Sexual Abuse in Australian Institutional Contexts 2008–13: Findings from Administrative Data* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, Australian Centre for Child Protection, 2017) 59.

¹²² *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013) (a)–(d) (emphasis added).

The Letters Patent instructed the Commission to “focus your inquiry on systemic issues, recognising nevertheless that you will be informed by individual cases”,¹²³ a format echoed by this research project. The Letters Patent noted:¹²⁴

[I]t is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best-practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.

Next, the Royal Commission was instructed to consider child sexual abuse in an “institutional context”, including when:¹²⁵

- (i) it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or
- (ii) it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- (iii) it happens in any other circumstances where you consider that *an institution is, or should be treated as being, responsible for adults having contact with children.*

An “institution” was defined broadly, encompassing any entity that “provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, *including through their families*”.¹²⁶ An “official” of an institution was similarly broadly construed to include representatives, members, employees and volunteers of institutions, as well as those providing services to institutions and

¹²³ Ibid (f).

¹²⁴ Ibid (emphasis added).

¹²⁵ Ibid (emphasis added).

¹²⁶ Ibid (emphasis added).

“any other person who you consider is, or should be treated as if the person were, an official of the institution”.¹²⁷

The Terms of Reference also incorporated inquiry into “the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts”.¹²⁸ The Commissioners noted this included “the way in which institutions, such as police services, responded to allegations of abuse in other institutions”.¹²⁹ As a result, the responses of government departments and agencies to allegations of child sexual abuse became a focus of the inquiry.¹³⁰ The Commission’s findings in regard to these agencies are decidedly relevant to the work of the family courts. As can be seen in the case studies featured in Chapters Five and Six of this thesis, the response of state child protection bodies to allegations of child sexual abuse is frequently influential in determining the family courts’ handling of such cases. Finally, the instruction to inquire into “child sexual abuse and related matters”¹³¹ is significant to the work of the federal family courts due to the high comorbidity of child sexual abuse and other forms of child maltreatment, including family violence.¹³² The Terms of Reference defined “related matters” as “any unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse”.¹³³

While the Terms of Reference expressly excluded inquiry into child sexual abuse “within the family”, the Letters Patent noted that, while the inquiry would “not specifically examine the issue of child sexual abuse and related matters outside institutional contexts”, the Commission’s recommendations would be “likely to improve the response to all forms of child sexual abuse in all contexts”.¹³⁴ Accordingly, the Commissioners noted that “a significant number of our recommendations do have application to child sexual abuse wherever it

¹²⁷ Ibid.

¹²⁸ Ibid (g).

¹²⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 18.

¹³⁰ Ibid 18.

¹³¹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013) (g) (emphasis added).

¹³² *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 51.

¹³³ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013).

¹³⁴ Ibid (emphasis added).

occurs”.¹³⁵ The operations of courts of all kinds were outside of the purview of the Commission.¹³⁶ However, the federal family courts are undeniably an institution engaged in regulating—in many cases, mandating and even enforcing—“adults having contact with children”.¹³⁷ This frequently occurs in circumstances involving reports of child sexual abuse and other risks of harm. As such, the findings and recommendations of the Royal Commission concerning the means to “achieve best-practice in encouraging the reporting of, and responding to” such reports are of great relevance to the family courts’ operation.

1.5 The Failure of Institutional Responses to Child Sexual Abuse in Australia

The Royal Commission highlighted the widespread failure of institutions to respond appropriately to child sexual abuse, citing a “manifestly inadequate response to the abused person” that exacerbated systemic failings in many of the cases under consideration.¹³⁸ The Commissioners explored numerous failings of state police and child protection bodies to believe or investigate allegations of child sexual abuse, and examined cases in which police returned children to unsafe institutions after they had escaped.¹³⁹ While many of the cases heard by the Royal Commission occurred prior to 1970, a significant proportion of the cases under consideration occurred this century.¹⁴⁰ The Commissioners highlighted that child sexual abuse is not purely historical; it remains very much a contemporary issue and is not limited to institutions.¹⁴¹ The Commissioners also emphasised that the impact of the Royal Commission is dependent on the implementation of its recommendations.¹⁴² They noted the importance of ongoing reform at government, institutional and community levels to minimise future harm,

¹³⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 18.

¹³⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 142.

¹³⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013).

¹³⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 5.

¹³⁹ *Ibid* 5.

¹⁴⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recordkeeping and Information Sharing* (Final Report, 15 December 2017) vol 8, 46.

¹⁴¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 3–4.

¹⁴² *Royal Commission into Institutional Responses to Child Sexual Abuse: Beyond the Royal Commission* (Final Report, 15 December 2017) vol 17, 10.

both from perpetrators and from dismissive or harmful institutional responses to reports of abuse.¹⁴³

The systemic failings identified by the Royal Commission are mirrored by the family law case studies featured in Chapters Five and Six, in which children and parents alleging abuse were not believed, and children who ran away from unsafe environments or homes were simply returned. These failings have been identified in cases heard by the family courts both during the term of the Royal Commission and since its Final Report was handed down in 2017. Critically, the Royal Commission focussed heavily on institutional culture in its work identifying ‘criminogenic institutions’, defined as those that are likely to cause or indirectly contribute to the occurrence of crime.¹⁴⁴ Many of the factors identified by the Commission as exacerbating the likelihood of child sexual abuse—including “failing to listen to or value children; encouraging secrecy and isolation; normalising harm; or being insular and cut-off from the outside world”¹⁴⁵—are evident in the family law cases analysed herein. Accordingly, the research project aims to explore the discourse that supports the family courts’ responses to allegations of child sexual abuse.

The Child Safe Standards were developed by the Royal Commission in response to findings that Australia’s institutions have failed to protect children.¹⁴⁶ Noting that “child sexual abuse in institutions continues today and is not just a problem from the past”, the Commissioners identified many existing systems as inadequate in identifying and responding to such abuse.¹⁴⁷ Grounded in case studies, commissioned research and consultations, the Child Safe Standards aim to provide a contemporary, systematic approach to making institutions safer for children by embedding child safety into institutional leadership, governance and culture, ensuring that children’s safety and best interests are prioritised.¹⁴⁸

¹⁴³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 61–62.

¹⁴⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 250.

¹⁴⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 39.

¹⁴⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 3.

¹⁴⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 134.

¹⁴⁸ *Ibid* 134–135.

The Child Safe Standards are:¹⁴⁹

1. Child safety is embedded in institutional leadership, governance and culture.
2. Children participate in decisions affecting them and are taken seriously.
3. Families and communities are informed and involved.
4. Equity is upheld and diverse needs are taken into account.
5. People working with children are suitable and supported.
6. Processes to respond to complaints of child sexual abuse are child focused.
7. Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training.
8. Physical and online environments minimise the opportunity for abuse to occur.
9. Implementation of the Child Safe Standards is continuously reviewed and improved.
10. Policies and procedures document how the institution is child safe.

The principle of the best interests of the child is embedded in the *Family Law Act* as the “paramount consideration” for judicial officers when making parenting orders.¹⁵⁰ Although the evidence-based Child Safe Standards could be effectively implemented within the family law system to increase the protections afforded to children, this has not yet occurred.

1.6 The Study: Research Design, Theoretical and Methodological Approaches

This section provides a discussion of the research design, and the theoretical and methodological frameworks employed for this study, as well as a brief summary of the following chapters. The study focuses on two primary areas of inquiry. First, it aims to compare the family courts’ responses to allegations of child sexual abuse with the findings and best-practice recommendations arising from the Royal Commission, as contextualised by numerous inquiries and established academic literature. Second, it evaluates the primary discursive

¹⁴⁹ Ibid 212, rec 6.5.

¹⁵⁰ *Family Law Act 1975* (Cth) s 60CA.

practices underpinning the assessment of, and response to, child sexual abuse allegations in the family courts.

The study employs a discourse analysis of 10 judgements of the Australian family courts published in the Australasian Legal Information Institute's database (hereinafter 'AustLII') since the conclusion of the Royal Commission. It compares the practices of the family courts in evaluating and responding to allegations of child sexual abuse in these cases with the findings and recommendations of the Royal Commission, drawing on key government inquiries and established academic literature to inform the evaluation. The project adopts a discourse analysis of the selected cases to identify the reasoning employed by judges in assessing the risks posed to children, interpreting relevant legislation and determining the impact of these risks on crucial issues such as children's time with alleged perpetrators of child sexual abuse. As family law cases are nuanced and complex, the discourse analysis of published judgements seeks to gain a deeper understanding, not only of the decisions of judicial officers, but of the reasoning employed when reaching these decisions, and the extent to which this reasoning is underpinned by the academic consensus on child sexual abuse, as reflected in the reports of the Royal Commission.

Although numerous means of evaluating the data were considered, the project ultimately employs a discourse analysis of case studies, as it suggests the clearest view into the interrelated personal and sociocultural paradigms that at once underpin, and are perpetuated by, each decision.¹⁵¹ Discourse analysis is selected as the framework through which to analyse judicial responses to allegations of child sexual abuse, as this research method enables the elucidation of the normative assumptions underpinning judicial decision-making in each case.¹⁵² Discourse analysis is also a useful method of evaluating issues of power and dominance in law, as it fosters examination of what is being said, by whom, and what is being excluded.¹⁵³ Within the

¹⁵¹ Sreeparna Chattopadhyay, 'Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India' (2017) 20(2) *Law, Social Justice and Global Development* 1–16; Daniel Del Gobbo, 'Unreliable Narration in Law and Fiction' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 311–338, 39.

¹⁵² Andreas von Arnould and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 358.

¹⁵³ Jonathan Evans, 'Artful Dodgers: The Role of Unreliable Narrators in the Production of Authorized Histories and Assessments of Young People in Conflict with the Law' (2017) 38(9) *Deviant Behavior* 1042–1058, 1053; Nicole VT Lugosi, '"Truth-Telling" and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 304.

research project, discourse analysis aims to identify the thematic patterns and similarities between judgements, thereby highlighting the assumptions and beliefs evident in family law discourse. Most importantly, discourse analysis of the selected cases enables exploration of the ways in which beliefs, assumptions and practices that contradict established knowledge and best-practice responses to child sexual abuse may be evident and even persistent in the family courts, in light of the decades of critique and attempts at legislative reform outlined in the following discussion. The use of the Royal Commission as a benchmark for research-based responses to child sexual abuse strengthens analysis by enabling judicial beliefs and assumptions to be compared with established best-practice, thereby facilitating the identification of the discursive practices that enable family court decision-making that fails to protect children from sexual harm.

Discourse analysis has long been applied to law in areas as diverse as criminal justice, human rights and family law.¹⁵⁴ Within criminal jurisprudence, discourse analysis has been used to examine the ways in which legal professionals and the media construct and communicate notions of guilt and innocence.¹⁵⁵ In the context of human rights, discourse analysis has been used to explore the ways in which legal and political discourses compose and reinforce power imbalances and inequalities.¹⁵⁶ In family law, discourse analysis allows for the study of legal and social discourses as they construct and reinforce gendered and hierarchical notions of family roles, parenting and family violence.¹⁵⁷ Overall, discourse analysis offers a valuable tool for understanding the complex ways in which law and legal institutions operate and shape sociocultural norms and practices. While discourse analysis cannot completely account for the interrelated machinations of legislation, legal institutions and judicial actions,¹⁵⁸ legal texts may be considered as rich sources of meaning that reflect the values, biases and power dynamics of their authors, and of the society that produces them.¹⁵⁹

¹⁵⁴ L Cheng and D Machin, 'The Law and Critical Discourse Studies' (2022) 20(3) *Critical Discourse Studies* 243–255, 251.

¹⁵⁵ A Siddiqua and FU Yousafzai, 'A Critical Discourse Analysis of the Coverage of Human Rights Violation in Indian Held Kashmir' (2019) 22(1) *Kashmir Journal of Language Research* 233–255, 236.

¹⁵⁶ *Ibid* 236–237.

¹⁵⁷ Jessica Wild, 'Gendered Discourses of Responsibility and Domestic Abuse Victim-Blame in the English Children's Social Care System' (2023) 38 *Family Violence* 1391–1403, 1392.

¹⁵⁸ Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987) 158.

¹⁵⁹ *Ibid* 36.

The design of the project reflects foundational feminist research evaluating the discourses of law, while a critical paradigm fosters analysis of the power relationships perpetuated by systemic structures,¹⁶⁰ such as those underpinning child sexual abuse, family violence and family law. A critical analysis exposes the power disparities embedded in each legal judgement and the ways in which identities are constructed within them.¹⁶¹ Analysis of legal responses to sexual violence against children is a necessarily gendered avenue of inquiry. A gendered lens is vital in gaining an understanding of child sexual abuse as a product of institutional narratives and structures that perpetuate male domination over children and their mothers.¹⁶² Accordingly, a feminist epistemology underpins this work.

Critical feminist discourse analysis views interpersonal violence as a pervasive social problem that is deeply embedded in cultural norms and power structures that perpetuate gender inequality.¹⁶³ According to this perspective, child sexual abuse is not a random or isolated act, but rather a systemic issue that requires a nuanced understanding of the complex interplay of cultural, social and political factors that contribute to its prevalence.¹⁶⁴ The link between violence against children and their mothers and broader patterns of social inequality is particularly evident in contexts in which gender norms are deeply ingrained, and where men hold disproportionate power and privilege.¹⁶⁵ In emphasising the systemic nature of sexual violence against children, critical feminist discourse analysis supports the research project in providing a powerful framework for understanding family law responses to it.

The analysis of individual case studies, within the broader context of discourse on child sexual abuse in Australian family law, reveals the perspectives of the experts, lawyers and judicial officers involved. These perspective influences factors such as the deemed relevance of events in each case, the importance attributed to these events and circumstances, the credibility

¹⁶⁰ S Kelly and MJ Davis, 'Just Another Brick in the Wall... Or Not? A Paradigm Introduction Activity' (2011) 25(4) *Communication Teacher* 222–227, 224.

¹⁶¹ Nicole VT Lugosi, "'Truth-Telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 302.

¹⁶² Claire Houston, 'How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence' (2014) 21(2) *Michigan Journal of Gender and Law* 217–272, 241.

¹⁶³ Michelle M Lazar, 'Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis' (2007) 4(2) *Critical Discourse Studies* 141–164, 141.

¹⁶⁴ Sreeparna Chattopadhyay, 'Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India' (2017) 20(2) *Law, Social Justice and Global Development* 1–16, 14.

¹⁶⁵ L Radford and M Hester, *Mothering through Domestic Violence* (Jessica Kingsley Publishers, 2006) 18–20.

afforded to each party and the prioritisation of objectives. Notably, this involves balancing the child's right to protection from harm against their 'right' to maintain a relationship with a parent suspected of sexually abusing them. Collectively, these case studies suggest a wider discourse within family law and contribute to understanding the trends identified by diverse academic research, and by government and non-government inquiries. These trends highlight that children and their mothers often remain unprotected from violence.

The present analysis enabled the issues arising from the case studies to be grouped into themes. Those themes most accurately reflecting the findings and recommendations of the Royal Commission were used to evaluate the data and draw out commonalities between the cases, while themes that were less relevant to the work of the Royal Commission were discarded. The project focused on a key area of inquiry of the Royal Commission, that of identifying and responding to child sexual abuse. Several themes of relevance to the decision-making of the family courts were identified. These include interpreting children's disclosures of sexual abuse, reliance on erroneous beliefs, the use of pseudoscience, identifying perpetrators of child sexual abuse, normalising and excusing child sexual abuse, punitive responses to reports of child sexual abuse, and the prevention of further disclosures and reporting. The findings arising from this analysis are detailed in later chapters.

Discourse analysis of the selected case studies within the thematic structure described above enabled a direct comparison between the conclusions and orders of judicial officers of the family courts and the findings and recommendations of the Royal Commission, which presented a watershed moment in Australian conceptions of, and responses to, child sexual abuse. The themes identified also reflect many issues repeatedly arising during decades of academic critique of the family courts, and the recommendations of numerous government and non-government inquiries into the family law system.

1.7 Research aims and case selection rationale

The research project draws on judgements of the Family Court of Australia, Federal Circuit Court and the recently merged Federal Circuit and Family Court of Australia, published in the six years since the conclusion of the Royal Commission. The project addresses two aims:

1. Compare the family courts' responses to allegations of child sexual abuse with the relevant findings and recommendations of the Royal Commission into Institutional

Responses to Child Sexual Abuse, drawing on key government inquiries and established academic literature to inform the evaluation of 10 case studies.

2. Identify and evaluate the primary discursive practices used by judicial officers when hearing 10 contested cases of child sexual abuse, in particular exploring those assumptions, reasoning processes and narratives that support judicial determinations concerning children's contact with alleged perpetrators of abuse.

Reflecting these aims, the research questions ask: What insights can be gleaned from a comparative study of the family courts' responses to allegations of child sexual abuse and the recommendations of the Royal Commission? What assumptions, reasoning and narratives inform judicial determinations about children's contact with alleged perpetrators of child sexual abuse?

Cases were selected with a view to the critical feminist perspective underpinning the project. In order to identify cases concerning allegations of child sexual abuse, a search was conducted on the legal database AustLII, using the term 'sexual'. Search terms such as 'sexual abuse' and 'sexual assault' were not employed, as early reading of cases indicated that judicial officers often adopt euphemisms for child sexual abuse, referring to it in ways that obscure the gravity of the crime, such as 'sexual impropriety' and 'inappropriate behaviour'. To assess the impact of the Royal Commission on family law decision-making, the search was limited to judgements handed down in the six years (December 2017– December 2023) following the publication of the Royal Commission's Final Report.

Each case selected was heard by one of the Australian family courts, specifically the Family Court of Australia, the Federal Circuit Court and the newly merged Federal Circuit and Family Court of Australia, collectively referred to as the 'family courts'. Cases from the Family Court of Western Australia were excluded as, in addition to operating under the commonwealth *Family Law Act*, the court applies additional state-based legislation to children's matters involving separated de facto couples.¹⁶⁶

As the Federal Circuit Court hears cases across a broad spectrum of issues, the search returned some cases from that court that fell outside of the family law jurisdiction. Equally, many family

¹⁶⁶ *Family Court Act 1997* (WA).

law cases were excluded as they referred to sexual assaults of adults and other sexual behaviour that did not constitute child sexual abuse. Ten cases were selected, based on the criteria above and the extent to which their judgements reflected the concerns of the research project and exemplified the issues raised by the Royal Commission, academic literature and the inquiries held into the family law system. Of greatest importance in the selection of cases was the quality of the judicial officer's narrative. Judgements offering the clearest view of the history of the parties—from within the family law paradigm—and enabling solid grounds for analysis of the judge's decision-making were selected.

Of those cases selected, each involved allegations of sexual abuse of at least one child. In each, the alleged perpetrator was a parent, and/or an associate of theirs, such as a partner or family member. Most allegations were made against biological fathers or stepfathers by biological mothers and children. This accords with research findings that perpetrators of child sexual abuse are overwhelmingly male,¹⁶⁷ and frequently known to the family.¹⁶⁸ In many cases, allegations of child sexual abuse were countered by allegations of emotional abuse against the alleging parent. When this occurred, the alleged perpetrators generally argued that the act of making the allegation of sexual abuse constituted emotional abuse of the child, as it was intended to fracture their relationship with the other parent. Such claims reflect a 'parental alienation' framework, a theory that has been soundly debunked,¹⁶⁹ yet continues to permeate family law.¹⁷⁰ Many of the selected cases also involved allegations of other forms of harm,

¹⁶⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 34.

¹⁶⁸ *Ibid* 71.

¹⁶⁹ Joan S Meier and Sean Dickson, 'Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation' (2017) 32(2) *Law and Inequality* 311–334, 317; Miguel Clemente and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133, 130; H Smith, 'Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases' (2016) 11(1) *University of Massachusetts Law Review* 64–99, 64; Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 236–238; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), 3–4; Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 110.

¹⁷⁰ Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 1.

which accords with the literature on the comorbidity of child sexual abuse and other forms of maltreatment.¹⁷¹

The children in the cases analysed ranged in age from three to 14, with an average age of eight. Of these, 14 were girls and only three were boys. The cases varied in terms of the period of time the families spent engaged with the family law system, with some families spending several years before the courts. Each case featured between one and three subject children at the commencement of the litigation, although in some cases not all children in a family remained the subject of dispute by the time of final orders. The ethnicity of the children was not specified in most judgements. While family law judgements are publicly available on the AustLII database,¹⁷² each judgement is anonymised by the court prior to publication through methods such as changing the names of parties and obscuring identifying details such as dates of birth, workplaces, and the towns and suburbs in which they reside.¹⁷³ For ease of identification within the research project, parents who were the subject of allegations of child sexual abuse are termed hereinafter as ‘alleged perpetrators’, while parents making the allegations are termed ‘alleging parents’.

The family courts do not make all judgements public and, in doing so, they demonstrate the issues that reporting judges view as important, and the approach and reasoning deemed appropriate by the family courts in informing future precedent. Accordingly, the project did not aim to determine the prevalence of child sexual abuse allegations within family law, nor the proportion of such cases resulting in orders mandating contact between children and alleged perpetrators. The analysis of cases presented in this thesis provides valuable insights into the role of experts and the influence of psychosocial theories on judicial reasoning, the beliefs and preconceptions of judicial officers, and the weight judges, lawyers and allied family law professionals place on current best-practice knowledge, including social science research and the findings of the Royal Commission itself.

¹⁷¹ R Field et al., ‘Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?’ (2016) 25 *Judicial Administration* 212–236, 223.

¹⁷² ‘Home’, *Australasian Legal Information Institute* (Web Page) <<https://www.austlii.edu.au/>>.

¹⁷³ *Family Law Act 1975* (Cth) (comp 12 June 2024) ss 114(N)–114(T).

1.8 Chapter summary

As an applied sociological thesis, this work utilises a theoretical methodological framework which employs critical feminist discourse analysis in the evaluation of legal cases. A critical feminist jurisprudence contests the positivist foundations of law—highlighting the disputed nature of the objectivity on which formalist legal decisions purport to be based—and emphasises the real-world impacts of the application of legal power on the lives of the women and children who are subject to legal judgements.¹⁷⁴ The critical feminist approach is grounded in a Foucauldian understanding of discourse, which highlights the political nature of discourse¹⁷⁵ as both constituted by and constituting power relations.¹⁷⁶ The theoretical methodological frameworks underpinning the thesis and its design are detailed in Chapter Two. Part one of Chapter Two focuses on a theoretical discussion of discourse and narrative analysis, whereas part two considers the theoretical practice of applying feminist discourse analysis to the law.

A social history of Australian family law contextualises the growth of family law discourse since the formation of the Family Court of Australia in the 1970s within the sociopolitical development of Australia. This social analysis informs a review of the four decades of inquiries exploring the capacity of the family courts to protect vulnerable people from abuse, and the numerous legislative reforms and initiatives that have attempted to address the identified failings of the courts. The social history of family law comprises Chapter Three, while Chapter Four traces the legislative and policy context within which family law discourse has developed.

Chapter Five details each of the selected case studies, while Chapter Six analyses these published judgements against the findings and recommendations of the Royal Commission. Grouping the cases by themes to identify and analyse the main discursive practices underpinning the published judgements, the research explores those assumptions, reasoning processes and narratives that support judicial decisions determining children's contact with alleged perpetrators of child sexual abuse. These chapters provide a research-based perspective

¹⁷⁴ Peta Broughton, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136–152, 142; Sreeparna Chattopadhyay, 'Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India' (2017) 20(2) *Law, Social Justice and Global Development* 1–16, 4.

¹⁷⁵ Nicole VT Lugosi, "'Truth-Telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 302.

¹⁷⁶ David R Howarth, *Discourse* (Open University Press, 2000) 48–49.

on the psychosocial and quasi-medical theories applied to each case by the judicial officers and experts involved. In particular, the discourse analysis highlights the use of gendered and culturally specious myths and theories to assess child sexual abuse allegations—framing that normalises and excuses such abuse and minimises the harm it causes—and the use of coercion and threats aimed at stopping further allegations of abuse.

Finally, Chapter Seven presents a conclusion. Evaluation of the theoretical and empirical evidence presented in the literature reviews and case studies herein demonstrates that, despite decades of inquiries and academic research and the clear findings and recommendations of the Royal Commission, the Australian family courts remain impervious to research-based approaches to child protection. The thesis concludes that, given the extensive authority of the family courts over the children who are subject to their judgements and the consequences of child sexual abuse for the life trajectories of survivors, the family courts are not only failing countless children who fall within their jurisdiction, but also exacerbate the risks many face.

Chapter Two – Theoretical Frameworks: Discourse, Narrative and Feminist Analysis of Family Law

2 Introduction

Part one of this chapter details the frameworks supporting the research project as it explores the intricate interplay between discourse, law and the treatment of child sexual abuse allegations within the Australian family courts. Through discourse and narrative analysis the project aims to dissect the discourse employed in selected legal judgements, revealing systemic barriers to best-practice responses to child sexual abuse within the family law system. Part two of this chapter considers the application of a critical feminist legal framework, which emphasises the personal and societal effects of the exercise of judicial power.¹⁷⁷ Through discourse analysis, this research echoes established feminist literature as it interrogates the personal beliefs and broader norms governing family law discourse.¹⁷⁸

This study theoretically challenges law's claims to objectivity, highlighting the nature of law as a form of social control and emphasising its impacts at personal and societal levels. The project's use of discourse analysis aims to disrupt harmful misconceptions within legal discourse. It highlights points where the tenets of family law diverge from the evidence-based consensus on the identification of child sexual abuse and best-practice responses to it. The following discussion informs the theoretical underpinnings of these claims. It is through critical examination of the epistemic structures that underpin legal discourse that this research seeks to uncover the ways in which such discourse shapes—and is shaped by—broader societal understandings of child sexual abuse, highlighting the family courts' reliance on narratives and discourse that often marginalise the experiences of children. Woven throughout both parts of this chapter is a review of key scholarly literature that underpins the theories and methods adopted for this study.

2.1 Defining Discourse

The law shares many similarities with the empire. Like the empire, the law is far reaching, paternalistic and benevolent in its intention, yet violent and silencing in

¹⁷⁷ Daniel Del Gobbo, 'Unreliable Narration in Law and Fiction' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 311–338, 329.

¹⁷⁸ Lucy Thompson, Bridgette Rickett and Katy Day, 'Feminist Relational Discourse Analysis: Putting the Personal in the Political in Feminist Research' (2018) 15(1) *Qualitative Research in Psychology* 93–115, 93.

its application. It is also propelled by powerful discursive practices. The law assumes one cohesive pattern of determinate meaning. Its insistence on rationality and reason asserts one true way of knowing, to the exclusion of other ways of knowing. It is an exemplary modern discourse. The legal object is disembodied of experience and “de-faced” of any subjectivity via the subject-constituting practices of the law ... [T]he law further constitutes itself by privileging its own truth and alienating others from their experiences. As the law embodies itself, it disembodies others ...¹⁷⁹

The project applies Foucauldian conceptions of discourse to case studies within a critical feminist theoretical methodological framework to determine the extent to which evidence-based best-practice, as encapsulated by the findings and recommendations of the Royal Commission, influences contemporary family law decision-making. In identifying and evaluating the primary discursive practices used by judicial officers when hearing contested cases of child sexual abuse, discourse analysis enables exploration of the assumptions, reasoning and narrative processes that support judicial decisions determining children’s contact with alleged perpetrators of child sexual abuse within the selected case studies.

Discourse theory arose during the 20th century from the fields of linguistics, structuralism and, later, post-structuralism.¹⁸⁰ Although initially a contested theory, discourse analysis rose to popularity amid the transition from positivist to more interpretive and critical approaches to the social sciences in the second half of the 20th century.¹⁸¹ Due to continued application across a diverse range of disciplines, discourse—and the practice of discourse analysis itself—has been defined in various ways.¹⁸² Jørgensen and Phillips view discourses as “socially constructed meaning-systems that could have been different”.¹⁸³ They argue that “reality can never be reached outside discourses and so it is discourse itself that has become the object of

¹⁷⁹ Peta Broughton, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136–152, 141.

¹⁸⁰ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 283.

¹⁸¹ David R Howarth, *Discourse* (Open University Press, 2000) 1.

¹⁸² *Ibid* 1.

¹⁸³ Marianne W Jørgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (SAGE Publications, 2002) 21.

analysis”.¹⁸⁴ Holzscheiter holds similar sentiments, stating there is “[n]o social reality conceivable outside discourse”.¹⁸⁵

Broughton defines the theory and exercise of law as a discourse, as “it produces meaning via its institutions and practices. Legal meaning is not simply a reflection of fact or reality; rather, it is culturally and historically contingent, fixed in time and space”.¹⁸⁶ Evaluating the role of Aboriginal Australians in legal discourse, Broughton highlights the ways in which law establishes itself via “construction of a legal other”, emphasising “the problematic notion of a consensual community as the source of law’s authority”.¹⁸⁷ The case studies herein clearly reflect what Broughton refers to as “the epistemic violence that effaces one’s subjectivity”, as children and parents who relay experiences of family and sexual violence to the family courts are othered and silenced.¹⁸⁸ Additionally, Broughton notes that to disclose personal experiences within the realm of law, they must be cloaked in the discourse of law, or the “dominant pattern of legal meaning. The law will not tolerate that which threatens its internal logic”.¹⁸⁹

The project makes use of Foucault’s dual conceptions of discourse to explore the constitution of subjects within the discourse of family law and the ways in which potential responses to child sexual abuse are delineated. Foucault’s approach to discourse evolved during his life’s work, beginning with the somewhat structuralist conception of discourse featured during his writing of the 1960s, which portrayed discourses as “autonomous systems of rules that constitute objects, concepts, subjects and stratagems, thereby governing the production of scientific statements”.¹⁹⁰ His later genealogical work cast discourses as “the products of power relations” and the vehicles through which powerful forces “advance their interests”.¹⁹¹ This understanding of discourse emphasises its “inherently political” nature,¹⁹² and the issues of

¹⁸⁴ Ibid 21.

¹⁸⁵ Anna Holzscheiter, 'Between Communicative Interaction and Structures of Signification: Discourse Theory and Analysis in International Relations' (2014) 15(2) *International Studies Perspectives* 142–162, 146.

¹⁸⁶ Peta Broughton, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136–152, 137.

¹⁸⁷ Ibid 136.

¹⁸⁸ Ibid 142.

¹⁸⁹ Ibid 141.

¹⁹⁰ David R Howarth, *Discourse* (Open University Press, 2000) 48–49.

¹⁹¹ Ibid 48–49.

¹⁹² Nicole VT Lugosi, "'Truth-Telling" and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 302.

social inequity that arise as subjects of varying levels of social power have differing opportunities to participate in various discourses.¹⁹³

In particular, Foucault applied his genealogical conception of discourse to his work on sexuality, stating “it is in discourse that power and knowledge are joined together”.¹⁹⁴ Foucault utilised the concept to explore the interrelation of discourses and the institutions and practices through which they operate, noting, “the spotlighting of sexuality didn’t happen only in discourses but *in the reality of institutions and practices*”.¹⁹⁵ It is this aspect of Foucault’s approach to discourse that is of use to the research project in highlighting the *practical exercise* of power within discourse, the “possibilities that are excluded by the exercise of power and systems of domination” and the “points of resistance” that arise within a discourse.¹⁹⁶ Foucault’s evolving conceptions of discourse facilitate “a vital connection between discourse analysis and the social sciences”.¹⁹⁷ His vision of individuals as “objectified and structured by discourse” forms the foundation of a Foucauldian critical discourse analysis,¹⁹⁸ which has been widely applied by critical and feminist scholars seeking to “expose the way in which language and meaning are used by the powerful to deceive and oppress the dominated”.¹⁹⁹ While the law does not form a central focus of Foucault’s work, his writings on discourse are so directly applicable to jurisprudence that they have frequently been employed by legal academics.²⁰⁰

There is an uneasy alliance between Foucault and feminist frameworks. Foucault’s perspective on law has been both applied and contested by feminist theorists in support of a feminist theory of jurisprudence.²⁰¹ Smart’s feminist post-structuralist approach to law utilises Foucault’s theory of power to emphasise the ways in which law’s “claim to truth” enables it to exert authority, as legal knowledge disqualifies other forms of knowledge, particularly feminist

¹⁹³ James Paul Gee, *An Introduction to Discourse Analysis: Theory and Method* (Routledge, 3rd ed, 2011) 13.

¹⁹⁴ Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Pantheon Books, 1978) 100.

¹⁹⁵ Micheal Foucault, 'The History of Sexuality: Interview' (1980) 4(2) *Oxford Literary Review* 3–14, 4 (emphasis added).

¹⁹⁶ David R Howarth, *Discourse* (Open University Press, 2000) 48–49.

¹⁹⁷ Ibid 48.

¹⁹⁸ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 285.

¹⁹⁹ David R Howarth, *Discourse* (Open University Press, 2000) 4.

²⁰⁰ Douglas Litowitz, 'Foucault on Law: Modernity as Negative Utopia' (1995) 21(1) *Queen's Law Journal* 1–36, 28.

²⁰¹ Ibid 3.

perspectives.²⁰² Bunting highlights the tensions inherent in a Foucauldian-feminist analysis, as the framing—central to much feminist analysis—of gender discrimination as underpinning much societal interaction is contested by Foucault’s rejection of universal theories.²⁰³ McNeil extends the argument, stating that Foucault has inspired “the interrogation of feminism’s own discourses”, such as those around women and patriarchy.²⁰⁴

Bunting notes, however, the synergy between Foucauldian and feminist approaches to legal discourse is marginalising women through “universal truth claims”.²⁰⁵ The author draws on feminist theorists who advocate the use of a Foucauldian “critical method”²⁰⁶ to contest the exertion of power within society,²⁰⁷ noting the “strong affinity between the feminist slogan that ‘the personal is political’ and Foucault’s analysis of the pervasiveness of power”.²⁰⁸ Pringle and Watson argue that a Foucauldian perspective on power lends itself to feminist analysis as it casts power as both a “micro-level phenomenon and a socially pervasive one”.²⁰⁹ Other feminist theorists take issue with Foucault’s examination of violence. Taylor argues that while Foucault devotes considerable focus to the consequences of the exertion of power by established discourses *on* violent men, he does not analyse the impacts of power relations *between* violent men and the victims and survivors of their violence, largely women and children.²¹⁰ Hartsock notes that, in de-emphasising structural power inequities and focusing on the intricate mechanisms of power, Foucault loses sight of dominated individuals in favour of

²⁰² Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989) 26.

²⁰³ Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842, 832.

²⁰⁴ Maureen McNeil, 'Dancing with Foucault: Feminism and Power-Knowledge' in Caroline Ramazanoglu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* (Taylor & Francis Group, 1993) 147–178 158.

²⁰⁵ Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842, 832.

²⁰⁶ Jana Sawicki, 'Foucault and Feminism: Toward a Politics of Difference' (1986) 1(2) *Motherhood and Sexuality* 23–36, 33.

²⁰⁷ Chris Weedon, *Feminist Practice and Post-Structuralist Theory* (Blackwell, 1987) 125.

²⁰⁸ Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842, 834.

²⁰⁹ Rosemary Pringle and Sophie Watson, 'Women’s Interests and the Post-Structuralist State' in M Barrett and A Phillips (eds), *Destabilizing Theory: Contemporary Feminist Debates* (Polity Press, 1992) 53–73, 65.

²¹⁰ Chloe Taylor, 'Infamous Men, Dangerous Individuals, and Violence against Women: Feminist Re-Readings of Foucault' in Christopher Falzon, Timothy O’Leary and Jana Sawicki (eds), *A Companion to Foucault* (John Wiley & Sons, 2013) 419–435, 419.

an abstract notion of the dominated.²¹¹ These perspectives have significant implications for the research project and, in contrast to a purely Foucauldian approach, the selected case studies illuminate the dual impacts of legal discourse and interpersonal power relations on the women and children involved.

2.2 Critical Discourse Analysis

One influential authority on critical discourse analysis is Norman Fairclough, whose foundational text, *Language and Power*,²¹² describes a critical model of discourse analysis that builds on Foucault's framework in aiming to identify the interrelationships between language, power and ideology.²¹³ Whereas Foucault's focus is on the reciprocity of unequal power relations through discourse,²¹⁴ Fairclough's analysis highlights the dominance of the interpretations of a text made by members of the reading group—based on their shared experience—over that of the meaning intended by its author.²¹⁵ This research project does not deploy in its entirety the highly structured system of critical discourse analysis laid out by Fairclough,²¹⁶ as it is more applicable to interactional dialogue than to written legal judgements.²¹⁷ Fairclough's model fails to fully encompass the context in which each text is produced,²¹⁸ a context laden with nuance as the accounts of alleged perpetrators and survivors of violence are evaluated by judicial officers in the family courts. An additional contextual factor is the extensive, ongoing criticism of the family courts' handling of family violence and child sexual abuse.²¹⁹

²¹¹ N Hartsock, 'Foucault on Power: A Theory for Women?', *Feminism and Postmodernism* (Routledge, 1990) 69, cited in Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842, 834.

²¹² Norman Fairclough, *Language and Power* (Longman, 2nd ed, 2001).

²¹³ *Ibid* 4.

²¹⁴ Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842, 831.

²¹⁵ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 287.

²¹⁶ Norman Fairclough, *Language and Power* (Longman, 2nd ed, 2001) 91–139.

²¹⁷ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 299.

²¹⁸ *Ibid* 291.

²¹⁹ J Faulks, '"Condemn the Fault and Not the Actor?" Family Violence: How the Family Court of Australia Can Deal with the Fault and the Perpetrators' (2010) 33(3) *University of New South Wales Law Journal* 818–835, 819.

Of great importance are the real-world consequences of the operation of the discourse. Fairclough notes the capacity of discourse to contest, sustain or reshape social structures.²²⁰ Fairclough addresses the real-world consequences of the operation of discourse in his work on critical discourse analysis. While Fairclough's construction of discourse as concerning semiotic systems contrasts with Foucault's treatment of all social practice as discourse, the result of each approach is the recognition of the role discourse plays in the production and maintenance of knowledge and meaning, social relations and identities.²²¹ However, Fairclough's close attention to vocabulary in seeking an explanation of a text, particularly through classification schemes, rewording and metaphor,²²² illuminates themes frequently arising in the studied judgements as judicial officers approach allegations of child sexual abuse. Equally, Fairclough's model highlights the relational values that reveal social relationships. This takes place through the terms judicial officers employ for parties in the judgements studied and the expressive values, or worldview, exposed through the writers' use of euphemisms for physical and sexual violence.²²³ Fairclough's model also advocates for a search for 'experiential values', through which the 'text-producer's' personal experiences and ideological perspectives infiltrate the text, and for the means by which a producer refers to sources within and outside of a text.²²⁴ Analysis of the selected case studies through this lens highlights judicial officers' reliance on personal beliefs within the exceedingly closed world of family law discourse, an insularity that arguably allows the perpetuation of many of the practices identified by the research project as contradicting evidence-based best-practice.

Legal discourses of case law and legislation can be understood as closely interrelated and largely closed to external influences, as each operates to validate the other. In family law discourse, this is evident in the interplay between legislation and case law, as the legislature has repeatedly amended the *Family Law Act* and judicial officers 'interpret' that legislation in light of precedent. The appeals process is another vehicle through which family law discourse is amplified as the decision-making of first instance courts is considered, and very often

²²⁰ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 292.

²²¹ Marianne W Jorgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (SAGE Publications, 2002) 67.

²²² Norman Fairclough, *Language and Power* (Longman, 2nd ed, 2001) 94–100.

²²³ Ibid 93.

²²⁴ Ibid 93.

confirmed, by higher courts. Gobbo argues that judicial decisions are “mapped and rigorously enforced” due to their power to influence the outcomes of similar cases.²²⁵ In this way, the author states that “judicial opinions imply more than the conclusion of individual disputes, but the existence of group values, the upholding of objectively intelligible and accessible meanings that are the fundamental and practice-based desiderata of the common law system”.²²⁶ Once validated within the discourse, any challenge to judicial or legislative authority that does not utilise the means of invoking change established by the discourse itself becomes unthinkable.²²⁷

Fairclough’s system of critical discourse analysis is also useful in highlighting the role of interpretation of a text by interpreters possessing diverse members’ resources.²²⁸ While legal judgements are ostensibly directed towards the parties involved in a legal matter—often containing direct instructions as to how the parties may behave in the future—arguably, the judgement’s ultimate audience is the court of appeal that may be called to evaluate the application of legal principles therein. Of course, secondary interpreters may evaluate the judgement, including members of the media, academics and the present researcher. Fairclough’s model is key in highlighting the ways in which members’ resources are reproduced in the act of interpretation of a text, and the ways in which text-producers utilise these shared resources to foster the ‘reproduction’ of the discourse or acceptance of its arguments.²²⁹ Within family law discourse, the ‘members’ resources’ of judicial officers and other family law professionals are partially identifiable through existing research into their socioeconomic characteristics and attitudes to interpersonal violence.²³⁰

²²⁵ Daniel Del Gobbo, 'Unreliable Narration in Law and Fiction' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 311–338, 329.

²²⁶ Ibid 329.

²²⁷ Nicole VT Lugosi, "'Truth-Telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 302.

²²⁸ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 297.

²²⁹ Ibid 298.

²³⁰ See for example Patrick Parkinson, Judith Cashmore and Atlanta Webster, *The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation* (Legal Studies Research Paper No 11/13, Sydney Law School, February 2011); ML Haselschwerdt, JL Hardesty and JD Hans, 'Custody Evaluators' Beliefs About IPV Allegations During Divorce: Feminist and Family Violence Perspectives' (2011) 26(8) *Interpersonal Violence* 1694–1719; DG Saunders, KC Faller and RM Tolman, *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, IPV Knowledge and Custody-Visitation Recommendations* (Final Technical Report Submitted to the National Institute of Justice, October 2011); Patrick Parkinson and Judy Cashmore, 'Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges' (2007) 21(2) *International Journal of Law, Policy and the Family* 160–189; Patrick Parkinson

Noting that discourse analysis is “necessarily an ‘insider’s’... task”, Fairclough makes clear that the role of researcher requires awareness of the ‘member’s resources’ that the researcher themselves uses to inform their analysis.²³¹ The perspective aids the research project in emphasising the subjectivity and situatedness of knowledge, whereby even the act of selecting a case for analysis is an editorial act. Together, Fairclough’s and Foucault’s perspectives on discourse lend great benefit to the research project in emphasising the malleability of personal accounts when placed in the hands of a group of more powerful audience members. This is most evident in family law judgements when judicial officers evaluate statements made to state authorities by children disclosing sexual abuse or weigh the credibility of a witness by evaluating their verbal or affidavit evidence.

2.3 Narrative

Bruner asserts the profound influence that narrative has on people’s understanding and construction of reality.²³² Noting that narrative thinking is a fundamental way of organising human experiences, the author argues that narratives do not merely reflect reality, but rather they construct it, ascribing meaning to events and actions.²³³ Of the use of narrative in law, Bruner writes:²³⁴

While lawyers, typically, in translating the client’s personal “story” into a legal narrative, offer the client options in how the “facts of the case” shall be legally framed ... the final legal story is, nonetheless, forced into a “canonical” narrative that conforms to prevailing biases in the society while also corresponding to some precedent in the law.

The application of discourse analysis to the selected case studies provokes questions concerning the role of narrative in two key ways. First, narrative theory can be used to highlight the malleability of legal judgements as these narratives are constructed as both products and propagators of legal discourse. Second, the concept of unreliable narration is valuable in

and Judy Cashmore, *The Views of Judicial Officers* (Report to the Family Court of Australia and the Federal Magistrates Court, University of Sydney, 2006).

²³¹ Norman Fairclough, *Language and Power* (Longman, 2nd ed, 2001) 139.

²³² Jerome Bruner, 'The Narrative Construction of Reality' (1991) 18(1) *Critical Inquiry* 1–21, 4.

²³³ *Ibid* 4.

²³⁴ *Ibid* 11.

interrogating legal judgements founded on, and legitimating, knowledge and practices that diverge from established best-practice responses to child sexual abuse.

Developing alongside discourse theory, with roots in linguistics, literary theory and sociology, narrative has been defined in diverse ways.²³⁵ Mumby's concept of narrative as at once producing a social context and deriving meaning from it, aligns with the Foucauldian and Faircloughian tenets of discourse on which the research project is based.²³⁶ Arnauld and Martini describe the development of a legal narrative as "a complex process interweaving norms and facts", as the 'facts' of a case are "collected and reconstructed already with a view to the necessity of relating them to the terms and notions of the law".²³⁷ Olson argues that narrative plays a crucial role in the construction of legal meaning and the administration of justice²³⁸ and contends that legal narratives are shaped by cultural, historical and social factors, and that these narratives can have significant implications for legal decision-making.²³⁹ Legal narratives are not neutral or objective, but are instead shaped by cultural and historical contexts, in particular the legal culture within which they are produced.²⁴⁰ In this vein, Cover states that "[o]nce understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live".²⁴¹

Within the family courts, throughout a process that can span several years, multiple personal narratives are issued by each party. These are influenced by legislation and precedent, as well as the narratives and reactions of the judge and other parties to the material before them. Ultimately, these competing personal narratives are integrated by a judge, who perceives them through the lens of their own "legal and factual reality" to create "a legally valid and

²³⁵ Roger Pierce, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305, 300.

²³⁶ Dennis K Mumby, *Narrative and Social Control: Critical Perspectives* (Sage Publications, 1993) 30.

²³⁷ Andreas von Arnauld and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 356.

²³⁸ Greta Olson, 'Narration and Narrative in Legal Discourse' in Peter Hühn et al. (eds), *Handbook of Narratology* (De Gruyter, 2nd ed, 2014) 371–383, 371–372.

²³⁹ Ibid 372.

²⁴⁰ Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) *Law and Society Review* 29–44, 32.

²⁴¹ Robert M Cover, 'The Supreme Court, 1982 Term: Foreword' (1983) 97 *Harvard Law Review* 4–68, 4–5.

enforceable master narrative” in the form of a written or verbal judgement.²⁴² The concept of narrative assists the research project in highlighting the perpetual battle for control of these legal narratives. Foucault argues that law is not a fixed or objective system of rules, but rather a discourse or language game that involves a struggle for interpretive power.²⁴³ Foucault asserts that claims to scientific objectivity are in themselves exercises of power; as these claims are accepted, other knowledges are accorded less value.²⁴⁴ Foucault’s analysis of legal discourse and narrative suggests that legal decision-making is not based on a fixed or objective set of rules, but rather involves struggles for interpretive power that are shaped by a variety of contextual factors.

2.4 Master Narrative

Echoing Foucault’s perspective, Windsor similarly frames the contest for control of a narrative in law as “a struggle for interpretive power”.²⁴⁵ Focusing on the use of narrative in international law, Windsor argues that legal professionals concur around a ‘master narrative’ as they narrate legal events, thereby obscuring the normative frameworks from which they operate in advancing their own projects.²⁴⁶ The same can be said of family law, through which the ‘master narrative’ of the child’s right to a ‘meaningful relationship’ with both parents is often raised when prioritising that relationship to the detriment of the child’s right to safety from abuse. The ‘master narratives’ emerging from family law discourse in turn validate and perpetuate the tenets of the discourse.

The use of narrative to legitimise and perpetuate normative frameworks is not unique to the family law system. Hackett and Coghlan highlight the use of narrative in conjuring up the “magic” that sustains the monarchy in the recent coronation of King Charles III, noting the deployment of “stage management” in the broadcast of the event “to exclude any counter-

²⁴² Andreas von Arnould and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 357.

²⁴³ Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989) 14.

²⁴⁴ *Ibid* 14.

²⁴⁵ Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) *Leiden Journal of International Law* 743–769, 743.

²⁴⁶ *Ibid* 744.

narrative from being broadcast”.²⁴⁷ Within family law, the potent operation of ‘master narratives’ is readily identifiable in the operation of ‘friendly parent’ provision, which was made part of the *Family Law Act* in the 2006 legislative amendments.²⁴⁸ The provision stipulated that an “additional consideration” when determining a child’s best interests was “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent”.²⁴⁹ Despite the repeal of the ‘friendly parent’ provision within the 2012 ‘family violence reforms’²⁵⁰ of the *Family Law Act*, the concepts of ‘friendly parent’ and ‘parental alienation’ remain embedded in the culture of the Australian family courts.²⁵¹

These concepts continue to influence both the recommendations of experts and the advice of lawyers to their clients, to the extent that “substantial minorities” of families with a history of family violence and other forms of child abuse do not report their concerns about child safety in family law proceedings.²⁵² In this way, legal realities shape the personal narratives of parties, causing judicial officers to assess the risk of violence based on incomplete information.²⁵³ When concerns about child sexual abuse are raised, the courts continue to rely on “gendered discourses of hysterical, vindictive and manipulative women that have historically been used to discredit women and children”.²⁵⁴ Ultimately, these factors result in a ‘master narrative’ that is based on the norms embedded in family law discourse, rather than the experiences of the families who are subject to family law judgements.

²⁴⁷ Lisa J Hackett and Jo Coghlan, 'Conjuring up a King: The Use of Magic and Ritual in the Coronation of King Charles Iii' (2023) 26(5) *M/C Journal*.

²⁴⁸ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60CC(3)(c).

²⁴⁹ *Ibid* (comp 25 May 2006) s 60CC(3)(c).

²⁵⁰ *Family Law Legislation Amendment (Family Violence and Other Measures) Act (No 189) 2011* (Cth).

²⁵¹ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 11–13.

²⁵² Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) 76.

²⁵³ Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 93.

²⁵⁴ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 8.

2.5 The Unreliable Narrator

A second aspect of narrative theory of utility to the research project is that of unreliable narration, as it draws a distinction between the ‘internal reality’ of a text, or the norms of its narrator, and that of a broader external reality.²⁵⁵ The use of unreliable narration rose to prominence in popular literature when deployed by Agatha Christie in her novel *The Murder of Roger Ackroyd*,²⁵⁶ which outraged readers for its violation of the implicit contract between author and reader prohibiting “narrator-murderers in crime fiction”.²⁵⁷ In the early 1960s, Booth brought the concept of unreliable narration into literary theory²⁵⁸ shortly after the publication of Vladimir Nabokov’s *Lolita*.²⁵⁹ Booth drew a distinction between the norms of a text’s narrator and those of its “implied author who carries the reader with him in judging the narrator”, stating that a narrator may be deemed reliable when those norms align.²⁶⁰

The success of unreliability as a literary device depends on the reader’s capacity to detect the divergence between internal and external ‘reality’.²⁶¹ In this light, interpretation of a text is “dependent on the reader’s knowledge, norms, attitudes and capabilities”.²⁶² *Lolita* demonstrates this concept. Windsor states that, “[r]ead uncritically, the first-person narration would seem to function as an apologist tract for paedophilia”; however, “distinguish[ing] between the norms of the implied author and that of the unreliable narrator” allows a more nuanced understanding of the text.²⁶³ This, Booth states, gives rise to a “secret communion” between the implied author and the reader.²⁶⁴ Legal texts may be subject to a similarly nuanced

²⁵⁵ Andreas von Arnould and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 354.

²⁵⁶ Agatha Christie, *The Murder of Roger Ackroyd* (William Collins, 1926).

²⁵⁷ Daniel Del Gobbo, 'Unreliable Narration in Law and Fiction' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 311–338, 325–326.

²⁵⁸ Wayne C Booth, *The Rhetoric of Fiction* (University of Chicago Press, 1961).

²⁵⁹ Vladimir Vladimirovich Nabokov, *Lolita* (Weidenfeld and Nicolson, 1959).

²⁶⁰ Wayne C Booth, *The Rhetoric of Fiction* (University of Chicago Press, 1961) 158.

²⁶¹ Andreas von Arnould and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 354.

²⁶² *Ibid* 354.

²⁶³ Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) *Leiden Journal of International Law* 743–769, 752.

²⁶⁴ Wayne C Booth, *The Rhetoric of Fiction* (University of Chicago Press, 1961) 307, cited in Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) *Leiden Journal of International Law* 743–769, 752.

analysis. While the purpose of a legal judgement may ostensibly be to provide the parties to a case with the reasoning underpinning a judicial decision, legal judgements also provide a justification of that decision, to be relied on in case the matter appears before another first-instance or appellate court. As such, the ultimately intended readers of a legal story are judges and other legal experts.²⁶⁵ Yet many—but not all—legal texts are made available to the public. They are read and interpreted by others outside of elite legal circles and can be weighed against standards other than the closely knit legal requirements laid down by previous judges in interpreting legislation and choosing whether to apply precedent.

Arnauld and Martini contend that, while “legal texts claim to relate to the social world”, this relationship is far more nuanced.²⁶⁶ Drawing on constitutional law as an example of ‘founding narratives’, they state that “[t]he preamble to a constitution might narrate historical events leading up to the foundational ‘constitutional moment’; this narration, however, might depart significantly from the true course of history (as far as this can be objectively reconstructed)”.²⁶⁷ In the same vein, the authors argue that a legal decision may “present a consistent line of argument which sounds compelling in itself and nevertheless disregards important sociolegal facts”.²⁶⁸ This is evident in many of the cases analysed in the research project, as accounts of the ‘founding narratives’ of a family, and the parents’ relationship and separation, contrast vividly in the hands of competing narrators. In family law, the impacts of an unreliably narrated judicial decision can extend to orders mandating children’s time with adults whom they have described as sexually abusing them while separating them from those who love and protect them. By evaluating the selected family law judgements with reference to the norms established by evidence-based research into child sexual abuse—as encapsulated in the weight of academic research, the findings of numerous inquiries and, ultimately, the Royal Commission—the internal normative frameworks of judgements are revealed, calling into question the reliability of their narration.

²⁶⁵ Andreas von Arnauld and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370, 350.

²⁶⁶ Ibid 366.

²⁶⁷ Ibid 366.

²⁶⁸ Ibid 366.

2.6 Feminist Perspectives on Narrative

Viewing a judgement as a narrative presents a challenge to the positivist concepts of objectivity and neutrality. Butler's work explores the intertwining of narrative and identity, framing the concepts of gender and identity as performative and constructed through discourse and repetition.²⁶⁹ The author suggests that our identities are constituted by the narratives we inhabit within the "available sites of power/discourse", illuminating how the narratives around gender and power can be used to maintain societal norms.²⁷⁰ Butler further argues that the law itself utilises narratives to justify its authority, or the existence of particular parcels of legislation.²⁷¹ Similarly, Hooks explores the ways in which societal narratives are shaped by systems of power, including the power of white middle-class women, noting that "many liberal feminist reforms simply reinforced capitalist, materialist values".²⁷² The author underscores the importance of alternative, intersectional narratives in challenging dominant patriarchal norms and promoting social justice.²⁷³

Of specific utility to the research project, critical feminist writers focus on the real-world impacts of narrative. Collins explores the power of political and legal narratives in shaping real-world attitudes, beliefs and systems of oppression, stating "courts determine which narratives are legitimated and which remain censored, government agencies decide which official interpretations of social reality prevail".²⁷⁴ The author emphasises the importance of "self-definition" for marginalised groups as a means of resistance and empowerment and highlights the significant role of personal and communal narratives in influencing power dynamics and challenging entrenched systems of power, particularly in the context of gender and racial oppression.²⁷⁵ A focus on narrative also corresponds with feminist recognition of the subjectivity of narrative as, within the research project itself, even the act of selecting legal

²⁶⁹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 2006) 34.

²⁷⁰ Ibid 43.

²⁷¹ Ibid 48.

²⁷² Bell Hooks, *Feminist Theory from Margin to Center* (South End Press, 1984) 21.

²⁷³ Ibid 64.

²⁷⁴ Patricia H Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2nd ed, 2000) 85.

²⁷⁵ Ibid 97.

judgements for analysis may be an act of narration.²⁷⁶ Smart encapsulates this subjectivity in discussing the translation of personal experience into law:²⁷⁷

[T]he legal process translates everyday experience into legal relevances, it excludes a great deal that might be relevant to the parties, and it makes its judgement on the scripted or tailored account. Of course parties are not always silenced, but I hope to show ... that how they are allowed to speak, and how their experience is turned into something that law can digest and process, is a demonstration of the power of law to disqualify alternative accounts.

Reading legal judgements as narrative through a critical feminist lens challenges traditional conceptions of objectivity and neutrality within the law. Employing a diverse narrative framework in the examination of family law judgements, this research will elucidate instances in which judgements were rendered without genuine consideration of the perspective of each party, thereby shedding light on pre-existing biases within the judicial process and the consequences they may invoke.

2.7 Analysing Australian Legal Discourse

Of significant relevance to the research project is the capacity for the development of values and norms within a particular discourse that clash violently with the values and norms of broader society. A striking example of this occurred in the 1990s, when Australian media reported a string of judicial statements excusing sexual violence.²⁷⁸ The first such case widely reported in this period involved Bollen J's statement in the South Australian Supreme Court that a man was entitled to employ "rougher than usual handling" in procuring sexual intercourse with his wife.²⁷⁹ While in common understanding, "rougher than usual handling" in the pursuit of sexual intercourse constitutes sexual assault, the practice was framed within the legal discourse of the time as the natural entitlement of a husband. The potential for erroneous individual beliefs and attitudes to coalesce among the members of a discourse,

²⁷⁶ Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) *Leiden Journal of International Law* 743–769, 759.

²⁷⁷ Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989).

²⁷⁸ Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 350.

²⁷⁹ *R v Johns* (unreported, Supreme Court of South Australia, 26 August 1992) (Bollen J), cited in Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 350.

ultimately informing the normative prescriptions of the discourse itself, was exemplified in a subsequent judgement in the state of Victoria in which Bland J stated:²⁸⁰

And often, despite the criticism that has been directed at judges lately about violence and women, men acting violently to women during sexual intercourse, it does happen to *the common experience [sic] of those who have been in the law as long as I have*, anyway, that “No” often means “Yes”.

While such a statement of experiential values is easily classified as belonging to a prior era, judicial attitudes that conflict with research-based understandings of sexual and physical violence have continued to be identified by research into the Australian family courts. A 2011 study of Australian family lawyers in New South Wales identified “widespread agreement” that apprehended violence orders are deployed for “tactical reasons” in family law,²⁸¹ reflecting the views identified by other research as being held by magistrates,²⁸² family lawyers²⁸³ and judicial officers in the family courts.²⁸⁴ Such beliefs were again recognised by the 2016 Victorian Royal Commission into Family Violence as persisting among legal professionals, despite research clearly establishing that false allegations of family violence are rare—including within the family courts—and are no more often made by women than men.²⁸⁵

Despite contradicting an externally recognised reality, erroneous beliefs may become entrenched within the bounds of a discourse. Berger and Luckmann argue that social reality is influenced by the collective understanding and meaning attached to objects, activities and concepts.²⁸⁶ In this way, even false or contradictory beliefs can be maintained within a group

²⁸⁰ *R v Donald* [1993] Morwell County Court (15 April 1993) (Bland J), cited in Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 350 (emphasis added).

²⁸¹ Patrick Parkinson, Judith Cashmore and Atlanta Webster, *The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation* (Legal Studies Research Paper No 11/13, Sydney Law School, February 2011) 33.

²⁸² Jennifer Hickey and Stephen Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Report, Judicial Commission of New South Wales, 1999) 37, 46; Belinda Carpenter, Sue Currie and Rachael Field, 'Domestic Violence: Views of Queensland Magistrates' (Conference Paper, Australian and New Zealand Society of Criminology Annual Conference, 21–23 February 2001).

²⁸³ Jane Wangmann, '"She Said ..." "He Said ...": Cross Applications in NSW Apprehended Domestic Violence Order Proceedings' (PhD Thesis, University of Sydney, 2009) 95–100.

²⁸⁴ R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 734, 772.

²⁸⁵ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

²⁸⁶ PL Berger and T Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, 1966) 85–86.

if they are collectively agreed upon and become a part of the group's discourse.²⁸⁷ Within the family courts, McInnes argues that a systemic failure to accept allegations of child sexual abuse in turn *reinforces* judicial preconceptions that such allegations made in family law proceedings are usually false.²⁸⁸ This, she states, "reinscribes the ... paradigm in the lived experiences of family law officers".²⁸⁹

The domain of family law can be understood as a discourse in which judicial officers and legal professionals operate on the basis of shared understandings and assumptions; families subject to the family courts' jurisdiction must frame their arguments in line with the rules and conventions of this discourse in order to be heard.²⁹⁰ A Foucauldian-feminist critical discourse analysis lends itself neatly to the critique of family law discourse, within which many erroneous beliefs about the veracity and sanity of women and children operate as 'common sense', despite their obvious conflict with the evidence-based academic consensus. Examining the ways in which "the legal imagination is constrained" by discourse is a key objective of critical legal scholarship in seeking to understand the political choices inherent in every legal decision.²⁹¹

When weighing the family courts' responses to reports of child sexual abuse against the findings and recommendations of the Royal Commission, the present discourse analysis identified numerous instances in multiple judgements in which patently inaccurate beliefs, and norms that contradict broader Australian community values, took precedence over the research-based findings of the Royal Commission, key government inquiries and established academic literature.

²⁸⁷ Ibid 95.

²⁸⁸ Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3.

²⁸⁹ Ibid 3.

²⁹⁰ J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2006) 144.

²⁹¹ Simpson GJ and H Charlesworth, 'Objecting to Objectivity: The Radical Challenge to Legal Liberalism' in Hunter, Ingleby and Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995) 100–110, 100–102.

2.8 Contesting Legal Positivism

Part two of this chapter counters the notion of legal objectivity in relation to this study. Positivism is a philosophical and epistemological approach that relies on empirical evidence and scientific methods to study and understand social phenomena.²⁹² Positivism has its roots in the Age of Enlightenment, which took place primarily in Europe during the 18th century.²⁹³ Enlightenment thinkers championed the use of reason and empirical evidence over traditional religious or metaphysical doctrines, laying the groundwork for positivism.²⁹⁴ However, positivism, as a formalised philosophy, gained significant popularity during the 19th century, particularly through the work of Auguste Comte, who is credited with coining the term and establishing its foundations.²⁹⁵ Positivists assert that there is an objective reality that can be studied through observation, measurement and experimentation, and that knowledge can be obtained by applying logical and systematic methods of inquiry.²⁹⁶ From a critical perspective, however, the claimed neutrality of law serves as a means to obscure motives and ideologies behind case law and legislation as legal reasoning *justifies* essentially political decisions.²⁹⁷ Discourse analysis seeks to understand the ways in which language and communication shape such social realities,²⁹⁸ as analysts evaluate the underlying assumptions and ideologies that are implicit in the ways in which language is used to construct meanings, shape identities and establish power relationships.²⁹⁹ As Campbell describes the Age of Enlightenment:³⁰⁰

In the eighteenth-century Enlightenment, it was thought that a reasonable world contained an order of everlasting truths that could be grasped directly by the rational mind. But a suspicion began to dawn that this was obtaining truth on the cheap, too easily and neatly, that the Age of Reason actually suffered from a smug and artificial sense of security.

²⁹² Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970) 88.

²⁹³ Dorinda Outram, *The Enlightenment* (Cambridge University Press, 4th ed, 2019) 146.

²⁹⁴ Ibid 4.

²⁹⁵ John Stuart Mill, *Auguste Comte and Positivism* (Cambridge University Press, 2nd ed, 2015 [1866]) 7.

²⁹⁶ Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970) 88.

²⁹⁷ Simpson GJ and H Charlesworth, 'Objecting to Objectivity: The Radical Challenge to Legal Liberalism' in Hunter, Ingleby and Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995) 100–110, 100.

²⁹⁸ James Paul Gee, *An Introduction to Discourse Analysis: Theory and Method* (Routledge, 3rd ed, 2011) 9.

²⁹⁹ Ruth Wodak and Michael Meyer, *Methods of Critical Discourse Studies* (SAGE Publications, 3rd ed, 2015) 3.

³⁰⁰ Jeremy Campbell, *The Liar's Tale: A History of Falsehood* (WW Norton & Co, 2001) 127.

The discourse of the Enlightenment continues to influence liberal jurisprudence today.³⁰¹ Megill argues that, while belief in the Enlightenment certainties of ‘good’ and ‘true’ has significantly declined, contemporary political, social and legal institutions remain products of Enlightenment ideals.³⁰² While the positivist perspective is largely now understood as a flawed and incomplete theory, legal positivism continues to impact the practical application of law through its emphasis on the separation of law and morality.³⁰³ According to legal positivists, a law is valid if it has been properly enacted or established by a recognised authority, regardless of its content or its conformity to higher moral or ethical standards.³⁰⁴ The tensions inherent in legal positivism were best encapsulated by English legal philosopher, John Austin, in the 19th century, who stated, “[t]he existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry”.³⁰⁵ While positivism emphasises objectivity and the use of scientific methods to study social phenomena, discourse analysis recognises that knowledge is socially constructed and shaped by language, culture and historical context.³⁰⁶ McKee’s post-structuralist textual analysis emphasises that there are no ‘true’ realities referred to by texts—only various interpretations of reality—and the researcher’s role is to try to capture the various ways people make sense of a text.³⁰⁷ Through this lens of inquiry, the features chosen for analysis are identified by the researcher in the context of the social meanings they want to elucidate.³⁰⁸

Discourse analysts often reject the idea of objective truth or a single unified reality, instead emphasising the importance of multiple perspectives and the ways in which different discourses construct different realities.³⁰⁹ A critical feminist discourse analysis challenges the

³⁰¹ Alan Hunt, 'The Big Fear: Law Confronts Postmodernism' (1990) 35(3) *McGill Law Journal* 507–540, 507.

³⁰² A Megill, *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (University of California Press, 1987) 340.

³⁰³ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593–629, 594.

³⁰⁴ Leslie Green and Thomas Adams, 'Legal Positivism', *Stanford Encyclopedia of Philosophy* (Web Page, 2019) <<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>>.

³⁰⁵ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593–629, 596.

³⁰⁶ Marianne W Jorgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (SAGE Publications, 2002) 12.

³⁰⁷ Alan McKee, 'A Beginner’s Guide to Textual Analysis' (2001) 127/128 *Metro* 138–149, 145.

³⁰⁸ *Ibid* 148–149.

³⁰⁹ Ruth Wodak and Michael Meyer, *Methods of Critical Discourse Studies* (SAGE Publications, 3rd ed, 2015) 8.

basic tenets of positivism, emphasising the contentious nature of the claim to objectivity that is purported to underpin formal legal rulings.³¹⁰ A feminist perspective also accentuates the tangible effects of law's authority on the lives of women and children who find themselves subject to legal verdicts.³¹¹ During the rise of the critical legal studies movement in the 1970s, feminist and Marxist researchers began to contest the claims of objectivity and rationality underpinning Western legal systems, particularly highlighting the gendered nature of law itself.³¹² The concept of discourse as socially determinative squarely challenges legal positivist doctrine, which portrays the law as objective and the judge as neutral arbiter of the truth.³¹³ Critical and feminist legal scholars contest this purported neutrality of law, emphasising the powerful position of judges and other legal professionals as the "interpreter inevitably becomes a part of the interpretation".³¹⁴ In particular, critical and feminist perspectives highlight the ways in which legal discourse obscures the discriminatory practices carried out by a "hegemonic and privileged story teller"³¹⁵ in maintaining law's position as the most credible method of discerning truth.³¹⁶ The critical feminist delineation of the disparities in the power of parties engaging with legal systems³¹⁷ aligns with Foucault's analysis of the ways in which discourse operates to define and limit even the *options* available to parties in contesting knowledge that has been given the status of truth.³¹⁸

³¹⁰ Peta Broughton, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136–152, 142; Sreeparna Chattopadhyay, 'Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India' (2017) 20(2) *Law, Social Justice and Global Development* 1–16, 4.

³¹¹ Patricia H Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2nd ed, 2000) 85.

³¹² Joanne Conaghan, 'Reassessing the Feminist Theoretical Process in Law' (2000) 27(3) *Journal of Law and Society* 351–385, 360.

³¹³ Margaret Thornton, *Law and the Quest for Gender Equality* (ANU Press, 2023) 45.

³¹⁴ Sandra S Berns, 'Judicial Decision Making and Moral Responsibility' (1991) 13(2) *Adelaide Law Review* 119–162, 123.

³¹⁵ Nicole VT Lugosi, "'Truth-Telling" and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 303.

³¹⁶ *Ibid* 307.

³¹⁷ Nicola Lacey, 'Feminism and the Tenets of Conventional Legal Theory' (1995) 11 *Humboldt Forum Rechts* 1–7, 2.

³¹⁸ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed C Gordon, tr C Gordon et al. (Harvester Wheatsheaf, 1980) 93–94; Wendy Cheryl Shaw, 'The Weaver and the Web: A Foucauldian Analysis of the Discourses Which Produce Women Abusing Women in the Workplace' (PhD Thesis, University of Regina, 2012), 91.

Writing in 1979, Klare describes legal systems within capitalist cultures as a “mode of domination rather than freedom”,³¹⁹ defining law as a practice that establishes a social hierarchy.³²⁰ Stubbs’ 1980s critique of legal positivism continues this argument, claiming that, far from achieving a transhistorical universality, positivist legal discourse reproduces “the sex and economic class relations of capitalist society”.³²¹ Stubbs points to the futility of feminist challenges to a legal philosophy that is grounded in “an understanding of law as a neutral and independent structure ... uninvolved as an institution in the repression of women”.³²² Both Klare and Stubbs draw attention to the “alienation of law”,³²³ with Klare stating law’s “control by experts socialised in elite institutions and distanced from the lived reality of everyday life in capitalist societies”³²⁴ exacerbates the difficulties faced by advocates contesting the harmful consequences of law’s practical application.³²⁵ Stubbs echoes Klare’s position in advocating for a feminist challenge to law itself, rather than to inequitable aspects of legal process or legislation,³²⁶ stating that “the Western legal order serves to perpetuate and maintain patriarchal domination under what is essentially an ideological facade of formal justice, procedural equity, neutrality and judicial impartiality”.³²⁷

Thornton similarly highlights the impacts of law’s purported neutrality, casting law as both a “conduit” for dominant ideology and a “powerful mechanism of social control” as it divides the world into (masculine) public and (feminine) private spheres.³²⁸ The author argues that it is law’s claim to a natural, inevitable authority that makes it so difficult to challenge, as women

³¹⁹ Karl Klare, 'Law-Making as Praxis' (1979) 40 *Télos* 123–135, 132.

³²⁰ Ibid 128.

³²¹ Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91, 63.

³²² Ibid 64.

³²³ Ibid 84.

³²⁴ Karl Klare, 'Law-Making as Praxis' (1979) 40 *Télos* 123–135, 132, cited in Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91, 84.

³²⁵ Karl Klare, 'Law-Making as Praxis' (1979) 40 *Télos* 123–135, 132, cited in Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91, 84.

³²⁶ Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91, 64.

³²⁷ Ibid 69.

³²⁸ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5–29, 5–7.

are “rendered marginal to the operation of the law by virtue of assignation to the private sphere”.³²⁹ The author draws on the work of Husson, who states:³³⁰

[T]he law achieves an illusory but intimidating authority. It appears to be the embodiment of a neutral or natural ethic, a “given” structure, rather than a contingent construction. The hierarchies that the law guards, institutionalised in our society, likewise appear to be natural and necessary, rather than the malleable creations of men that they actually are.

Although many of the central tenets of legal positivism have long been avidly contested within the social sciences, the doctrine remains highly influential within contemporary jurisprudence.³³¹ Davies challenges the positivist construction of law as distinct from law’s culture, stating “it has become increasingly obvious to critical legal scholars that relationships of power in the legal and social fields are mutually constitutive and conceptually quite inseparable except, perhaps, at the level of law’s self-legitimizing rhetoric”.³³² The author continues, “[w]e can only understand legal ‘fact’ if we understand the subjects and the various cultural processes which determine such ‘facts’”.³³³ In these ways, critical feminist approaches to law continue to emphasise that, far from offering uniform justice, the administration of law is highly malleable, being subject to the norms of legal discourse and to the beliefs of individual judges,³³⁴ which may differ markedly from the research-based consensus on social phenomena.

Within family law in particular, research demonstrates that judicial attitudes are sometimes informed by a lack of knowledge about family violence, and other forms of child abuse, on the part of judicial officers, and the experts on whom they rely.³³⁵ The highly individuated nature of judicial determinations has also been identified in research into case allocation in Australian

³²⁹ Ibid 5–7.

³³⁰ Christine A Desan Husson, 'Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law' (1986) 95(5) *Yale Law Journal* 969–991, 971, cited in Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5–29, 7.

³³¹ Margaret Davies, 'The De-Capitation of a Discipline, or How Legal Theory Lost Its Head' (2000) 4(1) *Flinders Journal of Law Reform* 127–142, 130–132.

³³² Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 *Macquarie Law Journal* 5–30, 20.

³³³ Ibid 29.

³³⁴ LL Berger, BJ Crawford and KM Stanchi, 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' (2018) 47 *University of Baltimore Law Review* 167–197, 186.

³³⁵ Amanda Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases' (2011) 46(1) *Australian Psychologist* 31–40, 35–37.

family courts, which finds that judicial officers and court staff commonly perform informal evaluations of judges' performance, expertise and 'fairness' when allocating cases.³³⁶ Staff with case allocation responsibilities acknowledged assigning cases, for example, based on a judge's attitude to family violence,³³⁷ or their capacity to encourage early resolution of a matter through an 'interventionist' approach.³³⁸ The impacts of this practical, bureaucratic administration of family law case assignment highlight that, for staff at the coalface of family law, the administration of justice is neither fair nor neutral. Feminist jurisprudence continues to reflect this practical understanding of the exercise of law, highlighting that, instead of being confined to a legal positivist model of 'interpreting' legislation, the role of judicial discretion within Australian family law empowers judges to effectively *create* law.³³⁹ Within the research project itself, the judgements selected as case studies exemplify the ways in which the gendered myths embedded within family law discourse dislocate personal experience, perpetuating a status quo which deprioritises the right of children to be safe from abuse.

2.9 Normative Prescriptions and Gendered Legal Discourse

Critical feminist literature frames various discourses as founded on shared values and beliefs which circulate through "stock stories"³⁴⁰ or narratives that "preserve the interests of dominant groups".³⁴¹ These narratives perpetuate the foundational beliefs of a discourse, offering both an inter-narrative uniformity³⁴² and an "internal consistency that is recognised and interpreted as though it were representative of a socially determined truth".³⁴³ The 1980s drew into focus the exclusion of women from legal constructions of the 'normal', 'objective' and 'reasonable', alongside normative associations of women with the natural world and the corresponding

³³⁶ Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2015) 41(2) *Monash University Law Review* 445–468, 446.

³³⁷ *Ibid* 460.

³³⁸ *Ibid* 455.

³³⁹ P Pether and T Threadgold, 'Feminist Methodologies in Discourse Analysis: Sex, Property, Equity' in A Lee and C Poynton (eds), *Culture and Text: Discourse and Methodology in Social Research and Cultural Studies* (Allen & Unwin, 2000) 132–151, cited in Amanda Shea-Hart, 'Children Exposed to Domestic Violence: Whose "Best Interests" in the Family Court?' (PhD Thesis, University of South Australia, 2006) 85.

³⁴⁰ Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 373–374; Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 6.

³⁴¹ Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 354.

³⁴² Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 37.

³⁴³ *Ibid* 18.

alignment of men with the rational. MacKinnon emphasises the objectification of women in law, stating “the definition of women in law and in life is *not ours*”.³⁴⁴ Drawing on sex discrimination law, MacKinnon argues that, in order to seek equality through legal channels, women must either pursue a purportedly gender-neutral and objective standard of behaviour, which is in fact modelled on masculinity, or meet a male standard of femininity, which claims that they need protection by virtue of their femaleness.³⁴⁵ Ultimately, the author contends, female parties to legal matters must “meet either the male standard for males or the male standard for females”.³⁴⁶ Thornton similarly highlights the “exclusion of women from the neutrality prescript”, stating that “women’s association with nature is equated with reproduction and bodily functions which thereby perennially denies us the ability to engage in objective scholarship”.³⁴⁷ Worrall demonstrates the stark impacts for parties to legal disputes as this gendered ideology infuses legal discourse.³⁴⁸ The author notes the gendered nature of “self-evident truths” underpinning legal assessments of merit and credibility of parties to legal matters.³⁴⁹

The practical implications of this ubiquitous gendered legal discourse are highlighted by feminist critiques of legal narratives that discount the impacts of family violence and child sexual abuse on victims and survivors, attributing women and children raising allegations of violence with malign motives, such as vengeance;³⁵⁰ characteristics of deviance, such as

³⁴⁴ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 71 (emphasis in original).

³⁴⁵ *Ibid* 71.

³⁴⁶ *Ibid* 71.

³⁴⁷ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5–29, 16.

³⁴⁸ Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, 1989) 55, cited in Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 130.

³⁴⁹ Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, 1989) 55, cited in Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 130.

³⁵⁰ Wendy Lee Foote, 'Child Sexual Abuse Allegations in the Family Court' (PhD Thesis, University of Sydney, 2006), cited in Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 81.

frigidity³⁵¹ or mental illness;³⁵² or an ‘unnatural’ willingness to disrupt the family unit.³⁵³ Taylor applied discourse analysis to judicial narratives in transcripts of child sexual abuse trials in Victoria,³⁵⁴ in seeking to explore the ways in which the putative neutrality of law supports masculinist theories and processes that silence and re-victimise survivors.³⁵⁵ The author’s critical feminist epistemological foundation is evident in her understanding of intrafamilial child sexual abuse as a structurally and ideologically gendered crime protected by a powerful status quo.³⁵⁶ Taylor reflects earlier feminist researchers in arguing that the perspectives of judges and lawyers support legal processes that transform survivors’ experiences into “stock story narratives”, perpetuating harmful assumptions about women and children, protecting a patriarchal status quo and ultimately minimising and excusing the actions of perpetrators of intrafamilial sexual abuse by assigning blame to their victims.³⁵⁷ Although this work was published in 2001, many of the structural, social and legal deficiencies identified in criminal law’s capacity to respond to child sexual abuse³⁵⁸ continue to operate within Australia’s criminal justice system.

The Royal Commission identified erroneous judicial beliefs as continuing to present significant problems for child sexual abuse survivors seeking justice through the criminal justice system.³⁵⁹ Although some highly gendered jury directions have been amended or repealed in many Australian jurisdictions in recent years, myths and assumptions continue to influence the process and outcome of sexual assault trials in Australia and internationally.³⁶⁰ Taylor argues that judicial beliefs, such as the idea that women and girls lie about sexual assault, have become

³⁵¹ Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 278.

³⁵² Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 79.

³⁵³ Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 162.

³⁵⁴ Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 17.

³⁵⁵ *Ibid* 404–5.

³⁵⁶ *Ibid* 13.

³⁵⁷ *Ibid* 227–229.

³⁵⁸ *Ibid* 414–419.

³⁵⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 110.

³⁶⁰ *Ibid* 109–111.

“immutable rhetoric in legal trials and immune to legal reform”,³⁶¹ while Kaspiew highlights the inefficacy of law reform, given “mounting evidence that progressive change is frequently subverted by a persistently change-resistant, conservative system”.³⁶² These issues are similarly found within Australia’s family law system. Analysis of the case studies in the current research project reflects these findings, identifying family law discourse that appears driven by gendered misconceptions, a reliance on pseudoscience and a lack of knowledge of the dynamics of child sexual abuse. These deficiencies can be seen impairing the judgement of judicial officers and other professionals throughout the cases studied. The project investigates the gendered ‘truths’ underpinning narratives of family and law, as power is constituted and contested within competing discourses. Through this lens, the ‘facts’ and expert evidence underpinning the legal narratives analysed are understood not as natural or neutral, but as gendered representations of social and political values.³⁶³ Through a Foucauldian lens, both the family law system’s responses to allegations of child sexual abuse and an alleging parent’s attempts to protect their child within—and outside of—the courts, can be seen as exercises of agency within a “network of contingencies” prescribed by the institutional discourses of interpersonal violence and family law.³⁶⁴

A key component of Foucault’s work on discourse lies in the power of discourse to ensure that individuals police their own behaviour. Foucault emphasised the ways in which discourses produce norms that work with formal legal structures to govern the behaviour of individuals.³⁶⁵ In his work on prisons, Foucault argued that, in forcing the prisoner to adhere to behavioural norms, the prison makes the prisoner “the principle of his own subjection”.³⁶⁶ Smart echoes this contention, stating that legal regulation does not rest solely on applying penalties but is instead achieved through compelling individuals to restrict and censor themselves.³⁶⁷ In this

³⁶¹ Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 5.

³⁶² Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 351.

³⁶³ Chris Weedon, *Feminist Practice and Post-Structuralist Theory* (Blackwell, 1987) 112.

³⁶⁴ Michel Foucault and Lawrence D Kritzman, *Politics, Philosophy, Culture: Interviews and Other Writings 1977–1984* (Routledge, 1988) 37.

³⁶⁵ Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Pantheon Books, 1978) 144.

³⁶⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Allen Lane, 1977) 203, cited in Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, 1997) 84.

³⁶⁷ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Law and Society* 194–210, 197.

way, normative prescriptions form part of the law itself, arguably determining self-regulation more effectively than legislation or case law.³⁶⁸ In many of the family law cases studied, the erroneous beliefs of legal and associated professionals about the nature of child sexual abuse and family violence are echoed in the justifications made by alleged perpetrators of such violence, and in the tortuous arguments made by parties attempting to advocate for the safety of their children *within the constraints* of family law discourse. Family violence research similarly identifies the impact of gendered norms on the evidence provided to the family courts. Laing, Kaspiw and Rathus have all documented the “silencing power”³⁶⁹ of the “climate of disbelief”³⁷⁰ of violence within the family courts, which can lead survivors to conceal or minimise their experiences of abuse,³⁷¹ and their concerns for the safety of their children, as courts focus on their ‘motives’ in reporting safety concerns, rather than on the risks their children face.³⁷²

2.10 Gender and the Criminal Justice System

Since the advent of second-wave feminism in the early 1960s, feminist researchers have critiqued the role of gendered discourse in the criminal justice system, particularly in relation to punishment.³⁷³ Many early theories of criminality excluded women, while those that focused on female criminality attributed women’s criminal behaviour to biological—often sexual—factors.³⁷⁴ Feminist researchers such as Klein, Smart and Worrall brought the examination of gendered discourse into the realm of jurisprudence through their focus on the ways in which

³⁶⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Allen Lane, 1977) 144.

³⁶⁹ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 8.

³⁷⁰ Lesley Laing, 'Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System' (2016) 23(11) *Violence Against Women* 1–22, 10.

³⁷¹ Rae Kaspiw et al., *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015) 174.

³⁷² Lesley Laing, 'Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System' (2016) 23(11) *Violence Against Women* 1–22, 10.

³⁷³ Anette Ballinger, 'Masculinity in the Dock: Legal Responses to Male Violence and Female Retaliation in England and Wales, 1900–1965' (2007) 16(4) *Social and Legal Studies* 459–481, 460.

³⁷⁴ Dorie Klein, 'The Etiology of Female Crime: A Review of the Literature' (1973) 8(2) *Issues in Criminology* 3–30, 3. See, for example, C Lombroso and G Ferrero, *The Female Offender* (D Appleton, 1897); WI Thomas, *Sex and Society* (Little, Brown and Company, 1907); WI Thomas, *The Unadjusted Girl* (Harper and Row, 1923); Kingsley Davis, 'The Sociology of Prostitution' (1937) 2(5) *American Sociological Review* 744–755; Otto Pollak, *The Criminality of Women* (University of Pennsylvania Press, 1950); Sigmund Freud, *New Introductory Lectures on Psychoanalysis*, ed Angela Richards and James Strachey (Penguin, 1973).

constructions of femininity can impact judicial officers' and jurors' perceptions of defendants, with implications for the outcomes of criminal trials. Klein challenged the representation of women in traditional criminological literature, demonstrating that popular theories of female criminality from the turn to the middle of the 20th century were predicated on the belief that the criminal behaviour of women was due to biological or psychological deficiencies.³⁷⁵ The author asserted that the criminal justice system commonly presumes that, as a "deviant" woman rebels against the "passive nature of womanhood", she effectively desires to act and be treated as a man.³⁷⁶ Similarly, Edwards argued that violent female offenders are traditionally characterised as mentally ill or socially deviant.³⁷⁷ Smart provided early insight into perceptions of female deviance in the criminal justice system through exploration of legal perceptions of certain deviant behaviours in defendants as natural in males, and unnatural in females, resulting in discrepancies in decisions to prosecute male and female defendants.³⁷⁸ Writing in the 1990s, Worrall also noted that female offenders tended to experience different treatment by the courts and social welfare agencies from that afforded to male offenders.³⁷⁹ She concluded that some female offenders are subject to subtle and sophisticated oppression, emanating from the inability or refusal of correctional and welfare professionals to listen to anything that did not align with their preconceived notions.³⁸⁰ In this way, inadequate categorisations can be applied to female offenders, leading to inappropriate solutions offered to their poorly defined problems.³⁸¹

Feminist researchers continue to contest assumptions within legal discourse—often enshrined in jury warnings about the veracity of female complainants—that sexual assault victims make unreliable witnesses in criminal trials.³⁸² Grounds contested by feminist academics worldwide include legal standards, such as that of the 'reasonable man', which has been uncritically used

³⁷⁵ Dorie Klein, 'The Etiology of Female Crime: A Review of the Literature' (1973) 8(2) *Issues in Criminology* 3–30, 3.

³⁷⁶ Ibid 3.

³⁷⁷ Susan S Edwards, 'Neither Bad nor Mad: The Female Violent Offender Reassessed' (1986) 9(1) *Women's Studies International Forum* 79–87, 81.

³⁷⁸ Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (Routledge & Kegan Paul, 1978) 208.

³⁷⁹ Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, 1989) 189.

³⁸⁰ Ibid 189.

³⁸¹ Ibid 189.

³⁸² Jocelyn Hollander, 'Challenging Despair: Teaching About Women's Resistance to Violence' (2005) 11(6) *Violence Against Women* 776–791, 780; Jan Jordan, 'What Would Macgyver Do? The meaning(s) of Resistance and Survival' (2005) 11(4) *Violence Against Women* 531–559, 531.

to evaluate the actions of criminal defendants generally, including women;³⁸³ the gendered concept of ‘provocation’, predominantly employed as a partial defence in relation to men who kill unfaithful female partners;³⁸⁴ and ‘battered woman syndrome’, which may be applied to account for the actions of women who kill a violent partner due to a perceived inability to escape their violence.³⁸⁵

Tarrant noted the gendered construction of the principles of ‘provocation’ and ‘battered woman syndrome’, which obscure survivors’ narratives by requiring women to “stretch and manipulate experience so as to fit a social or legal category”, such that “even where individual women are successful in their use, the basic structure of those laws may contribute to an understanding of ‘woman’ as other than the norm”.³⁸⁶ McCarthy’s analysis of *R v Raby*³⁸⁷ noted the process by which legal discourse subsumed both the narratives of the ‘battered woman’, Ms Margaret Raby, and her abusive husband, Mr Keith Raby, whom she killed.³⁸⁸ The first case in Victoria where ‘battered woman syndrome’ was argued as a form of ‘provocation’,³⁸⁹ *R v Raby* prompted the sentencing judge’s remarks that “[d]isposing of battering men is absolutely unacceptable. Exposing them for the villains that they are is to be encouraged in every way”.³⁹⁰ Despite this, the author noted that the constraining effects of psychological and psychiatric discourse within the broader discourse of the trial rendered Mr Raby’s physical, sexual and psychological violence against Ms Raby invisible, and prevented the defendant from relating her experiences in any meaningful way.³⁹¹ McCarthy advocated for “a law which does not contort women’s experience to conform to legal categories constructed upon masculinist premises”,³⁹² quoting feminist legal academic Helen Brown, who argued, “[l]et us argue that

³⁸³ Margaret Thornton, 'Portia Lost in the Groves of Academe and Wondering What to Do About Legal Education' (1991) 9(2) *Law in Context* 26–32, 27.

³⁸⁴ Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge-Cavendish, 2013) 1.

³⁸⁵ Katherine O’Donovan, 'Defences for Battered Women Who Kill' (1991) 18(2) *Law and Society* 219–240, 229; Sharon Lamb, 'Constructing the Victim: Popular Images and Lasting Labels' in Sharon Lamb (ed), *New Versions of Victims: Feminists Struggle with the Concept* (New York University Press, 1999) 108–138, 111.

³⁸⁶ Stella Tarrant, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15(4) *Legal Service Bulletin* 147–150, 147.

³⁸⁷ *R v Raby* (unreported, Supreme Court of Victoria, 22 November 1994, no 94).

³⁸⁸ Therese McCarthy, "'Battered Woman Syndrome': Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1995) 4(1) *Australian Feminist Law Journal* 141–151, 142.

³⁸⁹ *Ibid* 141.

³⁹⁰ *R v Raby* (unreported, Supreme Court of Victoria, 22 November 1994, no 94) [2] (Teague, J).

³⁹¹ Therese McCarthy, "'Battered Woman Syndrome': Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1995) 4(1) *Australian Feminist Law Journal* 141–151, 141.

³⁹² *Ibid* 145.

HE is sick. He is abnormal. His behaviour is aberrant. Let's invent a syndrome. Let's call it battering man syndrome".³⁹³

While in Australia and many countries internationally, many legal standards are now ostensibly gender-neutral, feminist researchers continue to contest them as perpetuating similar harms through their ongoing entrenchment of gendered misconceptions in legal and social discourse. Naffine traces the evolution of law from its heavily gendered origins to its careful, contemporary use of gender-neutral concepts.³⁹⁴ However, Naffine states:³⁹⁵

This is an in-group talking to themselves, excluding from the discussion those who are unlike them, who might offer a different and critical point of view ... If no robust and respected counter point of view/understanding is permitted, the influential way will just look right and normal and the less influential and different views will seem to be misguided ... There is in fact a very tight demographic to be observed among the men of legal influence. It is a small and privileged social and legal world populated by a small culturally homogeneous group of persons, a male elite of rule makers and rule interpreters, located within intellectual families of influence, often actively guarding its terrain, and delivering its opinions to the like-minded.

Baker's research into individual and legal constructions of women who experience male violence, applies Foucault's perspective on discourse as perpetuating societal power dynamics, arguing that the subjectification—and consequent reasoning and actions—of individuals is inextricably linked with the prescriptions of the discourses in which they engage.³⁹⁶ Baker argues that, in this way, "both criminal legal and individual women's discourses need to be read in terms of the power, knowledge and effects which they exert upon individual women".³⁹⁷

³⁹³ Helen Brown, 'Mad, Bad or Unreasonable Women: Battered Women's Syndrome and It's Silencing of the Experience of Women: Two Alternative Approaches' (Conference Paper, Australian Law and Society Conference, 14 December 1994) 7 (emphasis in original), cited in Therese McCarthy, "'Battered Woman Syndrome': Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1995) 4(1) *Australian Feminist Law Journal* 141–151, 145.

³⁹⁴ Ngaire Naffine, 'Criminal Law and the Moral Education of Men' (2018) 11(2) *Fudan Journal of the Humanities and Social Sciences* 129–144, 140–141.

³⁹⁵ *Ibid* 141–142.

³⁹⁶ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed C Gordon, tr C Gordon et al. (Harvester Wheatsheaf, 1980) 93, cited in Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 124.

³⁹⁷ Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 123.

Examining the processes by which women and men are constructed in sexual assault trials, Smart writes that, in construing the female victim as “guilty of consent”, the trial becomes a celebration of “natural male sexual need and female sexual capriciousness”.³⁹⁸ Quilter’s analysis of the history of rape law highlights the continuing paucity of Australian criminal legal responses to sexual assault, “[d]espite more than three decades of progressive law reform”.³⁹⁹ The author situates contemporary responses to sexual assault within a broader sociolegal history from the 13th to 18th centuries,⁴⁰⁰ when rape was constructed as “a crime of interference with patriarchal interests in marriage and property”.⁴⁰¹ Noting that early legal requirements, particularly those concerning the restraint and physical injury of the victim, persist in practice despite being removed from the legislation, Quilter argues that attempts to reform harmfully gendered legislation must go beyond the formal content of legislation to address “the knowledges and cultural lineages” that inform legal practice.⁴⁰²

In 2010, the Australian and New South Wales Law Reform Commissions raised concerns about the ongoing use of gendered jury warnings in Australian criminal trials, arguing that they reflect antiquated claims underpinning early common law, concerning a fundamental unreliability in women and children that causes them to lie about sexual assault.⁴⁰³ In 2017, the Royal Commission echoed these concerns, formally recommending legislation outlawing jury directions in all Australian state and territory jurisdictions that call into question the reliability or credibility of women and children due to delay in reporting sexual offences, a lack of corroboration of their evidence or the fact that the complainant is a child.⁴⁰⁴ Yet, as the case studies herein demonstrate, these claims are routinely made to great effect within Australian family law.

³⁹⁸ Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989), 35.

³⁹⁹ Julia Quilter, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law and History* 89–113, 89.

⁴⁰⁰ *Ibid* 93.

⁴⁰¹ *Ibid* 89.

⁴⁰² *Ibid* 89.

⁴⁰³ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) [24.56].

⁴⁰⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 88, rec 65.

2.11 Feminist Responses

Since the 1970s, feminist activism regarding family violence (termed ‘domestic violence’ during this period) led to increased public consciousness of the issue and the establishment of the first domestic violence refuges in Australia.⁴⁰⁵ At this time, feminist researchers turned their attention towards legal and policy responses to interpersonal violence, arguing that violence, including sexual violence, perpetrated against women by men, is evaluated according to male standards embedded within social norms and legal institutions.⁴⁰⁶ Brownmiller emphasised legal discourse’s attribution of responsibility for sexual violence to victims and survivors, based on gendered conceptions of women as weak and passive, arguing that the internalisation of gendered discourse socialises women to become victims of rape.⁴⁰⁷ Gelles explored legal responses to sexual and physical assaults of women by their husbands, two significantly underreported crimes.⁴⁰⁸ The author highlighted enduring narratives that female assault victims are ‘asking for’, ‘deserving’ of or ‘enjoying’ their victimisation, and the consequent misunderstanding of their cases by police, lawyers and judges.⁴⁰⁹ Kaplan and Svaldi similarly identified inadequate responses to domestic violence within the criminal justice system.⁴¹⁰ They noted the limited training of police and the ineffective policies at the prosecutorial level that ignore the emotional and economic needs of women and children who are victims of domestic violence.⁴¹¹ Hindman also observed a high degree of community acceptance towards domestic violence, contributing to underreporting.⁴¹² These issues continue to persist today.

Beginning in the 1980s, feminist perceptions of domestic violence began to encompass a growing awareness of the need to address gendered assumptions. Knight and Hatty assessed

⁴⁰⁵ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 1.

⁴⁰⁶ Elizabeth Stanko, *Intimate Intrusions: Women’s Experiences of Male Violence* (Routledge and Kegan Paul, 1985) 13; Carol Smart, ‘The Woman of Legal Discourse’ (1992) 1(1) *Social and Legal Studies* 29–44, 32; Ngaire Naffine, ‘Possession: Erotic Love in the Law of Rape’ (1994) 57(1) *Modern Law Review* 10–37, 10.

⁴⁰⁷ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Pelican Books, 1975) 309, 312.

⁴⁰⁸ Richard J Gelles, ‘Power, Sex, and Violence: The Case of Marital Rape’ (1977) 26(4) *Family Coordinator* 339–347, 339.

⁴⁰⁹ *Ibid* 341.

⁴¹⁰ A Kaplan and J Svaldi, ‘An Overview of Family Violence’ (1979) 17(3) *Conciliation Courts Review* 1–12, 1.

⁴¹¹ *Ibid* 1.

⁴¹² MH Hindman, ‘Family Violence: An Overview’ (1979) 4(1) *Alcohol Health and Research World* 2–11, 2.

the implications for social action in cases of domestic violence, stating that theoretical and methodological paradigms applied by researchers to conceptualise domestic violence, often involve erroneous notions of gender, such as equal power between men and women.⁴¹³ They advocated for female empowerment through the adoption of feminist paradigms that enhance the visibility of victims.⁴¹⁴ MacKinnon criticised the paradigms through which rape, sexual harassment, pornography and domestic violence are assessed, legally and socially, stating that “gender-neutral, objective formulations” adhere to a male standard as they “avoid asking *whose* expression, from whose point of view”.⁴¹⁵ Also during the 1980s, feminist advocates began to focus on child sexual abuse.⁴¹⁶ Growing academic recognition of child sexual abuse led to the first mandatory reporting laws in limited Australian jurisdictions, resulting in an increase in the reporting of such crimes.⁴¹⁷ The movement in Australia played a crucial role in bringing the issue of child sexual abuse to the forefront of public discourse, advocating for the rights and wellbeing of children and promoting a cultural shift towards greater transparency and accountability.⁴¹⁸ This shift in focus led to a greater awareness of the prevalence and impacts of child sexual abuse, as well as the need for more effective prevention and intervention strategies.⁴¹⁹

While feminist activism regarding domestic violence achieved significant legislative reform in Australia in the form of state intervention order legislation during the 1980s, and a recognition of family violence in the *Family Law Act* during the 1990s under the *Family Law Reform Act*,⁴²⁰ Hunter and other feminist academics continued to raise concerns about the implementation of these reforms by non-feminist judges who bring their own “‘knowledge’ about violence” to proceedings.⁴²¹ Writing in the 2000s, Coker attributed many legal reforms impacting legal

⁴¹³ Rosemary A Knight and Suzanne E Hatty, 'Theoretical and Methodological Perspectives on Domestic Violence: Implications for Social Action' (1987) 22(2) *Australian Journal of Social Issues* 452–464, 452.

⁴¹⁴ *Ibid* 452.

⁴¹⁵ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 92 (emphasis in original).

⁴¹⁶ Madelyn Simring Milchman, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139, 115.

⁴¹⁷ Ben Mathews, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2014) 5.

⁴¹⁸ Hayley Boxall, Adam M Tomison and Shann Hulme, *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, Australian Institute of Criminology, 2014) 9–10.

⁴¹⁹ *Ibid* 9–10.

⁴²⁰ *Family Law Act 1975* (Cth) (comp 16 December 1995) ss 68F(2)(g)–(i).

⁴²¹ R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 733.

responses to violence within the family, to feminist advocacy.⁴²² Reforms, such as those in the US legislating mandatory arrest of perpetrators, were received with ambivalence as some feminist academics pointed to a decrease in survivors' agency,⁴²³ while others expressed optimism at the law's capacity to provide justice for victims of family violence.⁴²⁴ In Australia, Murray and Powell contended that feminist campaigns have been effective in shaping public policy that formally acknowledges family violence as a significant issue impacting Australian women from the 1980s onwards.⁴²⁵

Throughout the 1990s and 2000s, Australian states and territories continued to enact mandatory reporting laws to ensure that professionals working with children, such as teachers and medical practitioners, were legally obligated to report any suspected cases of child sexual abuse to relevant authorities.⁴²⁶ Researchers and advocates began to focus on understanding the dynamics of child sexual abuse, the impact on survivors and the development of effective prevention and intervention strategies, contributing to the development of evidence-based policies and practices to protect children from abuse.⁴²⁷ During this period, several high-profile cases of child sexual abuse in institutional settings, such as the Catholic Church, raised public concern and increased pressure on the government to take action.⁴²⁸ These cases demonstrated that abuse was not isolated to a few individuals but was systemic.⁴²⁹ As more cases of institutional child sexual abuse came to light, there were growing calls for a national inquiry to examine the extent of the issue and how institutions had responded to allegations of abuse.⁴³⁰ In November 2012, the then Prime Minister, Julia Gillard, announced the establishment of the

⁴²² Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4(2) *Buffalo Criminal Law Review* 801–860, 803.

⁴²³ *Ibid* 801.

⁴²⁴ Ruth Lewis et al., 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10(1) *Social and Legal Studies* 105–130, 106.

⁴²⁵ Suellen Murray and Anastasia Powell, "'What's the Problem?': Australian Public Policy Constructions of Domestic and Family Violence' (2009) 15(5) *Violence Against Women* 532–552, 532.

⁴²⁶ Ben Mathews, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2014) 12.

⁴²⁷ Marije Stoltenborgh et al., 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence around the World' (2011) 16(2) *Child Maltreatment* 79–101, 79–80.

⁴²⁸ Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10–22, 14; Kate Gleeson and Sinéad Ring, 'Confronting the Past and Changing the Future? Public Inquiries into Institutional Child Abuse, Ireland and Australia' (2020) 29(1) *Griffith Law Review* 109–133, 120.

⁴²⁹ Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10–22, 15.

⁴³⁰ *Ibid* 14.

Royal Commission into Institutional Responses to Child Sexual Abuse.⁴³¹ Despite these gains, many issues persist, particularly in the family law system. These issues are identified in the inquiries and reports described in following chapters. Understanding the competing discourses concerning family violence and child sexual abuse remains crucial in understanding the significant impact of this discourse on the family law system.

Australian and international literature has long highlighted judicial officers' resistance to both evidence-based research and legislative reform, when it contradicts the established norms of legal discourse.⁴³² Hunter's analysis of Family Court of Australia cases involving allegations of family violence found that the use of 'consent' orders, which "clearly perpetuated rather than prevented the father's future control and abuse of the mother", has impacted family law discourse by perpetuating gendered beliefs that minimise and deny such violence.⁴³³ The author emphasises the hegemonic power of discourse in arguing that feminist-inspired legislative reform is easily undermined when implemented by judicial officers and other legal professionals whose understandings of interpersonal violence conflict with feminist accounts.⁴³⁴ Discourse analysis of New Zealand family lawyers' perspectives on supervised access to children following family violence found that some family lawyers framed supervised access as "violating men's rights to a relationship with their children, and children's right to a relationship with both parents", despite evidence that supervision increases survivors' safety and despite New Zealand legislation providing that perpetrators of such violence may be restricted to supervised contact with children.⁴³⁵ Millar similarly frames the shifting legislation governing abortion in Australia since the late 1960s within the context of the "normative regulation of abortion".⁴³⁶ The author constructs a "genealogy of abortion shame",⁴³⁷ which

⁴³¹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013).

⁴³² See for example, Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91 64; Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 5; Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 351; Julia Quilter, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law and History* 89–113, 89.

⁴³³ R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 773.

⁴³⁴ *Ibid* 733.

⁴³⁵ Rachael Pond and Mandy Morgan, 'Protection, Manipulation or Interference with Relationships? Discourse Analysis of New Zealand Lawyers' Talk About Supervised Access and Partner Violence' (2008) 18(5) *Community and Applied Social Psychology* 458–473, 458.

⁴³⁶ Erica Millar, 'Choice Makers or Failures: Providing a Genealogy of Abortion Shame and Shaming' (2015) 2 *Law and History* 114–145, 116.

⁴³⁷ *Ibid* 114.

she argues continues to form part of the extrajudicial discourses through which women's abortion choices are regulated.⁴³⁸ Leckey's evaluation of Canadian judicial officers' discourse on property distribution found that legislative reform aimed at modernising legal conceptions of marriage had breathed "new life" into traditional marriage norms, as judicial officers declared support for marital diversity while arriving at new legal justifications for their existing gendered and classist beliefs.⁴³⁹

Australian research affirms the dominance of gendered discourse over family law reform. Cook and Natalier applied critical feminist discourse analysis to Australian family law in evaluating the extent to which evidence-based research has informed government approaches to child support law reform.⁴⁴⁰ The research determined that the selection of both quantitative and anecdotal data in the child support chapter of the pivotal report, *Every Picture Tells a Story*, defined child support issues in ways that "privilege[d] fathers' financial interests and autonomy" over those of mothers.⁴⁴¹ In this way, the subsequent 2006–2008 reform of the Australian Child Support Scheme, arising from the report, was grounded in *data that was rendered legitimate*, not with reference to its quality but "*through its relationship to the gendered definition of the 'problems' of child support*".⁴⁴²

The project applies critical feminist discourse analysis to the selected legal judgements through its focus on language, as constructing both the discourses of which social structures and narratives play a part, and the individuals who are subject to them.⁴⁴³ In the cases studied, competing personal accounts and institutional discourses inform multiple characterisations of each party—informing their identities and their credibility—as judicial officers weigh opposing accounts of each family's history, and of the actions of the courts and state institutions charged with protecting each child. The children subject to the selected judgements move between alternate identities—that of a young victim of a father's violence, a corrupt or mentally ill colluder or, sometimes, a vexatious voice of resistance. Together, these judgements

⁴³⁸ Ibid 117.

⁴³⁹ Robert Leckey, 'Judging in Marriage's Shadow' (2018) 26(1) *Feminist Legal Studies* 25–45, 25.

⁴⁴⁰ Kay Cook and Kristin Natalier, 'Gender and Evidence in Family Law Reform: A Case Study of Quantification and Anecdote in Framing and Legitimising the "Problems" with Child Support in Australia' (2016) 24(2) *Feminist Legal Studies* 147–167, 147.

⁴⁴¹ Ibid 147.

⁴⁴² Ibid 147 (emphasis added).

⁴⁴³ Chris Weedon, *Feminist Practice and Post-Structuralist Theory* (Blackwell, 1987) 112.

unwittingly invoke the loss of subjectivity of parties to these decisions and highlight the grave personal impacts that can result when individuals are constructed by competing discourses. Constituted by family and friends, state child protection bodies and the independent children's lawyers charged with representing their best interests, the voices of the children themselves are markedly absent from most of the selected judgements. Their fears and wishes appear in snippets, almost always translated through the language of an adult who, in many cases, has never met them. When they do express an opinion, it is dismissed as 'coached' by the alleging parent, as the product of mental illness or simply as the tantrum of a 'bad' child. By legitimising particular stories while excluding others, legal discourse further entrenches inequality as survivors' experiences of violence are subsumed by the privileged voices of legal actors, resulting in a systematic form of oppression⁴⁴⁴ that perpetuates a violent status quo.⁴⁴⁵

2.12 Challenging law

This research applies Foucault's perception of discourse as both perpetuating and challenging societal power structures⁴⁴⁶ as it seeks to locate the beliefs and norms informing family law discourse. In *The History of Sexuality*, Foucault focused on the "unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy".⁴⁴⁷ Foucault argues that "discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it".⁴⁴⁸ Feminist theorists have long drawn on Foucault's work in seeking points of resistance within legal discourse. In Trites' analysis, Foucault's understanding of power is that of a force "both repressive and enabling; it is from within the confines of powerlessness that people rebel and discover their own power".⁴⁴⁹ Butler

⁴⁴⁴ Nicole VT Lugosi, "'Truth-Telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315, 307.

⁴⁴⁵ Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 18.

⁴⁴⁶ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed C Gordon, tr C Gordon et al. (Harvester Wheatsheaf, 1980) 93.

⁴⁴⁷ Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Pantheon Books, 1978) 100–101, cited in Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 125.

⁴⁴⁸ Michel Foucault, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Pantheon Books, 1978) 100–101, cited in Helen Baker, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142, 125.

⁴⁴⁹ Roberta S Trites, *Disturbing the Universe: Power and Repression in Adolescent Literature* (University of Iowa Press, 2004) 79.

extends Foucault's conception of the interaction of discourse and power, arguing that "one's very formation as a subject" depends on experiencing domination by an external power.⁴⁵⁰ Butler argues that "the subject is formed in submission",⁴⁵¹ and one's actions are driven by deep internal motivations that extend beyond mere reactions to oppression.⁴⁵² Lacey contends that in highlighting the ways in which law establishes and perpetuates gendered power dynamics, feminist jurisprudence critiques law's claims to neutrality.⁴⁵³ Thornton points to feminism's potential to destabilise gendered legal frameworks and ideologies through its "attempts to deconstruct the law's facade of neutrality and objectivity [and] the right of men to domination", highlighting that the "private, and supposedly apolitical world of women, together with the hitherto sacrosanct family, has been exposed by feminists to be a world of violence and inequality".⁴⁵⁴

Several legal scholars have applied discourse analysis to challenge various aspects of law, including sexual assault, discrimination and family law. Many of these scholars have sought to expose the impacts of gender biases, stereotypes and patriarchal norms on legal decision-making and policy. Cossins utilised discourse to investigate the ways in which legal discourse constructs and perpetuates racial and gendered stereotypes in Australian sexual assault trials.⁴⁵⁵ Within family law, Lapierre et al. evaluated the use of 'parental alienation' discourse within Canadian courts, determining that "the legitimisation and institutionalisation of 'parental alienation' discourse has permeated child custody as well as child protection proceedings".⁴⁵⁶ Milchman found that a "misogynistic cultural framework" is so embedded in legal discourse in the United States that it "undermines evidence-based reasoning in child custody cases".⁴⁵⁷ Similarly, Death et al. analysed the use of 'parental alienation' claims to rebut allegations of

⁴⁵⁰ Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, 1997) 2.

⁴⁵¹ *Ibid* 2.

⁴⁵² Roberta S Trites, *Disturbing the Universe: Power and Repression in Adolescent Literature* (University of Iowa Press, 2004) 5.

⁴⁵³ Nicola Lacey, 'Feminism and the Tenets of Conventional Legal Theory' (1995) 11 *Humboldt Forum Rechts* 1–7, 2.

⁴⁵⁴ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5–29, 15–16.

⁴⁵⁵ Anne Cossins, 'Saints, Sluts and Sexual Assault: Rethinking the Relationship between Sex, Race and Gender' (2003) 12(1) *Social and Legal Studies* 77–104, 77.

⁴⁵⁶ Simon Lapierre et al., 'The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec' (2020) 42(1) *Social Welfare and Family Law* 30–44, 30.

⁴⁵⁷ Madelyn Simring Milchman, 'Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases' (2017) 14(4) *Child Custody* 211–233, 211.

child sexual abuse within the Australian family law system.⁴⁵⁸ The authors identified the use of “gendered discourses of hysterical, vindictive and manipulative women” within the Family Court of Australia, stating “[t]hese gendered discourses have been discredited elsewhere and should be similarly challenged in the [Family Court]”.⁴⁵⁹ These feminist legal scholars, among others, have demonstrated the power of discourse as a lens through which to evaluate and challenge law, promoting greater awareness of gender biases and calling for more equitable legal frameworks.

Although the cases studied in the research project overwhelmingly resulted in judicial decisions that arguably perpetuated violence and gendered inequality, small shifts in legal discourse and judicial reasoning are noted as indicators of positive change. These incremental adjustments demonstrate a growing awareness among legal professionals of the need to challenge traditional gender stereotypes and address the root causes of violence and inequality in society. It is hoped that, with continued advocacy from feminist legal scholars and the incorporation of evidence-based approaches, these small changes will contribute to a broader transformation of the legal system, ultimately leading to more equitable and just outcomes for all individuals affected by gender-based violence.

The following chapters apply the theoretical and methodological approaches adopted in this study—namely discourse, narrative and feminist frameworks—in countering notions of legal objectivity and challenging power, and at its core, the law. A detailed discussion of the social history of Australian family law grounds and contextualises the cases studies and analysis that follow.

⁴⁵⁸ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 2.

⁴⁵⁹ *Ibid* 8–9.

Chapter Three – The Social History of Australian Family Law

3 Introduction

This chapter grounds and contextualises the social history of Australian family law, beginning with the foundational tenets of sexual assault law. This is followed by an overview of the creation of the Family Court and early legal and governmental responses to family violence, with a focus on the responses from the Keating and Howard governments, before examining more contemporary responses in the 2000s and beyond. The latter half of the chapter focuses on the tragic filicide cases which are considered as overlooked indicators of some of the core issues this research is seeking to address.

3.1 Foundations

The principles and discursive paradigms underlying the federal family courts' responses to child sexual abuse today arose, and continue to develop, within a sociolegal context rich in assumptions about the veracity and sanity of women and children. Such claims have permeated medicine, psychiatry and law since the 18th century. French physician, Ambroise Auguste Tardieu, was among the first to study the extent and characteristics of intrafamilial child sexual abuse, writing during the 18th century.⁴⁶⁰ Tardieu's work was met with hostility in the medical sphere,⁴⁶¹ with colleague Alfred Fournier stating in an 1880 presentation to the French Academy of Medicine that children could make false allegations of sexual abuse and were even capable of falsifying venereal disease.⁴⁶² Chair of Legal Medicine at the University of Paris, Paul Brouardel, echoed these claims, advocating for medical experts in criminal trials to educate magistrates about the psychology of victims and those who supported them,⁴⁶³ and

⁴⁶⁰ J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 23, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 28.

⁴⁶¹ J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 23, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 28.

⁴⁶² J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 43, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 28.

⁴⁶³ J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 46, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child

claiming that mothers' questions could cause their children to erroneously believe they had been sexually assaulted.⁴⁶⁴ Around this time, Jean-Martin Charcot, a French physician who was heavily influential in legal circles, connected allegations of sexual assault by women and girls with 'hysteria', a condition depicted as deeply embedded in female sexuality by the literature of the time.⁴⁶⁵ While initially, Sigmund Freud identified child sexual abuse as causing long-term impacts in victims, he later recanted, instead portraying women and children who made sexual abuse allegations as "liars and seductive colluders".⁴⁶⁶ This concurred with the work of Fournier, Brouardel and colleagues, who not only portrayed female victims of child sexual abuse as liars, but as suffering mental illness due to their 'femaleness'.⁴⁶⁷ By the end of the 19th century, despite the dissent of numerous academics, the dominant understanding held by medical and legal professionals was that children who made disclosures of sexual assault were both hysterical and lying.⁴⁶⁸

English common law responses to sexual assault can be traced back to the writings of 17th century jurist, Sir Matthew Hale. The mid-17th century was a time in which people began to doubt the existence of witchcraft, yet Hale, raised a Puritan and "overpowered by a heavy burden of uncritical religiosity",⁴⁶⁹ sentenced two women to death for witchcraft in a 1664 judgement that was significantly influential in the continued prosecution of this 'crime' in both England and America for the next 50 years.⁴⁷⁰ Hale's perspective on sexual assault was similarly uncritical, yet it remains a powerful driver of contemporary responses to this crime.⁴⁷¹

Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 29.

⁴⁶⁴ J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 45–46, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 30.

⁴⁶⁵ Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 31.

⁴⁶⁶ Ibid 27, 32.

⁴⁶⁷ Ibid 30.

⁴⁶⁸ J Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985) 45–46, cited in Caroline Shannon Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001) 30.

⁴⁶⁹ WS Holdsworth, 'Sir Matthew Hale' (1923) 39 *Law Quarterly Review* 402–426, cited in Gilbert Geis, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44, 26.

⁴⁷⁰ W Notestein, *A History of Witchcraft in England from 1558 to 1718* (American Historical Association, 1911) 268, 305.

⁴⁷¹ Gilbert Geis, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44, 26.

In writings published 50 years after his death, Hale wrote that “rape ... is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent”.⁴⁷² Hale’s scepticism of the veracity of sexual assault allegations underpins the ‘cautionary rule’ by which juries in criminal trials may be warned of the dangers of relying on the uncorroborated evidence of survivors of sexual assault.⁴⁷³ Although research indicates that the prevalence of false reports of sexual assault of both adults and children is consistently low,⁴⁷⁴ Hale’s philosophy persists in underpinning criminal justice system responses to sexual violence in many Anglo-Saxon jurisdictions worldwide.⁴⁷⁵ It also continues to be powerfully deployed—often despite legislative reform—in portraying women and children as vindictive, supporting false assertions about the prevalence of false allegations⁴⁷⁶ and contributing to low conviction rates in sexual assault cases.⁴⁷⁷

In Australia, Hale’s scepticism about sexual assault allegations is evident in the criminal justice system through historical common law jury directions seeking corroboration in cases involving adult women and children as sexual assault complainants, and urging caution in cases of delayed reporting of sexual violence.⁴⁷⁸ These jury directions far exceed the warnings given to

⁴⁷² M Hale, *Historia Placitorum Coronae* (Nutt and Gosling, 1734) i, 328, cited in Gilbert Geis, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44, 26.

⁴⁷³ Gilbert Geis, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44, 40.

⁴⁷⁴ Kimberly Lonsway, Joanne Archambault and David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* (Report, National Center for the Prosecution of Violence Against Women, 2009) 2; Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1333; *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

⁴⁷⁵ Gilbert Geis, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44, 26.

⁴⁷⁶ *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) [24.57].

⁴⁷⁷ *Ibid* [18.21].

⁴⁷⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 86.

juries in trials for other offences.⁴⁷⁹ While some of these jury directions have been amended or limited by legislation over the years, others continue to proliferate in Australia, chiefly through their repetition by judges.⁴⁸⁰ This perpetuates community misconceptions about the nature of sexual violence. Writing centuries after Hale, the Royal Commissioners noted a longstanding tension in the development of Australian criminal law, in which the High Court has repeatedly upheld jury warnings discrediting the veracity of women and children complainants in sexual assault trials, despite continuing legislative reform aimed at preventing the use of those warnings.⁴⁸¹ A similar tension exists in family courts, where academic analysis highlights a parallel tension between legislation and judicial interpretation.⁴⁸² This tension can clearly be seen in the contest between the *Family Law Act*'s legislated mandate to consider the best interests of children⁴⁸³ and judicial interpretation which centres on supporting children's relationships with both parents, regardless of the risk of harm.⁴⁸⁴

Hale's views continue to influence Australian family court proceedings, in which the literature highlights a tendency to mistrust allegations of violence generally, and of child sexual abuse in particular.⁴⁸⁵ This scepticism has significant implications for the safety and wellbeing of children, who may be exposed to ongoing risk due to a lack of genuine consideration of allegations of abuse. Hale's maxim has been cited and paraphrased in numerous family law cases,⁴⁸⁶ including Australia's leading case concerning risk assessment in cases of child sexual abuse allegations, in which five justices of the High Court unanimously echoed Hale, stating,

⁴⁷⁹ Ibid 86.

⁴⁸⁰ Ibid 90.

⁴⁸¹ Ibid 90.

⁴⁸² Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 351; R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 773; Robert Leckey, 'Judging in Marriage's Shadow' (2018) 26(1) *Feminist Legal Studies* 25–45, 25; Simon Lapierre et al., 'The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec' (2020) 42(1) *Social Welfare and Family Law* 30–44, 30; Madelyn Simring Milchman, 'Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases' (2017) 14(4) *Child Custody* 211–233, 211; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10 8–9.

⁴⁸³ The principle of the best interests of the child is embedded in the *Family Law Act* as the “paramount consideration” for judicial officers when making parenting orders: *Family Law Act 1975* (Cth) s 60CA.

⁴⁸⁴ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6–7.

⁴⁸⁵ T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (Allen & Unwin, 2007) 6–7.

⁴⁸⁶ See for example *Donaghey & Donaghey* [2011] FamCA 13; *Featherstone & Adey* [2018] FCCA 754 (29 March 2018); *N v S* (1995) 19 Fam LR 837; *Re: W* [2004] FamCA 768.

“an allegation that a parent has sexually abused a child [is] an allegation which is often easy to make, but difficult to refute”.⁴⁸⁷ The following sections detail the Australian historical and political context that has led to the family courts’ contemporary responses to allegations of child sexual abuse.

3.2 Creation of the Family Court

The 1970s were a time of great social change in Australia. Australia’s first domestic violence refuge was established during the 1970s in Sydney,⁴⁸⁸ the Supporting Mother’s Benefit was introduced in 1973,⁴⁸⁹ and by the mid-1970s feminist agitation in the women’s refuge movement had placed domestic violence on the government policy agenda.⁴⁹⁰ It was within this context that Australia’s contemporary family law system formally began in 1976, with the creation of the Family Court of Australia.⁴⁹¹ Colonial Australian divorce law derived from English legislation, under which divorce was entirely fault-based and accessible only to the wealthy.⁴⁹² With the exception of Western Australia, infidelity was emphasised as the primary ground for divorce in each state and territory, and this moralistic approach to marital separation also impacted judicial decision-making around children and property.⁴⁹³ As a result, the Family Law Bill,⁴⁹⁴ which established the Family Court of Australia, was subject to strong opposition as it stipulated 12 months’ separation as the only legal ground for divorce.⁴⁹⁵ The Bill passed both the Senate and House of Representatives via a conscience vote.⁴⁹⁶ The introduction of no-

⁴⁸⁷ *M v M* (1988) 166 CLR 69 (8 December 1988) [22] (Mason CJ, Brennan J, Dawson J, Toohey J and Gaudron J).

⁴⁸⁸ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 1.

⁴⁸⁹ Australian Bureau of Statistics, *Year Book Australia: History of Pensions and Other Benefits in Australia* (Report No 1301.0, January 1988) 381.

⁴⁹⁰ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 16.

⁴⁹¹ John Fogarty, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101, 93.

⁴⁹² *Ibid* 90.

⁴⁹³ *Ibid* 92.

⁴⁹⁴ Family Law Bill 1974 (Cth).

⁴⁹⁵ John Fogarty, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101, 92.

⁴⁹⁶ *Ibid* 93.

fault divorce saw a significant increase in divorce applications within the first year of the Family Court's operation, establishing a backlog that continues to this day.⁴⁹⁷

The 1977 Royal Commission on Human Relationships⁴⁹⁸ and the 1979 Australian Institute of Criminology conference on violence in the family,⁴⁹⁹ began to shift understandings of family violence from a private matter to one of public importance.⁵⁰⁰ The *Family Law Act*⁵⁰¹ introduced social scientists and counsellors to pre- and post-litigation procedures.⁵⁰² While the use of family reports was resisted vehemently by lawyers in the early years of the Court's operation,⁵⁰³ they dominate contemporary judicial decision-making today.⁵⁰⁴ From its inception, the Family Court operated under legislation excluding the public from courts and prohibiting identification of parties in family law cases. These provisions, along with other factors like the moral opposition to no-fault divorce and long delays in hearing cases, led to public dissatisfaction and a perception of the court as a secretive entity.⁵⁰⁵ While the public are now permitted to view most family court hearings, the *Family Law Act* continues to prevent publication of any details identifying a party to a family law dispute.⁵⁰⁶

The lack of judicial expertise in family violence, including child sexual abuse, and the consequent need for training of legal professionals identified by many contemporary reviews of the family courts,⁵⁰⁷ also derives from the court's early years. As former Family Court judge

⁴⁹⁷ Ibid 96.

⁴⁹⁸ *Royal Commission on Human Relationships* (Final Report, 1977).

⁴⁹⁹ Jocelyne A Scutt (ed), *Violence in the Family: A Collection of Conference Papers* (Australian Institute of Criminology, 1980).

⁵⁰⁰ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 16.

⁵⁰¹ *Family Law Act 1975* (Cth).

⁵⁰² John Fogarty, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101, 98.

⁵⁰³ Ibid 98.

⁵⁰⁴ R Field et al., 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25 *Judicial Administration* 212–236, 212.

⁵⁰⁵ John Fogarty, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101, 97.

⁵⁰⁶ *Family Law Act 1975* (Cth) (comp 12 June 2024) ss 114(N)–114(T).

⁵⁰⁷ See for example: *Australian Law Reform Commission, Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019); Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016); Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012); *Family Law Council, Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report,

John Fogarty AM notes of the period, “[i]nternally, there was an absence of peer example and previous excellence to fall back on. With one or two exceptions, none of the judges appointed in 1976 and 1977 had any judicial experience”.⁵⁰⁸ Dissatisfaction with the Family Court was underscored by a series of attacks in the first half of the 1980s, including bombings and shootings targeting judges and others associated with the court.⁵⁰⁹ A subsequent coronial investigation revealed that those targeted were linked by their involvement in one family law matter, which restricted a father’s access to his young daughter.⁵¹⁰

3.3 Early Coordinated Responses to Family Violence

The 1980s marked a significant era in Australia for addressing domestic violence, characterised by several state and territory inquiries leading to coordinated responses.⁵¹¹ The 1981 New South Wales Task Force on Domestic Violence—the first of its kind—initiated significant reforms, including the implementation of apprehended domestic violence orders, and paved the way for similar work in the other states and territories.⁵¹² Together, these state and territory inquiries acknowledged the importance of collaborative approaches to family violence among diverse sectors including criminal law, health, housing and, notably, family law.⁵¹³ Among these, the 1988 Queensland Domestic Violence Task Force was unique in particularly exploring the effects of family violence on children.⁵¹⁴ Despite these efforts, the domestic violence inquiries of the 1980s reflected an understanding of domestic violence as conflict between equals—rather than abuse arising from an imbalance of power—and highlighted a distinct reluctance on the part of courts and police to intervene and to apply criminal

Terms 3–5, June 2016); Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001).

⁵⁰⁸ John Fogarty, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101, 97.

⁵⁰⁹ Jamie McKinnell, 'Family Court Bomber Leonard Warwick Sentenced to Life in Prison', *ABC News* (online, 3 September 2020) <<https://www.abc.net.au/news/2020-09-03/family-court-bomber-leonard-warwick-jailed-for-life/12624080>>.

⁵¹⁰ Ross Coulthart, 'Investigation Exposes the Dad Accused of an Unsolved Crime Spree That Killed Four People', *Sunday Telegraph* (online, 7 July 2013) <<https://www.dailytelegraph.com.au/news/opinion/investigation-exposes-the-dad-accused-of-an-unsolved-crime-spree-that-killed-four-people/news-story/9e0c22589a2c76bbf88be1ba57d9efff>>.

⁵¹¹ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 17.

⁵¹² *Ibid* 18–19.

⁵¹³ *Ibid* 21.

⁵¹⁴ *Ibid* 21.

sanctions.⁵¹⁵ Nevertheless, by the 1990s most state jurisdictions had developed strategic plans promoting coordinated responses to family violence.⁵¹⁶

The first national domestic violence education campaigns, which focused on raising awareness of domestic violence and encouraging survivors to seek help, started during the late 1980s.⁵¹⁷ The first national education campaign, *A Say, A Choice, A Fair Go*, in 1987, was followed by the first national survey of Australian attitudes to domestic violence, published in 1988.⁵¹⁸ The Domestic Violence Attitude Survey, 1988 found that around one-third of respondents agreed with the statement that “domestic violence is a private matter that should be handled within the family”,⁵¹⁹ and around one-fifth believed the use of physical violence by a man towards his wife was justifiable in at least one circumstance such as nagging, infidelity and refusing sexual intercourse.⁵²⁰ The survey was followed one year later by another national community education campaign, *Break the Silence*, which emphasised the impact of physical violence through campaign images including a woman with a black eye, and again placed significant responsibility for ending violence on survivors by encouraging them to seek help.⁵²¹

During the 1980s and 1990s, police investigations into child sexual abuse in institutions began to be reported in the Australian media.⁵²² Several notorious child sex offenders were jailed during this time, including Dennis McKenna, Gerald Ridsdale and Ted Bales.⁵²³ Radio broadcaster Derryn Hinch and media company Macquarie Broadcast Holdings were publicly charged with contempt of court after Hinch made three broadcasts between November 1985 and March 1986 regarding Father Michael Glennon, a Catholic priest facing charges for sex

⁵¹⁵ Ibid 90.

⁵¹⁶ Ibid 22.

⁵¹⁷ Ibid 123.

⁵¹⁸ Public Policy Research Centre, *Community Attitudes Towards Domestic Violence in Australia* (Report, Australian Government, 1988), cited in S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 123–124.

⁵¹⁹ Jane Mugford, Stephen Mugford and Patricia Weiser Easteal, 'Social Justice, Public Perceptions, and Spouse Assault in Australia' (1989) 16(3) *Social Justice* 103–123, 108.

⁵²⁰ Public Policy Research Centre, *Domestic Violence Attitude Survey* (Report conducted for the Office of the Status of Women, Department of the Prime Minister and Cabinet, 1988), cited in Jane Mugford, *Domestic Violence* (Violence Today No 2, Australian Institute of Criminology, 1989) 108.

⁵²¹ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 127.

⁵²² Lisa Featherstone, "'Children in a Terrible State': Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42 *Journal of Australian Studies* 164–176, 164.

⁵²³ 'The Key Events That Led to the Child Abuse Royal Commission', *ABC News* (online, 12 December 2017) <<https://www.abc.net.au/news/2017-12-12/royal-commission-child-sexual-abuse-timeline/9222816>>.

offences against children, which revealed Glennon's prior convictions and ongoing access to children through involvement with a youth association.⁵²⁴ Hinch was briefly jailed in 1987 for contempt of court.⁵²⁵ By the early 1990s, Broken Rites, a child sexual abuse survivor group, had begun a hotline for survivors and actively advocated reporting to police.⁵²⁶

The 1980s saw a significant battleground arise within family law discourse under the banner of 'Parental Alienation Syndrome'. In 1986, American psychiatrist Richard Gardner introduced the theory of 'Parental Alienation Syndrome' to the social sciences, in response to feminist campaigning for the recognition of intrafamilial child sexual abuse in the mid-1980s.⁵²⁷ Gardner's theory centred on the claim that false allegations of child sexual abuse are frequently made by one parent—usually the mother—in a deliberate attempt to undermine their children's relationships with the other parent—generally the father.⁵²⁸ Proponents of the theory argue that these 'false allegations' constitute psychological abuse of the child, who is 'brainwashed' into needlessly rejecting the other parent.⁵²⁹ Gardner provided no research to substantiate his proposition, yet claimed that 'Parental Alienation Syndrome' was present in 90% of children who are subject to custody disputes.⁵³⁰ He argued that the only cure for 'parental alienation' was to transfer the custody of the child to the non-custodial parent accused of sexually abusing them.⁵³¹ The concept of 'parental alienation' entered Australian family jurisprudence in 1989, with Kenneth Byrne's article in an Australian family law journal.⁵³² Byrne, drawing on Gardner's work, argued that many allegations of child abuse in family litigation were false,

⁵²⁴ Prue Innes and Andrew Gleeson, 'From the Archives: Derryn Hinch Sentenced to Jail for Contempt of Court', *Sydney Morning Herald* (online, 26 May 2019) <<https://www.smh.com.au/national/from-the-archives-derryn-hinch-sentenced-to-jail-for-contempt-of-court-20190526-p51raq.html>>.

⁵²⁵ *Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* [1987] HCA 56 (2 December 1987).

⁵²⁶ 'The Key Events That Led to the Child Abuse Royal Commission', *ABC News* (online, 12 December 2017) <<https://www.abc.net.au/news/2017-12-12/royal-commission-child-sexual-abuse-timeline/9222816>>.

⁵²⁷ Madelyn Simring Milchman, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139, 115.

⁵²⁸ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 2.

⁵²⁹ *Ibid* 2.

⁵³⁰ C Bruch, 'Parental Alienation Syndrome: Junk Science in Child Custody Determinations' (2001) 3(3) *European Journal of Law Reform* 383–404, 384.

⁵³¹ Michelle A Adams, 'Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights' (2006) 40(2) *Family Law Quarterly* 315–338, 315.

⁵³² Kenneth Byrne, 'Brainwashing in Custody Cases: The Parental Alienation Syndrome' (1989) 4(3) *Australian Family Lawyer* 1–7, cited in Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 7.

and encouraged lawyers to view the opposition of resident parents and children to maintain contact with non-resident parents as a symptom of ‘alienation’.⁵³³ Although theories of ‘parental alienation’ have resoundingly been discredited in the academic literature,⁵³⁴ the concept of ‘alienation’ continues to influence family law.⁵³⁵

Contemporary advocates attempt to separate themselves from the ‘syndrome’s’ early roots by reformulating Gardner’s heavily contested work, offering new models and diagnostic tools under the term ‘parental alienation’ or ‘PA’,⁵³⁶ and the concept continues to form a central component of family law discourse. Lapierre et al. note that proponents, while not necessarily endorsing Gardner’s theory, contribute to this trend by advocating new approaches to the theory and applying assessment protocols for ‘parental alienation’ that share similarities with those prescribed by Gardner.⁵³⁷ ‘Parental alienation’ theories represent a powerful “cultural argument”,⁵³⁸ lending the “imprimatur of medical authority to time-worn Western myths about the dangerousness of the female sex”.⁵³⁹ Alienation theories also continue to play a key role in the work of men’s rights lobbies worldwide.⁵⁴⁰ They are evident in the reasoning of judicial

⁵³³ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 7.

⁵³⁴ Deborah Epstein and Lisa A Goodman, 'Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences' (2019) 167 *University of Pennsylvania Law Review* 399–461, 430; Miguel Clemente and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133, 126; Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 232; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 1; Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 955; Lenore EA Walker, Kristi L Brantley and Justin A Rigsbee, 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court' (2004) 1(2) *Child Custody* 47–74, 47; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3.

⁵³⁵ Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 232.

⁵³⁶ Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 2.

⁵³⁷ Simon Lapierre et al., 'The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec' (2020) 42(1) *Social Welfare and Family Law* 30–44, 30.

⁵³⁸ Madelyn Simring Milchman, 'Commentary: Implicit Cultural Arguments Affect the Science of Shared Parenting' (2018) 15(3) *Child Custody* 218–227, 218.

⁵³⁹ Madelyn Simring Milchman, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139, 116.

⁵⁴⁰ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 7;

officers⁵⁴¹ and continue to be deployed successfully in family litigation by fathers who face allegations of child sexual abuse, and by those whose children resist contact with them, both in the Australian family courts⁵⁴² and internationally.⁵⁴³ The cases explored in Chapters Five and Six highlight the application of gendered concepts, such as ‘parental alienation’ theories, to cases involving allegations of child sexual abuse within the Australian family courts.

3.4 Keating and Howard: Attitudes Towards Family Violence and Child Sexual Abuse

In 1995, the Keating government conducted a second national survey of community attitudes to violence against women,⁵⁴⁴ which revealed both improvements and concerning regressions in Australian understandings of such violence since the 1988 survey.⁵⁴⁵ The survey identified significant increases in the proportion of respondents who identified shouting and restricting access to money as domestic violence, increasing from 48% to 77% for verbal abuse and from 25% to 62% for financial abuse.⁵⁴⁶ However, around one-quarter of respondents (26%) did not agree that preventing contact with friends or family was domestic violence, and roughly one-third (29%) disagreed that verbal denigration intended to make the recipient feel “bad or useless” constituted domestic violence.⁵⁴⁷ Of greatest concern, the proportion of respondents who stated that physical violence was justifiable in certain circumstances had *risen*, from 19%

Madelyn Simring Milchman, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139, 115.

⁵⁴¹ This can be seen within Australia: Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 12; Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 8. The influence of the theory is also evident internationally: Adrienne Barnett, 'A Genealogy of Hostility: Parental Alienation in England and Wales' (2020) 42(1) *Social Welfare and Family Law* 18–29, 18; Roy Lubit, 'Valid and Invalid Ways to Assess the Reason a Child Rejects a Parent: The Continued Malignant Role of "Parental Alienation Syndrome"' (2019) 16(1) *Child Custody* 42–66, 42; Madelyn Simring Milchman, 'Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations' (2017) 14(4) *Child Custody* 234–259, 234; Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 955.

⁵⁴² Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6.

⁵⁴³ Lenore EA Walker, 'Nonjudicial Influence on Family Violence Court Cases' (2020) 64(12) *American Behavioral Scientist* 1749–1767, 1756.

⁵⁴⁴ Office of the Status of Women, *Community Attitudes to Violence against Women* (Detailed Report, 1995).

⁵⁴⁵ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 126.

⁵⁴⁶ *Ibid* 125.

⁵⁴⁷ *Ibid* 126.

in the prior survey, to 23%.⁵⁴⁸ Similar attitudes were evident in the Australian family courts, where the terms ‘parental alienation’ and ‘Parental Alienation Syndrome’ began to appear during the mid-1990s.⁵⁴⁹ In these early cases, ‘parental alienation’ was invoked by fathers in response to allegations of child sexual abuse and, while the fathers’ claims were largely unsuccessful, the concept of ‘parental alienation’ was considered uncritically by the judicial officers deciding these cases.⁵⁵⁰

‘Parental alienation’ theories began to find some early acceptance in 1997, when the Full Court of the Family Court heard *Johnson v Johnson*.⁵⁵¹ In this case, a father whose son opposed contact with him appealed the trial Judge’s decision not to allow him to recall an expert witness for further examination on “Parental Alienation Syndrome”.⁵⁵² Making reference to the work of Richard Gardner⁵⁵³ and detailing “the symptoms of the presence of the Syndrome” described by ‘parental alienation’ theorist, Kenneth Byrne,⁵⁵⁴ Ellis, Baker and Lindenmayer JJ allowed the father’s appeal, stating:⁵⁵⁵

In a case where there have been obvious contact difficulties between the parties, the possibility that the child has either been *brainwashed, or indoctrinated* by one of the parents, must be a relevant consideration. Dr Byrne’s article leaves us in no doubt that *Parental Alienation Syndrome is a very real psychological phenomenon* which the husband, in our opinion, was entitled to investigate and put to the relevant experts called in the course of the trial.

The 1996 election of the federal coalition government led by John Howard provoked a revision of government policy, which shifted the framing of family violence from “violence against women”—a term which reflected its gendered and systemic nature—to “domestic violence”,

⁵⁴⁸ Ibid 126.

⁵⁴⁹ Zoe Rathus, ‘A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences’ (2020) 42(1) *Social Welfare and Family Law* 5–17, 8.

⁵⁵⁰ See for example *Johnson v Johnson* [1997] FamCA 32; *M v H* [1996] FamCA 42, cited in Zoe Rathus, ‘A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences’ (2020) 42(1) *Social Welfare and Family Law* 5–17, 8.

⁵⁵¹ *Johnson v Johnson* [1997] FamCA 32.

⁵⁵² Ibid [126] (Ellis, Baker and Lindenmayer JJ).

⁵⁵³ Ibid [70] (Ellis, Baker and Lindenmayer JJ).

⁵⁵⁴ Ibid [71]–[73] (Ellis, Baker and Lindenmayer JJ).

⁵⁵⁵ Ibid [96] (Ellis, Baker and Lindenmayer JJ) (emphasis added).

which cast it as a broader social issue.⁵⁵⁶ Women’s advocacy organisations received reduced funding, and family violence-prevention initiatives focused on “strengthening families”.⁵⁵⁷ Whereas Australia had been recognised worldwide as one of the first nations to provide funding for refuges and legislate responses to family violence,⁵⁵⁸ the Howard government was seen internationally as “winding back women’s rights”.⁵⁵⁹ The government refused to ratify the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*, which enables women to lodge complaints regarding violations of human rights to the United Nations Committee on the Elimination of Discrimination against Women, once they have exhausted domestic remedies.⁵⁶⁰ Australia subsequently ratified this Optional Protocol in 2008.

3.5 Developments Since 2000

‘Parental alienation’ arguments were successfully used to discredit allegations of the sexual abuse of nine-year-old ‘S’ in the case *P v D*,⁵⁶¹ which was reported in 2001. While noting “reservations” about the father’s ability to handle the challenges that the child and he might face if a change of residence was ordered,⁵⁶² Lindenmayer J based the decision on expert testimony from a psychiatrist associated with the Gardner school of alienation.⁵⁶³ At the time of the hearing, S had lived with his mother and stepsiblings his entire life and had been subject to only supervised contact with his father for the prior three years.⁵⁶⁴ The mother was restrained from telling the child about the impending move to his father’s home “except pursuant to and in accordance with the written advice of a qualified mental health professional approved in advance by the Child’s Representative”.⁵⁶⁵ The case’s headnotes are striking, stating “Parenting Orders – child, aged 9, resided with the mother for his whole life – mother made unfounded allegations against father of ill-treatment and sexual abuse of child – *mother’s continuous*

⁵⁵⁶ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 27.

⁵⁵⁷ Ibid 29.

⁵⁵⁸ Ibid 17.

⁵⁵⁹ Ibid 30.

⁵⁶⁰ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS (entered into force 22 December 2000).

⁵⁶¹ *P v D* [2001] FamCA 1197 (29 August 2001).

⁵⁶² Ibid [455.7(iv)] (Lindenmayer J).

⁵⁶³ Ibid ord 1 (Lindenmayer J).

⁵⁶⁴ Ibid [3] (Lindenmayer J).

⁵⁶⁵ Ibid ord 4 (Lindenmayer J).

efforts to thwart contact and alienate child from father,” and “Contact – Dr Gardner’s ‘Parental Alienation Syndrome’”.⁵⁶⁶ Justice Lindenmayer ordered only ongoing telephone contact between the child and his mother.⁵⁶⁷

In 2004, the Howard government launched a national family violence prevention campaign, *Australia Says No*. The campaign adopted a deterrent approach to family violence, which it positioned as a crime, and encouraged both men who use violence, and survivors of that violence, to seek help.⁵⁶⁸ The campaign featured limited input from specialist family violence services, and directed survivors to generalist counselling service, Lifeline.⁵⁶⁹ While the campaign was clear in denouncing physical violence, it avoided mention of less tangible forms of interpersonal abuse, such as verbal and financial abuse, issues that the 1995 community survey had found a significant minority of Australians still had trouble identifying as problematic.⁵⁷⁰ The prevention campaign’s focus on family violence as a crime, contradicted the steady encroachment of civil and diversionary remedies into legal responses to such violence, such as apprehended domestic violence orders, which had been occurring at state and territory levels since the 1980s,⁵⁷¹ and the federal government’s own resourcing of pilot perpetrator counselling programs during its tenure.⁵⁷²

The concept of ‘parental alienation’ was examined critically within the family courts for the first time in 2004 in the case of *Summers v Nathan*.⁵⁷³ In that case, a father applied for orders to have the family assessed by a family counsellor with “expertise on the topic of Parental Alienation Syndrome”, for the purposes of preparing a single expert witness report to inform the proceedings.⁵⁷⁴ The judgement was handed down in March 2005. While acknowledging that the Full Court of the Family Court in *Johnson v Johnson*⁵⁷⁵ had “accepted that evidence of ‘Parental Alienation Syndrome’ fell within ‘a substantially established area of knowledge’”,⁵⁷⁶

⁵⁶⁶ Ibid 1 (headnote) (emphasis added).

⁵⁶⁷ Ibid ord 5 (Lindenmayer J).

⁵⁶⁸ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 128.

⁵⁶⁹ Ibid 129.

⁵⁷⁰ Ibid 129–130.

⁵⁷¹ Ibid 17.

⁵⁷² Ibid 99.

⁵⁷³ *Summers v Nathan* [2005] FamCA 1406 (9 March 2005).

⁵⁷⁴ Ibid [9] (Ramsden JR).

⁵⁷⁵ *Johnson v Johnson* [1997] FamCA 32.

⁵⁷⁶ *Summers v Nathan* [2005] FamCA 1406 (9 March 2005) [57] (Ramsden JR).

Ramsden JR, in adjourning the father's application, cited social science research that was somewhat critical of the theory.⁵⁷⁷ Judicial Registrar Ramsden stated:⁵⁷⁸

In the light of these articles and a large body of recent literature, I am not persuaded immediately that "P.A.S." has been established irrevocably as being within a substantially established area of knowledge allowing for the receipt of expert evidence.

In November 2006, the Victorian government conducted a community survey which identified violence-supportive attitudes in a significant population of respondents.⁵⁷⁹ Compared to the 1995 national survey of community attitudes,⁵⁸⁰ the proportion of respondents who believed that domestic violence was perpetrated equally by men and women had risen from 9% in 1995 to 20% in 2006.⁵⁸¹ Further, nearly half (46%) of the respondents in 2006 agreed with the statement that "[w]omen going through custody battles often make up claims of domestic violence to improve their case", with a further 25% saying they were unsure.⁵⁸² Around half of the 2,800 respondents to the 2006 survey answered each question about sexual violence.⁵⁸³ Although the proportion of respondents who believed the legal system treats sexual assault complainants fairly had fallen from 77% in 1995 to 65% in 2006,⁵⁸⁴ 15% of survey respondents in 2006 agreed with the statement that "women often say 'no' when they mean 'yes'", while another 8% were unsure.⁵⁸⁵

The mid-2000s finally saw significant government acknowledgement of the impacts of violence on children. In 2007, the federal Rudd government was elected, in part on a platform of establishing a national council of experts to create a strategic plan to decrease the prevalence

⁵⁷⁷ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 9.

⁵⁷⁸ *Summers v Nathan* [2005] FamCA 1406 (9 March 2005) [63] (Ramsden JR).

⁵⁷⁹ N Taylor and M Mouzos, *Community Attitudes to Violence against Women Survey 2006* (Full Technical Report, Australian Institute of Criminology, November 2006) xii.

⁵⁸⁰ Office of the Status of Women, *Community Attitudes to Violence against Women* (Detailed Report, 1995).

⁵⁸¹ N Taylor and M Mouzos, *Community Attitudes to Violence against Women Survey 2006* (Full Technical Report, Australian Institute of Criminology, November 2006) xiv.

⁵⁸² *Ibid* 67.

⁵⁸³ *Ibid* 66.

⁵⁸⁴ *Ibid* 67.

⁵⁸⁵ *Ibid* 67–68.

and impact of violence against women and children.⁵⁸⁶ The following year, the federal government reintroduced the element of gender to family violence discourse, with Prime Minister Rudd naming violence against women “the great silent crime of our time” in an address to the White Ribbon Foundation, stating “it is my gender—it is our gender—Australian men—that are responsible”.⁵⁸⁷ The Rudd era was noteworthy in recognising the role that men can play in violence prevention, as community organisations such as the White Ribbon Foundation began to feature men as ‘ambassadors’ in raising awareness of gendered violence.⁵⁸⁸ The National Council to Reduce Violence against Women and their Children was formed in 2008.⁵⁸⁹ In 2009 it released its report, *Time for Action*.⁵⁹⁰ The report recommended a coordinated effort on the part of commonwealth, state and territory governments to reduce violence, under commonwealth leadership.⁵⁹¹ The report also highlighted the plethora of family violence inquiries undertaken to date. In a foreword to their report, the National Council stated:⁵⁹²

We are fully aware that many fine reports have been written, and that many plans have been prepared on this issue. However, at this point in our country’s history, the Council strongly recommends that, as our title suggests, it is now *Time for Action*.

Also in 2009, the Council of Australian Governments launched its *National Framework for Protecting Australia’s Children*.⁵⁹³ The National Framework aimed to implement a substantial reduction in child abuse and neglect, noting that the “vast majority of child sexual abuse

⁵⁸⁶ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (Report, March 2009) ii.

⁵⁸⁷ Prime Minister Kevin Rudd, ‘Respecting Women and Leading Men’ (Speech, White Ribbon Foundation, 17 September 2008).

⁵⁸⁸ Michael Flood, *Where Men Stand: Men’s Roles in Ending Violence against Women* (Prevention Research Series No 2, White Ribbon, 2010) 3.

⁵⁸⁹ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (Report, March 2009) ii.

⁵⁹⁰ *Ibid* ii.

⁵⁹¹ *Ibid* 27, rec 11.

⁵⁹² *Ibid* v.

⁵⁹³ *Protecting Children Is Everyone’s Business: National Framework for Protecting Australia’s Children 2009–2020* (Report, 2009).

perpetrators are family members or someone well known to the child or young person”.⁵⁹⁴ It listed one of its six desired outcomes as “child sexual abuse and exploitation is prevented and survivors receive adequate support”.⁵⁹⁵

The results of another survey of attitudes to family violence were published in 2009.⁵⁹⁶ This survey employed a far larger sample than previous surveys of community attitudes, with just over 10,000 respondents.⁵⁹⁷ Compared with the 2006 Victorian survey,⁵⁹⁸ the 2009 survey showed steady increases in the proportion of respondents identifying non-physical abuse as domestic violence, including acts such as shouting, isolating, denigrating and denying a partner access to money.⁵⁹⁹ However, when respondents were asked if they agreed that “women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case”, 49% said yes, compared to 46% in 2006.⁶⁰⁰ The results of the 2009 national survey reflected the effect of men’s rights advocates in shifting community perceptions since the early 2000s, particularly to a view that men are equally victimised by family violence.⁶⁰¹ Twenty-two percent of respondents to the 2009 survey believed that men and women perpetrate violence equally, increasing from 20% in 2006 and only 9% in 1995.⁶⁰² Government initiatives in family violence education and prevention efforts had also been impacted by the work of men’s rights organisations, which had lobbied for a de-gendered understanding of family violence and advocated against campaigns aimed at addressing violence against women and children.⁶⁰³

⁵⁹⁴ Ibid 31.

⁵⁹⁵ Ibid 11.

⁵⁹⁶ Kiah McGregor, *National Community Attitudes Towards Violence against Women Survey 2009* (Project Technical Report, Australian Institute of Criminology, 2009).

⁵⁹⁷ N=10,105: ibid 12.

⁵⁹⁸ N Taylor and M Mouzos, *Community Attitudes to Violence against Women Survey 2006* (Full Technical Report, Australian Institute of Criminology, November 2006).

⁵⁹⁹ Kiah McGregor, *National Community Attitudes Towards Violence against Women Survey 2009* (Project Technical Report, Australian Institute of Criminology, 2009) 22.

⁶⁰⁰ Ibid 62.

⁶⁰¹ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 44–45.

⁶⁰² Kiah McGregor, *National Community Attitudes Towards Violence against Women Survey 2009* (Project Technical Report, Australian Institute of Criminology, 2009) 45.

⁶⁰³ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 135.

In many ways, a broader understanding of family violence may be seen as a success on the part of community education programs that have advocated for a definition of family violence that encompasses coercive and controlling behaviours and other non-tangible forms of abuse. The shift in the way family violence is framed at a community level, however, also echoes the key claims of the men's rights movement that statistics overestimate the extent of violence against women and underestimate its prevalence of violence against men.⁶⁰⁴ This claim is demonstrably untrue, with Australian and international research spanning decades consistently showing that women and children suffer the vast majority of family violence of all forms, that family violence is overwhelmingly perpetrated by men, and that when men do suffer violence it is almost always perpetrated by other men.⁶⁰⁵ Similarly, Australian and international research on false allegations of family violence clearly shows that false allegations in family law proceedings are rare, and are no more likely to be made by women than men.⁶⁰⁶ Nevertheless, the efforts of the men's rights movement appear to have succeeded in impacting broader community perceptions of violence and in affecting the culture and decision-making of the family courts. The publication of the results of the national survey was followed in 2010 by a new national family violence prevention and education social marketing campaign, *The Line*, aimed at fostering healthy relationships.⁶⁰⁷

3.6 Current Developments: The Tragic Filicide Cases

Despite significant progress in identifying vulnerable victims of family violence, the onset of the 21st century saw Australia grappling with a series of high-profile filicide cases. Each of these incidents was characterised by clear, yet overlooked, warning signs. The following section details some of these high-profile cases in order to highlight the devastating consequences of the lack of consistent, evidence-based strategies for the identification and prevention of abuse within the Australian family law system. It is also striking that the inquests

⁶⁰⁴ Ibid 127.

⁶⁰⁵ Peta Cox, *Violence against Women: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS Horizons: Research Report No 1, Australia's National Research Organisation for Women's Safety, 2016, rev ed) 26; Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018) ix.

⁶⁰⁶ Michael Flood, *False Allegations of Sexual Assault and Domestic Violence* (Report prepared for VicHealth, 25 June 2014), cited in *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

⁶⁰⁷ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011) 130.

and family court commentary surrounding these cases demonstrate very little accountability for the systemic failures that led to the deaths.

3.6.1 *The filicide of Braddon Park*

In 1999, Australians witnessed a high-profile case of retaliatory filicide when Mr Dean Williamson murdered his five-year-old son, Braddon Park, during a weekend access visit.⁶⁰⁸ While Mr Williamson had no documented history of physical violence towards either Braddon or his mother, Ms Lisa Park, his possessive and controlling behaviour towards Ms Park had led to the breakdown of the relationship⁶⁰⁹ and, after separation, Mr Williamson had used access visits to emotionally abuse Braddon and manipulate Ms Park.⁶¹⁰ Mr Williamson's resentment towards Ms Park had reportedly grown since separation, and he had reportedly developed an obsession with his obligation to pay child support and with the agreement for part-time access to Braddon that the couple had created through solicitors five years earlier.⁶¹¹ This reflects Flood's analysis that post-separation anger experienced by perpetrators of violence can last for years, actually escalating over time.⁶¹² Of greatest concern, in the months preceding the filicide, Mr Williamson had told a friend of his plan to kill Braddon and himself, but had not been believed.⁶¹³ After he killed his son, Mr Williamson cut himself with razor blades, calling an ambulance for himself the following day.⁶¹⁴ The case is significant as, prior to killing his son, Mr Williamson's violence took solely non-physical forms.⁶¹⁵ It also highlights the risks associated with post-separation violence during access visits,⁶¹⁶ and the common occurrence of perpetrators hurting children in order to punish their mothers, both during abusive

⁶⁰⁸ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 56.

⁶⁰⁹ Ibid 56.

⁶¹⁰ *DPP v Williamson* [2000] VSC 115 (31 March 2000) [6] (Cummins J).

⁶¹¹ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 56.

⁶¹² Michael Flood, "'Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328–347, 330.

⁶¹³ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 56.

⁶¹⁴ *DPP v Williamson* [2000] VSC 115 (31 March 2000) [13] (Cummins J).

⁶¹⁵ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 56.

⁶¹⁶ Ibid 58.

relationships⁶¹⁷ and, at its most extreme, in the form of post-separation retaliatory filicide.⁶¹⁸ After killing Braddon, Mr Williamson wrote to Ms Park:⁶¹⁹

You're not getting Braddon back, and you're not getting any more money from me! again [sic]. You are a fucking useless bitch ... And you are now going to suffer for the rest of your fucking useless life.

Braddon's killing occurred in the context of widespread debate in family jurisprudence, the social sciences and the broader community that framed family violence as rare, and questioned whether a father's absence was more harmful to a child than his violence.⁶²⁰ *The Age* reported on Mr Williamson's criminal trial under the headline, "[h]ow love and hate killed Braddon",⁶²¹ reflecting community confusion over paternal gender roles typical of the time. Journalist Gary Tippet described the parents' numerous separations over their five-year relationship as "rocky", stating that "eight months [after Braddon's birth] Dean [Williamson] was gone for good. Which didn't mean he didn't adore the boy, he was obsessed with him".⁶²²

3.6.2 *The Dalton family court filicides*

In 2004 Australia saw another high-profile filicide, this time of three-month-old Patrick and 20-month-old Jessie by their father, Mr Jayson Dalton, just two days after his application for shared care was denied by the Family Court of Australia.⁶²³ In Mr Dalton's case, there were numerous indicators of danger that went unaddressed by courts and services, including risk factors such as separation and a history of mental illness, which are common in cases of filicide.⁶²⁴ Mr Dalton had a history of verbal, physical and sexual violence towards the

⁶¹⁷ E Fish, M McKenzie and H MacDonald, *"Bad Mothers and Invisible Fathers", Parenting in the Context of Domestic Violence* (Discussion Paper No 7, Domestic Violence Resource Centre Victoria, 2009) 16.

⁶¹⁸ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 5.

⁶¹⁹ *DPP v Williamson* [2000] VSC 115 (31 March 2000) [13] (Cummins J).

⁶²⁰ H Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16(1) *International Journal of Law, Policy and the Family* 71–94, 81–82.

⁶²¹ Gary Tippet, 'How Love and Hate Killed Braddon', *The Age* (online, 11 March 2000) <<https://link.gale.com/apps/doc/A290636489/AONE?u=dixon&sid=AONE&xid=026a60a7>>.

⁶²² *Ibid.*

⁶²³ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 46.

⁶²⁴ T Brown, D Tyson and P Fernandez Arias, 'Filicide and Parental Separation and Divorce' (2014) 23(2) *Child Abuse Review* 79–88, 79.

children's mother, Ms Sonia Dalton.⁶²⁵ Some instances of physical violence had occurred in the presence of the children and, at the time of the children's deaths, Ms Dalton—but not the children—was under the protection of a domestic violence order.⁶²⁶ After separation, and following an occasion on which Mr Dalton had abducted the older child in a violent rage,⁶²⁷ Ms Dalton was admitted to a mental health facility with symptoms described as “postnatal psychosis”.⁶²⁸ The Family Court held a hearing in her absence, ordering the infants out of the temporary care of Ms Dalton's family, and into Mr Dalton's care.⁶²⁹ The court made no attempt to assess Mr Dalton's capacity to care for the infants,⁶³⁰ and the only mention of violence during the 14-minute hearing was Ms Dalton's solicitor's statement that “there are domestic violence issues”.⁶³¹ A subsequent Family Court hearing held several weeks later resulted in the children being ordered back into Ms Dalton's primary care, with substantial unsupervised time with their father.⁶³² Mr Dalton killed both children before they could be returned to their mother.⁶³³ At least in part, public reaction to the murders echoed the arguments of men's rights advocates at the time, with Mr Dalton's cousin describing several men in attendance at the children's funeral making statements such as “this all goes back to the father not having equal rights as far as the custody of the children is concerned”.⁶³⁴ Despite the failure of the Family Court to assess the father's capacity to care for the children in either hearing—particularly in light of Mr Dalton's documented history of physical and sexual violence and child abduction—Diana

⁶²⁵ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 47.

⁶²⁶ *Ibid* 47.

⁶²⁷ *Ibid* 47.

⁶²⁸ *Ibid* 47.

⁶²⁹ 'Losing the Children', *Four Corners* (Australian Broadcasting Corporation, 16 August 2004).

⁶³⁰ Elspeth McInnes, 'System Failure and Children at Risk When Family Law, Mental Illness and Family Violence Come Together' (Conference Paper, Shared Parental Responsibility in Australian Family Law and the Impact on Children Seminar, 13–15 April 2008) 7.

⁶³¹ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 47; 'Losing the Children', *Four Corners* (Australian Broadcasting Corporation, 16 August 2004).

⁶³² Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 47.

⁶³³ *Ibid* 47.

⁶³⁴ 'Losing the Children', *Four Corners* (Australian Broadcasting Corporation, 16 August 2004).

Bryant, then Chief Justice of the Family Court, stated on the television program *Four Corners*, “[t]here was nothing to indicate this would happen”.⁶³⁵

3.6.3 *The Farquharson filicides*

On Father’s Day 2005, Mr Robert Farquharson killed his three sons, 10-year-old Jai, seven-year-old Tyler and two-year-old Bailey, during an access visit, almost one year following his separation from their mother, Ms Cindy Gambino.⁶³⁶ The children died after Mr Farquharson drove into a dam, leaving the children behind as he left the car.⁶³⁷ Mr Farquharson had no documented history of physical violence towards the children or their mother,⁶³⁸ although indicators of danger existed. Trial witnesses reported his anger towards his ex-wife, his bitterness at her new relationship and his anger over being required to pay child support,⁶³⁹ a mental state which the original judge of the criminal trial, Cummins J, described as “burning resentment”.⁶⁴⁰ Most significantly, three months before the children’s deaths, Mr Farquharson had told a friend of his intention to murder the children in order to punish their mother.⁶⁴¹ As was the case with the filicide committed by Mr Dean Williamson in 1999 and, later, by Mr Arthur Freeman in 2009, the friend did not believe it.⁶⁴² Details of Mr Farquharson’s psychologically abusive behaviour were only released after his 2012 conviction, when Ms Gambino published her own account of events.⁶⁴³ This reflects UK research demonstrating that risk of paternal homicide may be predicated on “over-controlling and obsessive behaviour—far more than physical violence”.⁶⁴⁴ The case spanned eight years in the Australian

⁶³⁵ Ibid, cited in Elspeth McInnes, 'System Failure and Children at Risk When Family Law, Mental Illness and Family Violence Come Together' (Conference Paper, Shared Parental Responsibility in Australian Family Law and the Impact on Children Seminar, 13–15 April 2008) 7.

⁶³⁶ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 53.

⁶³⁷ *DPP v Farquharson* [2007] VSC 469 (16 November 2007) [9] (Cummins J).

⁶³⁸ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 52–53.

⁶³⁹ Ibid 52–53.

⁶⁴⁰ *DPP v Farquharson* [2007] VSC 469 (16 November 2007) [8] (Cummins J).

⁶⁴¹ Ibid [8] (Cummins J).

⁶⁴² Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 57.

⁶⁴³ Janine Little and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017) 1–24, 13–14.

⁶⁴⁴ 'Child Homicide Study: Main Findings', *Dispatches* (Channel 4, 2009) 9.

consciousness, as the media reported on the filicides, the trial, retrials and appeals.⁶⁴⁵ As is often the case in Australian representations of fathers who kill their children, Mr Farquharson was represented as a father “disempowered” by his loss of control over his relationship with his ex-wife and children.⁶⁴⁶ In reflecting implicit norms about gender roles within the family,⁶⁴⁷ some media accounts positioned Mr Farquharson as a “good bloke”, and hinted that Ms Gambino, in forming a new relationship, was somewhat culpable for the filicides.⁶⁴⁸ As was the case of Mr Dean Williamson,⁶⁴⁹ Mr Farquharson’s criminal behaviour was likened to paternal passion; it was hinted that, perhaps, he loved his children *too much*.⁶⁵⁰

3.6.4 *Darcey Freeman: Another family court filicide*

In January 2009, Mr Arthur Freeman killed his four-year-old daughter, Darcey, by throwing her from Melbourne’s Westgate Bridge in the presence of her two siblings.⁶⁵¹ Mr Freeman killed Darcey one day after consent orders were made in the Federal Magistrates Court which provided the children more time with their mother, Ms Peta Barnes, than their father.⁶⁵² At trial, Mr Freeman pleaded not guilty, claiming incapacity due to temporary mental impairment.⁶⁵³ This argument neatly echoes the broader claims of men’s rights advocates in portraying the killing as a consequence of the mental health impacts of Mr Freeman’s loss of some access to his children. As detailed in the following section, similar claims would be heard, just two years later, in media coverage of Mr Paul Rogers’ killing of his daughter, her mother and a family friend.⁶⁵⁴ As is often the case in Australian media coverage of filicide,

⁶⁴⁵ *DPP v Farquharson* [2007] VSC 469 (16 November 2007); *Farquharson v The Queen* (2009) 26 VR 410; *R v Farquharson* [2010] VSC 462; *Farquharson v The Queen* [2012] VSCA 296; *Farquharson v The Queen* [2013] HCATrans 182 (16 August 2013).

⁶⁴⁶ Janine Little and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017) 1–24, 13.

⁶⁴⁷ Janine Little, "'Family Violence Happens to Everybody': Gender, Mental Health and Violence in Australian Media Representations of Filicide 2010–2014' (2015) 29(4) *Media and Cultural Studies* 605–616, 613.

⁶⁴⁸ Janine Little and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017) 1–24, 13.

⁶⁴⁹ Gary Tippett, 'How Love and Hate Killed Braddon', *The Age* (online, 11 March 2000) <<https://link.gale.com/apps/doc/A290636489/AONE?u=dixon&sid=AONE&xid=026a60a7>>.

⁶⁵⁰ 'Across the Night Sky', *Australian Story* (Australian Broadcasting Corporation, 28 March 2011); Helen Garner, *This House of Grief* (Text Publishing, 2014).

⁶⁵¹ *R v Freeman* [2011] VSC 139 (11 April 2011) [8] (Coghlan J).

⁶⁵² *Ibid* [2] (Coghlan J).

⁶⁵³ *Ibid* [13] (Coghlan J).

⁶⁵⁴ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 60.

preoccupation with issues of mental illness in reporting Mr Freeman's case masked the context of post-separation family violence in which the filicide occurred.⁶⁵⁵ A voracious media portrayed the crimes as incomprehensible.⁶⁵⁶ In a *Perth Now* article, Mr Freeman was described as a man incapable of grasping his situation:⁶⁵⁷

Sometimes, Freeman bared his teeth in expressions of pain. He whimpered and wept and guzzled water during evidence about the autopsy of his daughter, Darcey Freeman, the four-year-old he threw off the West Gate Bridge ... Mostly, he stared with wide eyes, like a zoo exhibit who could not grasp how he'd arrived where he was.

In his 2009 review of the federal family courts' capacity to respond to family violence, Chisholm noted that, due to resourcing constraints, "the functioning of the system depends on most cases ending with consent orders rather than adjudicated outcomes",⁶⁵⁸ and that "a judicial officer in such circumstances will do everything possible to persuade the parties to reach agreement".⁶⁵⁹ Chisholm noted that, in the context of family violence and other forms of child abuse, pressure to enter into consent orders can lead to orders that place children at risk of harm.⁶⁶⁰ In Mr Freeman's case, the consent orders were made following a family report prepared by a Clinical Psychologist⁶⁶¹ which described Mr Freeman as "irrational and contradictory",⁶⁶² noting the history of family violence perpetrated by him against his ex-wife.⁶⁶³

⁶⁵⁵ Janine Little and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017) 1–24, 14.

⁶⁵⁶ Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 5.

⁶⁵⁷ Patrick Carlyon and Paul Anderson, 'Explaining the Inexplicable: How Could Arthur Freeman Kill Darcey?', *Perth Now* (online, 29 March 2011) <<https://www.perthnow.com.au/news/explaining-the-inexplicable-how-could-arthur-freeman-kill-darcey-ng-a0636309b67ed3423e41009bfb32d742>>.

⁶⁵⁸ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 85.

⁶⁵⁹ *Ibid* 82.

⁶⁶⁰ *Ibid* 85.

⁶⁶¹ *R v Freeman* [2011] VSC 139 (11 April 2011) [3] (Coghlan J).

⁶⁶² Report of Dr Neoh, cited in Patrick Carlyon and Paul Anderson, 'Explaining the Inexplicable: How Could Arthur Freeman Kill Darcey?', *Perth Now* (online, 29 March 2011) <<https://www.perthnow.com.au/news/explaining-the-inexplicable-how-could-arthur-freeman-kill-darcey-ng-a0636309b67ed3423e41009bfb32d742>>.

⁶⁶³ *Inquest into the Death of Darcey Iris Freeman* [2015] COR2009 000447 (30 October 2015) [5] (Gray J).

The inquest into Darcey's death was held after the 2012 'family violence reforms' to the *Family Law Act*, as described in the following chapter, came into effect. State Coroner, Judge Gray, considered several consultations between Darcey's mother and three General Practitioners in the months before and after the couple separated, in which Ms Barnes disclosed suffering physical violence and anger from Mr Freeman and expressed her fears that he could kill their children in order to punish her.⁶⁶⁴ Not one of these General Practitioners made a report to the Victorian Child Protection Service, or any other agency.⁶⁶⁵ One of the General Practitioners, referred to as 'GP B' in the inquest findings, submitted a statement which included the passage, "[w]ith the benefit of hindsight, I would not do anything differently. As I understood things Ms Barnes was addressing the issue of her children's safety with her attorney".⁶⁶⁶

Following the filicide, Chief Justice of the Family Court, Diana Bryant, claimed that the magistrate and the court itself had not erred in making the consent orders, stating that the parties had not raised safety concerns about Darcey in her father's care.⁶⁶⁷ From this it may be inferred that, in making the consent orders, the magistrate either did not refer to the family report documenting the history of family violence,⁶⁶⁸ or did not interpret violence towards the mother as posing any risk to her children. The inquest found that "Mr Freeman's actions, and Darcey's death, were unable to have been predicted with any great certainty".⁶⁶⁹ Judge Gray made "no adverse finding against any of the treating GPs or other professionals in this matter"⁶⁷⁰ and concluded that responsibility for the four-year-old's death lay "solely with Mr Freeman".⁶⁷¹

3.6.5 *Kyla Rogers: A post-separation familicide*

In 2011, Mr Paul Rogers killed his five-year-old daughter, Kyla, her mother, Ms Tania Simpson, and family friend Mr Antony Way before taking his own life.⁶⁷² The murder-suicide inflamed public misconceptions about the unfair treatment of fathers in the family courts.

⁶⁶⁴ Ibid [30]–[36] (Gray J).

⁶⁶⁵ Ibid [30]–[36] (Gray J).

⁶⁶⁶ Ibid [34] (Gray J).

⁶⁶⁷ Peter Gregory, 'Darcey Papers Stolen from Car', *Sydney Morning Herald* (online, 7 February 2009) <<https://www.smh.com.au/national/darcey-papers-stolen-from-car-20090206-7zzc.html>>.

⁶⁶⁸ *Inquest into the Death of Darcey Iris Freeman* [2015] COR2009 000447 (30 October 2015) [5] (Gray J).

⁶⁶⁹ Ibid [97] (Gray J).

⁶⁷⁰ Ibid [99] (Gray J).

⁶⁷¹ Ibid [96] (Gray J).

⁶⁷² Deborah Kirkwood, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012) 60.

Media coverage suggested that Mr Rogers' limited access to his children, the separation, and suspicions of Ms Simpson's new relationship, played a role in the crime.⁶⁷³ However, the inquest held in June the following year noted evidence of Mr Rogers' controlling behaviour towards Ms Simpson and his limited involvement with his children throughout their relationship.⁶⁷⁴

In 2010, the couple had announced their engagement, then separated four months later when Ms Simpson moved with the children to her parents' home on the Gold Coast.⁶⁷⁵ Following separation, Mr Rogers made suicide threats and engaged in self-harm.⁶⁷⁶ He followed Ms Simpson and the children to the Gold Coast, living without a fixed address.⁶⁷⁷ Mr Rogers spent time with both children each Saturday through an informal arrangement, but refused to tell Ms Simpson where he took the children during these times.⁶⁷⁸ During this period, Mr Rogers regularly loitered outside the homes and workplaces of Ms Simpson and Mr Way and made repeated, highly emotional requests to Ms Simpson that they resume their relationship, some of which occurred in front of the children.⁶⁷⁹ On one occasion Rogers followed Ms Simpson's mother in his car⁶⁸⁰ and, on another, he attended Kyla's school and carved his and her initials into a tree there.⁶⁸¹ Mr Rogers made one reported threat to Ms Simpson that he would kill her and take the children; a threat she disclosed to one friend only.⁶⁸²

⁶⁷³ For example, the ABC reported "Queensland police say a custody battle was at the centre of the murder-suicide", quoting Acting Superintendent Tim Trezise as stating that Rogers "wasn't coping" with separation from Kayla's mother and was "understandably upset and concerned about not having access to his children": 'Custody Battle Behind Gold Coast Murders', *ABC News* (online, 19 May 2011) <<https://www.abc.net.au/news/2011-05-19/custody-battle-behind-gold-coast-murders/2720672>>; The Courier Mail claimed, "Paul Rogers 'lost the plot' after his fiancée Tania Simpson packed up their two children and left him before their planned wedding, friends say... Police say he had access to his children Kyla, 5, and Bronnson, 22 months but was allowed to collect them only from their grandparents' home after a bitter break-up with his partner of eight years.": Greg Stolz and Sophie Elsworth, 'Paul Rogers, Who Killed Tania Simpson and Kyla, Became Tormented Loner after Break-Up', *Courier Mail* (online, 19 May 2011).

⁶⁷⁴ *Inquest into the Deaths of Antony Way, Tania Simpson, Kyla Rogers, Paul Rogers* [2012] COR 2011/1619, COR 2011/1620, COR 2011/1640 COR 2011/1641 (21 June 2012) 5 (Barnes SC).

⁶⁷⁵ Ibid 5 (Barnes SC).

⁶⁷⁶ Ibid 6 (Barnes SC).

⁶⁷⁷ Ibid 6 (Barnes SC).

⁶⁷⁸ Ibid 7 (Barnes SC).

⁶⁷⁹ Ibid 7 (Barnes SC).

⁶⁸⁰ Ibid 8 (Barnes SC).

⁶⁸¹ Ibid 7 (Barnes SC).

⁶⁸² Ibid 8 (Barnes SC).

The inquest was significant as it examined Ms Simpson's attempts to seek help from the Queensland Police Service in the lead-up to the killings.⁶⁸³ State Coroner Barnes noted that Ms Simpson had made contact with the police at least twice during the three months before the deaths;⁶⁸⁴ however, Sergeant Smithson, to whom Ms Simpson complained, testified that the reported information did not constitute family violence.⁶⁸⁵ Besides a five-minute call to Mr Rogers requesting he refrain from following Ms Simpson and her family, the police took no action to protect her or her children.⁶⁸⁶ While noting that Sergeant Smithson may have breached Queensland Police Services' operating procedures by failing to investigate whether Ms Simpson and her children were eligible for a Domestic Violence Order application,⁶⁸⁷ the Coroner concluded that Mr Rogers "duped the officer into believing he was an innocuous father simply wishing to spend more time with his children".⁶⁸⁸ Four days prior to the killings, Ms Simpson reported a break-in at her apartment complex to police, but they made no contact with Mr Rogers in this regard.⁶⁸⁹

The inquest also examined the failure of family law and healthcare professionals in the case. In arranging a property settlement, Ms Simpson had disclosed an incident to a lawyer, in which Mr Rogers had slashed his chest with a razor blade upon hearing that he could not see the children every day.⁶⁹⁰ The lawyer advised Ms Simpson of the process for applying for parenting orders through the family courts; however, Ms Simpson did not pursue parenting orders at that time.⁶⁹¹ As her daughter, Kyla, had begun to demonstrate considerable anxiety at school,⁶⁹² Ms Simpson also sought help from a psychologist, who advised her to attend mediation with Mr Rogers.⁶⁹³ The mediator assessed the couple as appropriate for face-to-face mediation, despite noting on Ms Simpson's intake documentation in regard to risk, "Paul following Tania, Tania's mum. Tania discussed with police – they have spoken with him".⁶⁹⁴ Mr Rogers did not attend

⁶⁸³ Ibid 1 (Barnes SC).

⁶⁸⁴ Ibid 8–10 (Barnes SC).

⁶⁸⁵ Ibid 25 (Barnes SC).

⁶⁸⁶ Ibid 9 (Barnes SC).

⁶⁸⁷ Ibid 25 (Barnes SC).

⁶⁸⁸ Ibid 25 (Barnes SC).

⁶⁸⁹ Ibid 12 (Barnes SC).

⁶⁹⁰ Ibid 26 (Barnes SC).

⁶⁹¹ Ibid 26 (Barnes SC).

⁶⁹² Ibid 10–11 (Barnes SC).

⁶⁹³ Ibid 11 (Barnes SC).

⁶⁹⁴ Ibid 11 (Barnes SC).

mediation.⁶⁹⁵ Coroner Barnes found the actions of the family lawyer, the psychologist and the mediator to have been adequate.⁶⁹⁶ On the night that the killings began, the family was failed again, this time by its neighbours. Several witnesses heard screams and pleading from Ms Simpson's home; two watched Mr Rogers carry Kyla from the apartment, and one saw him load her into a car and drive away.⁶⁹⁷ No one contacted the police or attempted to intervene in any way.⁶⁹⁸

In the Findings of Inquest, Coroner Barnes noted that around half of Queensland (47%) and Australian (53%) homicides in recent years were perpetrated by someone in a current or former domestic or family relationship with the deceased.⁶⁹⁹ Coroner Barnes highlighted academic findings presented to the court, that homicide is as likely to arise in the absence of serious physical violence as in its presence, and is often precipitated by the perpetrator's perceived loss of control of the victim, as the relationship breaks down.⁷⁰⁰ Although Mr Rogers was found "solely responsible for all of the deaths",⁷⁰¹ Coroner Barnes did highlight the systemic failings that contributed to the killings, stating:⁷⁰²

We know that in this case 21 people were aware of factors that when aggregated and analysed with expert insight indicated Paul Rogers was manifesting most of the indicators associated with deadly domestic violence. He was controlling and manipulative; he was obsessive and dishonest; he had previously threatened to kill Tania and take the children. He was stalking her and her family and she intuitively knew he was capable of harming her. He broke into her premises. He bought binoculars to spy on her. At the end he was confronted with evidence indicating his chances of regaining control of Tania were gone ... A more broadly focussed wide ranging inquiry into the family's circumstances could have revealed all or most of this. Intervention that focused on containing Mr Rogers until his destructive psychopathology could be ameliorated or minimised may have saved them all. Those charged with helping the family stay safe did not have processes that gathered the necessary information, nor the expertise to adequately interpret it.

⁶⁹⁵ Ibid 11 (Barnes SC).

⁶⁹⁶ Ibid 26 (Barnes SC).

⁶⁹⁷ Ibid 14 (Barnes SC).

⁶⁹⁸ Ibid 14 (Barnes SC).

⁶⁹⁹ Statistics from the Domestic and Family Violence Death Review Unit (Queensland) and National Homicide Monitoring Program, Australian Institute of Criminology, Annual Report 2010, cited in *ibid* 22 (Barnes SC).

⁷⁰⁰ Ibid 22–24 (Barnes SC).

⁷⁰¹ Ibid 2 (Barnes SC).

⁷⁰² Ibid 29 (Barnes SC) (emphasis added).

The Coroner recommended continued research into domestic homicide, and public education campaigns regarding “the risks posed by non-violent domestic and family violence”.⁷⁰³

3.6.6 Heather Glendinning: A mother’s filicide-suicide

Late in 2011, following the killings of Kyla Rogers, her mother and a family friend, and before their inquest could be held, another high-profile Australian filicide-suicide occurred, and this time the killings were perpetrated by the mother. Ms Heather Glendinning killed her second- and third-born daughters, 12-year-old Jane and 10-year-old Jessica, by stabbing, and then committed suicide on 5 December 2011. The family’s parenting proceedings do not appear to be—or do not remain—published by the Family Court of Western Australia, and so an understanding of those proceedings must be gleaned from the subsequently published findings of the inquest,⁷⁰⁴ and from the Family Court proceedings held before Thackray CJ regarding a publication order that occurred in the wake of the deaths.⁷⁰⁵ The inquest provides an expanded view of the Family Court proceedings, particularly in detailing evidence received by the Family Court that was not disclosed in the judgement of Thackray CJ.

The inquest,⁷⁰⁶ held four years after the deaths, noted the “long and acrimonious custody battle” between Ms Glendinning and her ex-husband, Mr Harley Cuzens, which had stretched over 10 years in the Family Court of Western Australia.⁷⁰⁷ In the Record of Investigation into Death, Coroner King referred to Ms Glendinning as “consumed” by these legal conflicts,⁷⁰⁸ stating that she suffered declining mental health during this period but displayed “reluctance to seek help because she feared that her mental health problems would be used against her in the custody dispute”.⁷⁰⁹ Due to Ms Glendinning’s ability to “mask” her problems, “[o]pportunities to attempt to assess her psychologically were missed ... She was never considered to be a risk to herself or to the children”.⁷¹⁰ Reportedly, Ms Glendinning and Mr Cuzens separated when

⁷⁰³ Ibid 31 (Barnes SC).

⁷⁰⁴ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016).

⁷⁰⁵ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016).

⁷⁰⁶ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016).

⁷⁰⁷ Ibid [2] (King C).

⁷⁰⁸ Ibid [10] (King C).

⁷⁰⁹ Ibid [8] (King C).

⁷¹⁰ Ibid [8] (King C).

Ms Glendinning and the children left the family home without warning in 2001, a few months after her third daughter was born.⁷¹¹ Ms Glendinning served Mr Cuzens with an interim restraining order and applied to the Family Court for residence of the children, citing domestic violence as the cause of the separation.⁷¹² Later in 2001, she took their oldest daughter Grace, then three years old, to a child sexual assault counsellor, where Grace vividly described her father's violence towards her mother.⁷¹³

Contesting the restraining order, Mr Cuzens consulted a Family Court counsellor, alleging that Ms Glendinning had issues with cannabis abuse and mental illness.⁷¹⁴ The children lived for several years with their mother, spending informally supervised,⁷¹⁵ and then unsupervised, time with their father under consent orders made between the parents.⁷¹⁶ From the beginning of 2007, Ms Glendinning denied Mr Cuzens access to the children, alleging they faced a substantial risk of harm from their father and from their paternal grandfather at the Cuzens' family farm.⁷¹⁷ As the parties continued their battle for custody of the children,⁷¹⁸ the children were subject to further engagement with counsellors and court-appointed expert witnesses.⁷¹⁹ They consistently expressed a wish to live with their mother and described displays of anger on the part of their father, saying he was "struggling to care for them".⁷²⁰ At a sexual assault service in 2007, one of the children made a disclosure "indicative of sexual abuse" by the paternal grandfather.⁷²¹

In 2008 in the Family Court, Martin J found that the children were not at unacceptable risk of harm in the care of Mr Cuzens or his parents, and that both parties were responsible for the violence that had occurred prior to separation.⁷²² As relayed by the Coroner, Martin J "did not

⁷¹¹ Ibid [39] (King C).

⁷¹² Ibid [40] (King C).

⁷¹³ Ibid [41]–[42] (King C).

⁷¹⁴ Ibid [43]–[44] (King C).

⁷¹⁵ Ibid [39] (King C).

⁷¹⁶ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016) [2] (Thackray CJ).

⁷¹⁷ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016) [60] (King C).

⁷¹⁸ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016) [2] (Thackray CJ).

⁷¹⁹ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016) [57], [60], [101] (King C).

⁷²⁰ Ibid [101]–[102] (King C).

⁷²¹ Ibid [57]–[59] (King C).

⁷²² Ibid [64] (King C).

accept that Mr Cuzens was the angel he maintained, but [believed] that he was not a violent or aggressive person, nor had he been seriously or criminally violent to Ms Glendinning”.⁷²³ Her Honour cited Ms Glendinning’s “unfounded concerns with sexual abuse and excessive concerns about past injustices, namely the alleged family violence and, particularly, her financial claims” as contributing to the “serious problems in relation to the children which had occurred since mid-2006”.⁷²⁴ In the absence of any evidence of abuse—besides the repeated accounts of Ms Glendinning and her three daughters—the children were ordered into the care of their father.⁷²⁵ The orders restrained Ms Glendinning from “questioning the children to obtain any disclosures about sexual abuse” and from “taking the children to any counsellor or professional for the purposes of domestic violence counselling or sexual abuse counselling without an order of the court or the consent of the Independent Children’s Lawyer”.⁷²⁶

These orders were made final without a psychiatric assessment of either parent.⁷²⁷ During the following years, Ms Glendinning reported further concerns about the children’s safety, including a claim about a powerful paedophile ring.⁷²⁸ These reports to the Department of Child Protection and Family Support yielded no action.⁷²⁹ Ms Glendinning’s mother and mother’s friend also raised concerns about the children with the Department, and again no action was taken in regard to their reports.⁷³⁰ Further Family Court proceedings in 2010 resulted in the children being returned to live with their mother and spending time with their father during holidays, while the oldest child, Grace, moved to live with the paternal grandparents in Perth.⁷³¹

Five months before the killings, Ms Glendinning began to consult psychologist Monika Knausenberger in order to discount Mr Cuzens’ claims that she had a personality disorder.⁷³² At Ms Glendinning’s request, Knausenberger agreed to minimise her note-taking during their

⁷²³ Ibid [65] (King C).

⁷²⁴ Ibid [66] (King C).

⁷²⁵ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016) [5]–[6] (Thackray CJ).

⁷²⁶ Ibid [8] (Thackray CJ).

⁷²⁷ Ibid [7] (Thackray CJ).

⁷²⁸ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016) [77]–[79] (King C).

⁷²⁹ Ibid [100] (King C).

⁷³⁰ Ibid [96]–[98] (King C).

⁷³¹ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016) [15]–[22] (Thackray CJ).

⁷³² *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016) [114] (King C).

sessions to allay her fear that the information she disclosed during their sessions would be used against her in the Family Court.⁷³³ In Knausenberger’s analysis, Ms Glendinning suffered from the impacts of long-term, extreme stress, resulting in post-traumatic stress disorder, depression and anxiety.⁷³⁴ She did not perceive Ms Glendinning as a risk to herself or others.⁷³⁵ At the inquest Knausenberger testified that, had she been aware of reports written by the Family Court-appointed experts which refuted Ms Glendinning’s account of the sexual abuse of her daughters and the scale of the domestic violence she suffered from Mr Cuzens, she would have reconsidered the conclusions she formed about Ms Glendinning.⁷³⁶

Forensic psychiatrist, Dr Brett, informed the inquest that at the time of the killings, Ms Glendinning was likely experiencing a psychotic episode, brought on by “severe stress, a possible mood disorder and probable substance abuse”.⁷³⁷ “It’s unlikely stress alone would have caused her psychosis,” he stated.⁷³⁸ In the words of Coroner King, Dr Brett concluded that “Ms Glendinning felt hopeless and helpless, that her life was not worth living and that it was not worth living for her children either, so she believed that the best option was to kill her children and then herself”.⁷³⁹ During the inquest, Coroner King publicly released a letter written by Ms Glendinning’s surviving daughter, Grace, regarding her experience of the legal proceedings that had dominated her childhood.⁷⁴⁰ In the Family Court of Western Australia, Thackray CJ granted media outlets permission to publish the letter, deeming it “necessary for the preservation of the reputation of the court”.⁷⁴¹ In this letter, Grace wrote:⁷⁴²

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

⁷³³ Ibid [115] (King C).

⁷³⁴ Ibid [120] (King C).

⁷³⁵ Ibid [120] (King C).

⁷³⁶ Ibid [121]–[122] (King C).

⁷³⁷ Ibid [167] (King C).

⁷³⁸ Kate Campbell, 'Day Two of Inquest into Deaths of Heather Glendinning, Daughters Jane and Jessica', *Perth Now* (online, 2 February 2016) <<http://www.perthnow.com.au/news/western-australia/day-two-of-inquest-into-deaths-of-heather-glendinning-and-daughters-jane-and-jessica/news-story/9cf5956c45d76eadcd0b225aaaa02656>>.

⁷³⁹ *Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary* (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016) [168] (King C).

⁷⁴⁰ *Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* [2016] FCWA 6 (4 February 2016) [23] (Thackray CJ).

⁷⁴¹ Ibid [39] (Thackray CJ).

⁷⁴² Tim Clarke, 'Port Dennison Killings: Surviving Sister Tells of Chaotic Life', *The West Australian* (online, 4 February 2016) <<https://thewest.com.au/news/australia/port-dennison-killings---surviving-sister-tells-of-chaotic-life-ng-ya-333432>>.

Family Court until Dec 5, 2011 ... It ended only because I lost my sisters and my mother ... My overall experience of the Family Court has been one of immense negativity, distress and trauma ... The social workers, counsellors, and psychologists who interviewed me throughout my childhood caused me to develop a deep mistrust of mental health care workers ... There was absolutely no one who felt I was consistently and objectively there to act as support for me or my sisters without any form of bias.

Growing up I witnessed events that in hindsight and now that I am older and able to see things from a different perspective may have been considered to have been of interest to those assessing my mother's mental state and ability to parent us. These events included for examples situations in which mum refused to get out of bed for days ... She often cried herself to sleep (if she did sleep at all as she would sometimes go for days without any sleep at all). Mum would show me the court documents and tell me all about the proceedings and would talk about how the Family Court was trying to take us away from her and go on rants about my father that would either involve her breaking chairs in the house or crying uncontrollably.

Mum never really worked full time as her days were consumed by the court battles ... I never spoke to anyone about these events until very recently ... I felt there was no-one that I felt I could tell ... I feel that the Family Court completely failed us.

3.6.7 *Luke Batty's death: A lifelong struggle for protection*

The filicide of 11-year-old Luke Batty occurred early in 2014. The killing constituted perhaps Australia's most notorious domestic homicide and brought family violence squarely into the public debate, as Luke's mother, Ms Rosie Batty, spoke publicly about their ordeal.⁷⁴³ The inquest examined Ms Batty's attempts to seek protection for herself and her son, particularly in the 18 months before his death.⁷⁴⁴

Ms Batty separated from Luke's father, Mr Gregory Anderson, before Luke's birth.⁷⁴⁵ During his life, Luke had spent time with his father under consent orders of the Family Court of Australia, which began shortly before Luke turned four.⁷⁴⁶ State Coroner, Judge Gray, noted that Mr Anderson's time with Luke had grown progressively more limited, due to involvement with Victoria Police, the then-named Department of Human Services, and the Family Court.⁷⁴⁷

⁷⁴³ Helen Garner, 'Mother Courage: At Home with Rosie Batty', *The Monthly Essays* (online, October 2014) <<https://www.themonthly.com.au/issue/2014/october/1412085600/helen-garner/mother-courage>>.

⁷⁴⁴ *Inquest into the Death of Luke Geoffrey Batty* [2015] COR2014 0855 (28 September 2015) [7] (Gray J).

⁷⁴⁵ *Ibid* [22] (Gray J).

⁷⁴⁶ *Ibid* [119] (Gray J).

⁷⁴⁷ *Ibid* [24] (Gray J).

Mr Anderson was verbally and physically abusive towards Ms Batty in Luke's presence on a number of occasions,⁷⁴⁸ but had never been physically violent to Luke.⁷⁴⁹ As is the case with many of the perpetrators of filicides detailed here, Mr Anderson appeared devoted to Luke.⁷⁵⁰ Judge Gray reported that, although Luke seemed to have "managed his relationship with his father carefully", he never expressed fear of him.⁷⁵¹ The inquest findings reported that, as a result of his exposure to family violence, Luke experienced night terrors and had stated that his life was not worth living.⁷⁵² Like many survivors of family violence, Ms Batty did not always report Mr Anderson's episodes of abuse to the police;⁷⁵³ however, his behaviour did invoke police involvement at times, including criminal charges in 2012 related to assault,⁷⁵⁴ and a number of Family Violence Intervention Orders that Ms Batty had secured over the years, beginning when Luke was an infant.⁷⁵⁵ In November 2012, Mr Anderson was detected accessing child exploitation material on a public library computer.⁷⁵⁶ He was charged and granted bail.⁷⁵⁷ Anderson was arrested again in January 2013, this time after threatening to kill Ms Batty,⁷⁵⁸ and was again granted bail.⁷⁵⁹ None of the criminal charges appear to have had an impact on the parenting orders by which the Family Court regulated Luke's time with his father.

In April 2013, months before his death, Luke disclosed to his mother that his father had produced a knife during one of their access visits, saying words to the effect "it could all end with this".⁷⁶⁰ Ms Batty reported the incident with the knife widely, including to Luke's school, her doctor, two police officers and a Senior Prosecutor.⁷⁶¹ During a subsequent Family Violence Intervention Order hearing, Magistrate Goldsbrough made an order forbidding Mr Anderson from contacting Luke and his mother and suspended the Family Court consent orders

⁷⁴⁸ Ibid [36] (Gray J).

⁷⁴⁹ Helen Garner, 'Mother Courage: At Home with Rosie Batty', *The Monthly Essays* (online, October 2014) <<https://www.themonthly.com.au/issue/2014/october/1412085600/helen-garner/mother-courage>> .

⁷⁵⁰ *Inquest into the Death of Luke Geoffrey Batty* [2015] COR2014 0855 (28 September 2015) [27] (Gray J).

⁷⁵¹ Ibid [28] (Gray J).

⁷⁵² Ibid [36]–[37] (Gray J).

⁷⁵³ Ibid [109] (Gray J).

⁷⁵⁴ Ibid [124] (Gray J).

⁷⁵⁵ Ibid [113], [125], [133], [168], [190] (Gray J).

⁷⁵⁶ Ibid [145] (Gray J).

⁷⁵⁷ Ibid [146]–[148] (Gray J).

⁷⁵⁸ Ibid [157] (Gray J).

⁷⁵⁹ Ibid [160] (Gray J).

⁷⁶⁰ Ibid [174] (Gray J).

⁷⁶¹ Ibid [180] (Gray J).

that allowed Mr Anderson weekly access to Luke.⁷⁶² Two months later, while Mr Anderson's charges for assault, accessing child exploitation material and threatening to kill Ms Batty were still outstanding,⁷⁶³ the same Magistrate relaxed the Family Violence Intervention Order to allow Mr Anderson to attend Luke's sporting events while maintaining a 25-metre distance from Luke himself.⁷⁶⁴

The Coroner noted that upon learning of the child exploitation material charges, Ms Batty contacted the Department of Human Services, seeking their help in protecting Luke.⁷⁶⁵ Judge Gray noted the Department workers' scrutiny of her "willingness, intention and capacity to protect Luke",⁷⁶⁶ and their request that she sign an undertaking detailing the Department's expectations of her as Luke's protective parent.⁷⁶⁷ In her own account of these events, Ms Batty detailed the double bind she faced when attempting to protect her son from within failing legal frameworks. Her memoir recounted receiving legal advice that removing her son to safety overseas could see him returned under the *Hague Convention on the Civil Aspects of International Child Abduction*,⁷⁶⁸ while simultaneously being warned by Department workers that, although Luke's contact with his father was mandated by orders of the Family Court, she could be held responsible for failing to protect him if Luke was harmed by his father.⁷⁶⁹

On the evening that he killed his son, Mr Anderson attended Luke's cricket practice in contravention of another Family Violence Intervention Order that named Luke as a protected person.⁷⁷⁰ Although there remained unexecuted warrants for Mr Anderson's arrest,⁷⁷¹ Ms Batty gave evidence at the inquest that she did not call the police to attempt to have Mr Anderson arrested, as she'd had difficulty attempting to involve the police in the past.⁷⁷² Ms Batty told the inquest:⁷⁷³

⁷⁶² Ibid [189]–[190] (Gray J).

⁷⁶³ Ibid [124], [261]–[266] (Gray J).

⁷⁶⁴ Ibid [270]–[273] (Gray J).

⁷⁶⁵ Ibid [292] (Gray J).

⁷⁶⁶ Ibid [312] (Gray J).

⁷⁶⁷ Ibid [313] (Gray J).

⁷⁶⁸ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980 (entered into force 1 December 1983).

⁷⁶⁹ Rosie Batty and Bryce Corbett, *A Mother's Story* (Harper Collins, 2015) 74.

⁷⁷⁰ *Inquest into the Death of Luke Geoffrey Batty* [2015] COR2014 0855 (28 September 2015) [69] (Gray J).

⁷⁷¹ Ibid [68] (Gray J).

⁷⁷² Ibid [68]–[69] (Gray J).

⁷⁷³ Ibid [193] (Gray J).

I knew about Darcey Freeman, I knew about the Farquharson boys, but I never knew their fathers. I didn't know Greg was capable of killing. I didn't know ... what their fathers were like with their sons, all I had known is that he loved his son, he'd never laid a hand on him, he was never verbally abusive to him, he loved him.

Mr Anderson hit Luke with a cricket bat then stabbed him to death. Mr Anderson was then shot by police.⁷⁷⁴ The following day, Ms Batty addressed the media on the steps of her home:⁷⁷⁵

I want to tell everybody that family violence happens to everybody. No matter how nice your house is, how intelligent you are. It can happen to anyone, and everyone. This has been an 11-year battle. You do the best you can. You're a victim, and you're helpless. An intervention order doesn't stop anything like this from happening.

The Coroner concluded that "Luke's death was not reasonably foreseeable by any entity or person".⁷⁷⁶ He highlighted a number of systemic flaws in Victorian responses to family violence, but stated "there was no causative link between the system gaps and flaws and Luke's death".⁷⁷⁷

3.6.8 *The Edwards filicides and suicides*

On 5 July 2018, Mr John Edwards shot and killed his children, 15-year-old Jack and 13-year-old Jennifer, in the home they shared with their mother, using legally obtained firearms.⁷⁷⁸ He then killed himself.⁷⁷⁹ Five months after the children's deaths, their mother, Ms Olga Edwards, died by suicide.⁷⁸⁰ The April 2021 inquest revealed that Mr Edwards' relationship with Ms Edwards, Jack and Jennifer exhibited numerous overlooked warning signs. State Coroner, Magistrate O'Sullivan, found that Mr Edwards' abusive behaviour had been disclosed to multiple agencies and professionals within the police service and family law system, yet "none

⁷⁷⁴ Helen Garner, 'Mother Courage: At Home with Rosie Batty', *The Monthly Essays* (online, October 2014) <<https://www.themonthly.com.au/issue/2014/october/1412085600/helen-garner/mother-courage>>.

⁷⁷⁵ Ibid.

⁷⁷⁶ *Inquest into the Death of Luke Geoffrey Batty* [2015] COR2014 0855 (28 September 2015) [16] (Gray J).

⁷⁷⁷ Ibid [17]–[18] (Gray J).

⁷⁷⁸ *Inquest into the Deaths of John, Jack and Jennifer Edwards* 2018/209420, 2018/208842, 2018/208843 (7 April 2021) [1] (O'Sullivan M).

⁷⁷⁹ Ibid [1] (O'Sullivan M).

⁷⁸⁰ Ibid [1138]–[1140] (O'Sullivan M).

were able to effectively mobilise to protect Jack, Jennifer, or Olga”.⁷⁸¹ Magistrate O’Sullivan noted that the killings exemplified systemic failings in three critical areas that could have helped to prevent the tragedy: first, the New South Wales Police response to Ms Edwards’ attempts to seek help; next the licensing regime that enabled Mr Edwards to legally obtain firearms despite a history of family violence; and finally, the impact of the actions of the Independent Children’s Lawyer on the family courts’ responses to the family.⁷⁸² Her Honour concluded:⁷⁸³

[T]o describe this as a tragedy is to import a sense of inevitability, that nothing could have been done to change the outcome. Instead, the evidence before this Court plainly reveals that the deaths of Jack and Jennifer Edwards were preventable.

Mr Edwards reportedly engaged in routine psychological and physical abuse, including assaults and stalking, targeting six former partners and eight children, before initiating a relationship with Ms Edwards,⁷⁸⁴ when he was 50 years old and she was 19.⁷⁸⁵ After their children were born in 2002 and 2004, Mr Edwards’ behaviour towards Ms Edwards became psychologically abusive.⁷⁸⁶ He became violent towards his younger children when Jack was 10 and Jennifer was eight.⁷⁸⁷ During the final years the family lived together, both children told their mother that they kept objects close by to protect themselves from their father.⁷⁸⁸ At age 11, Jack attempted to call the police about the abuse, but was stopped by his mother.⁷⁸⁹ On two instances in 2016, once prior to separation and once afterwards, Jack ran away from home. When he was found, he reported only “family difficulties” and did not disclose any abuse to police.⁷⁹⁰

⁷⁸¹ Ibid [1142] (O’Sullivan M).

⁷⁸² Ibid [1136]–[1143] (O’Sullivan M).

⁷⁸³ Ibid [1143] (O’Sullivan M) (emphasis added).

⁷⁸⁴ Ibid [22] (O’Sullivan M).

⁷⁸⁵ Ibid [60] (O’Sullivan M).

⁷⁸⁶ Ibid [61] (O’Sullivan M).

⁷⁸⁷ Ibid [72] (O’Sullivan M).

⁷⁸⁸ Ibid [73] (O’Sullivan M).

⁷⁸⁹ Ibid [73] (O’Sullivan M).

⁷⁹⁰ Ibid [77], [92] (O’Sullivan M).

Ms Edwards commenced family law proceedings in April 2016,⁷⁹¹ reporting psychological and physical abuse by Mr Edwards against herself, Jack and Jennifer.⁷⁹² She stated that the children did not want to see their father, and expressed her fear that he would kill the children.⁷⁹³ She also submitted that she had not previously reported the abuse to any external agency,⁷⁹⁴ a fact Mr Edwards later drew on to argue the allegations had been fabricated.⁷⁹⁵ Mr Edwards, in turn, made several reports to the then-named New South Wales Department of Family and Community Services,⁷⁹⁶ claiming that the children were “being continually and severely psychologically and emotionally abused” by their mother.⁷⁹⁷ His claims of emotional abuse in response to allegations of violence fit neatly into the ‘parental alienation’ paradigm, particularly as the children had expressed resistance to seeing him.

At a court-ordered Child Inclusive Conference, Ms Edwards again reported the abuse while expressing her belief in an ongoing risk to the children.⁷⁹⁸ Both children disclosed some of the abuse they had experienced from their father and informed the family consultant that they did not want to spend time with him.⁷⁹⁹ The family consultant identified the risk factors of family violence, physical and psychological abuse and ‘parental alienation’.⁸⁰⁰ The consultant recommended interim orders for the children to spend time with their father, despite their considerable reluctance, with the goal of providing “the opportunity to attempt to repair the relationship”,⁸⁰¹ noting that, for this to succeed, “the mother may need to ensure the children are protected from her feelings”.⁸⁰² The October 2016 orders noted an agreement by Mr Edwards and Ms Edwards to attend “confidential family therapy”.⁸⁰³ However, the family therapist concluded that, due to the allegations of abuse, family therapy was not in the children’s best interests and should be suspended until an expert report could be prepared.⁸⁰⁴

⁷⁹¹ Ibid [85]–[86] (O’Sullivan M).

⁷⁹² Ibid [758], [765]–[766] (O’Sullivan M) .

⁷⁹³ Ibid [758] (O’Sullivan M).

⁷⁹⁴ Ibid [767] (O’Sullivan M).

⁷⁹⁵ Ibid [783] (O’Sullivan M).

⁷⁹⁶ Ibid [85]–[86] (O’Sullivan M).

⁷⁹⁷ Ibid [770] (O’Sullivan M).

⁷⁹⁸ Ibid [774]–[776] (O’Sullivan M).

⁷⁹⁹ Ibid [777]–[778] (O’Sullivan M).

⁸⁰⁰ Ibid [773] (O’Sullivan M).

⁸⁰¹ Ibid [779] (O’Sullivan M).

⁸⁰² Ibid [779] (O’Sullivan M).

⁸⁰³ Ibid [785] (O’Sullivan M).

⁸⁰⁴ Ibid [817]–[819] (O’Sullivan M).

Also in October 2016, an Independent Children’s Lawyer, Debbie Morton, was appointed.⁸⁰⁵ Morton was privy to material from New South Wales Police produced under subpoena, which named Mr Edwards as a person of interest in four Apprehended Violence Orders, an assault charge and a “Domestic Violence - No Offence” matter, spanning an 18-year period and encompassing several women and children.⁸⁰⁶ At a Directions Hearing in December 2016, Morton informed the court that she had read the material under subpoena from New South Wales Police, stating:⁸⁰⁷

They put it down to parenting. *Maybe a bit heavy-handed parenting*, but there has been no action taking ... There’s no apprehended violence orders. I can’t see any charges ... *I don’t have any concerns* - and I put to you that that would be a good arrangement, for that few hours, for the father to see the children.

The independent children’s lawyer’s role, delineated at that time in the *Guidelines for Independent Children’s Lawyers*,⁸⁰⁸ is to “represent and promote the best interests of a child in family law proceedings”,⁸⁰⁹ including drawing on the analysis of experts, where appropriate, to assess the risks posed to children from family violence and other forms of child abuse.⁸¹⁰ While an independent children’s lawyer may make submissions to the court that are contrary to the wishes of a child,⁸¹¹ the independent children’s lawyer must “ensure the court is fully informed of the child’s views”.⁸¹² Contrary to the children’s statements to the family consultant and family therapist,⁸¹³ Morton informed the court that the children had told her they wanted to spend time with their father.⁸¹⁴ The children were ordered to spend unsupervised time with

⁸⁰⁵ Ibid [785] (O’Sullivan M).

⁸⁰⁶ Ibid [840]–[844] (O’Sullivan M).

⁸⁰⁷ Ibid [869] (O’Sullivan M) (emphasis added).

⁸⁰⁸ Family Court of Australia, Family Court of Western Australia and Federal Circuit Court of Australia, *Guidelines for Independent Children’s Lawyers* (Practice Guidelines, 29 May 2013). The current version has changed little: Federal Circuit Court and Family Court of Australia, *Guidelines for Independent Children’s Lawyers* (Practice Guidelines, 2021).

⁸⁰⁹ Family Court of Australia, Family Court of Western Australia and Federal Circuit Court of Australia, *Guidelines for Independent Children’s Lawyers* (Practice Guidelines, 29 May 2013) 1.

⁸¹⁰ Ibid 12.

⁸¹¹ Ibid 5.

⁸¹² Ibid 2.

⁸¹³ *Inquest into the Deaths of John, Jack and Jennifer Edwards* 2018/209420, 2018/208842, 2018/208843 (7 April 2021) [892] (O’Sullivan M).

⁸¹⁴ Ibid [892] (O’Sullivan M).

their father,⁸¹⁵ and to participate in family therapy,⁸¹⁶ although ‘therapy’ had been voluntary up until that time.⁸¹⁷ The children later refused to attend for the time with their father,⁸¹⁸ and they continued to refuse each week for the next six months.⁸¹⁹

In late December 2016, Ms Edwards attended the local police station to report assaults on both children occurring the previous year.⁸²⁰ While the Domestic Violence Standard Operating Procedures at the time mandated police to consider family law proceedings independently in responding to family violence allegations,⁸²¹ in documenting Ms Edwards’ report Senior Constable Brooke Cooper wrote, “[p]olice do not hold fears of safety [sic] and are of the belief that this maybe a premeditated attempt [to] influence some future family court and divorce proceedings”.⁸²² In oral evidence to the inquest, SC Cooper admitted that she depended on the delay in reporting the assaults and the existence of family law proceedings in determining that the allegations were false.⁸²³ Instead of recording the incident as an assault, SC Cooper recorded the incident as “Domestic Violence – No Offence”,⁸²⁴ and no further action was taken by police.⁸²⁵ In early 2017, notwithstanding his history of violence and being the subject of several Apprehended Violence Order applications, Mr Edwards obtained a gun club membership and licences for a rifle and pistol.⁸²⁶ He legally purchased five firearms during 2017 and 2018.⁸²⁷ In April 2017, the family commenced court-ordered family therapy with clinical psychologist, ‘RS’.⁸²⁸ RS informed the inquest that Mr Edwards admitted perpetrating

⁸¹⁵ Orders of the Federal Circuit Court (22 December 2016) ords 8, 11 (Monahan J), cited in *ibid* [906] (O’Sullivan M).

⁸¹⁶ Orders of the Federal Circuit Court (22 December 2016) ord 6 (Monahan J), cited in *ibid* [906] (O’Sullivan M).

⁸¹⁷ *Ibid* [785] (O’Sullivan M).

⁸¹⁸ *Ibid* [910] (O’Sullivan M).

⁸¹⁹ *Ibid* [1032] (O’Sullivan M).

⁸²⁰ *Ibid* [216] (O’Sullivan M).

⁸²¹ *Ibid* [181] (O’Sullivan M).

⁸²² *Ibid* [218] (O’Sullivan M).

⁸²³ *Ibid* [240] (O’Sullivan M).

⁸²⁴ *Ibid* [219]–[226] (O’Sullivan M).

⁸²⁵ *Ibid* [229]–[233] (O’Sullivan M).

⁸²⁶ *Ibid* [98]–[105] (O’Sullivan M).

⁸²⁷ *Ibid* [110], [115]–[116] (O’Sullivan M).

⁸²⁸ *Ibid* [930] (O’Sullivan M).

some violence.⁸²⁹ Both children were, again, clear that they wanted no contact with their father, and Jack described numerous instances of physical abuse by Mr Edwards.⁸³⁰

The Independent Children's Lawyer then issued a series of threats, insisting that Jack be brought to her office.⁸³¹ In a letter to Ms Edwards' legal representative, Morton threatened to recommend removing Jack or both children from Ms Edwards' care if she didn't facilitate a meeting between Mr Edwards and the children.⁸³² In another email, the Independent Children's Lawyer stated:⁸³³

The father will be introduced to the sessions with the children either together or individually at [RS]'s discretion. The mother is not to take any steps to thwart this ...With respect, if the mother either continues to be uncooperative and/or takes steps to thwart the possible restoration of the relationship between the father and the children she will leave me with no other alternative but to recommend that both children, or at least Jack, are removed from her care and placed in the father's care.

In May and June 2017, Ms Edwards provided further details to the Federal Circuit Court concerning Mr Edwards' coercive, controlling and physically violent behaviour, including an earlier attempt by him to obtain a firearm and his possession of a large machete, which he kept under his bed.⁸³⁴ Ms Edwards' May 2017 affidavit also enumerated the ways in which the Independent Children's Lawyer had misrepresented the children's best interests.⁸³⁵ In the June 2017 case outline, the Independent Children's Lawyer submitted that the mother claimed that there was a prolonged history of family violence by the father against her and the children, which was primarily emotional with "no independent evidence to support the Mother's allegations".⁸³⁶

⁸²⁹ Ibid [937] (O'Sullivan M).

⁸³⁰ Ibid [934]–[936] (O'Sullivan M).

⁸³¹ Ibid [939]–[949] (O'Sullivan M).

⁸³² Ibid [945] (O'Sullivan M).

⁸³³ Ibid [976] (O'Sullivan M).

⁸³⁴ Ibid [988] (O'Sullivan M).

⁸³⁵ Ibid [983] (O'Sullivan M).

⁸³⁶ Ibid [1009] (O'Sullivan M).

In the Findings of Inquest, Magistrate O’Sullivan quoted the following passage from the interim hearing:⁸³⁷

[JUDGE MONAHAN]: ... I want the children spending time with their father on the weekend. I’m - I have not seen anything today that suggests that they shouldn’t, okay, apart from “The children don’t want to go.”

... it’s not a matter of them choosing to go. I have ordered the children to go. Okay. The children spend time, three hours, 12 each Saturday, commencing last December at the food court at Westfield Hornsby. Has there been one occasion they’ve been there at 12 o’clock on a Saturday?

... MS MORTON: I think mum can try a bit harder, frankly. I think— I think, you know, as your Honour says, the kids are 12 and 14. They get told to get in the car and they get taken to that stop and they don’t get - if, in fact, that’s what they’re saying, then they don’t get to say that. They’re 12 and 14 years old. They’re kids.

Later that month, the children spent time with Mr Edwards in the company of the clinical psychologist, RS, in a public place.⁸³⁸ After several further sessions with Mr Edwards alone, RS emailed the Independent Children’s Lawyer, describing the children’s clear resistance to time with Mr Edwards and the emotional and physical abuse he had perpetrated against them, and stating there was no benefit in continuing to “force them to see me with a focus on restoring their relationship”.⁸³⁹ The proceedings were transferred to the Family Court of Australia in September 2017. In February 2018—six months before the killings and nearly two years after family law proceedings commenced—the parenting proceedings were concluded by consent, with any future time between Mr Edwards and the children to be at the children’s discretion.⁸⁴⁰ Detective Sergeant Phillips informed the inquest that Mr Edwards “obviously had been planning to kill his children probably six months at least prior”, which Magistrate O’Sullivan stated, “places the decision at or about the time the family law proceedings concluded in February 2018”.⁸⁴¹

⁸³⁷ Ibid [1029] (O’Sullivan M) (emphasis added).

⁸³⁸ Ibid [1043] (O’Sullivan M).

⁸³⁹ Ibid [1052] (O’Sullivan M).

⁸⁴⁰ Ibid [1078]–[1079] (O’Sullivan M).

⁸⁴¹ Ibid [118] (O’Sullivan M).

Media reports of the deaths evinced a marked shift compared to reports of earlier high-profile domestic homicides. As *The Australian* reported, “the long history of violence John [Edwards] had perpetrated on a total of seven partners and 10 children over many years went ignored”.⁸⁴² However, the key systemic issues raised by the inquest concerning responses to family violence and other forms of child abuse by the police and family courts remain largely unaddressed.

3.7 Social Context of the Royal Commission

In November 2012, under the leadership of the then Prime Minister Julia Gillard, the federal government established the Royal Commission into Institutional Responses to Child Sexual Abuse.⁸⁴³ The Royal Commission significantly impacted Australian discourse concerning sexual violence towards children through extensive media coverage. During the five years of the Commission, Australians heard about the extent—and often lifelong impacts—of child sexual abuse in Australian institutions, the high social standing of many perpetrators and the stark inadequacy of responses to reports of harm.⁸⁴⁴ The nation’s public broadcaster, the Australian Broadcasting Corporation (ABC), reported every case study on multiple platforms for the entirety of the Royal Commission.⁸⁴⁵

⁸⁴² Lane Sainty, 'Horror Note Found in John Edwards' Pocket an Enduring Mystery as Systemic Failures Laid Bare', *The Australian* (online, 12 April 2021) <<https://www.theaustralian.com.au/breaking-news/horror-note-found-in-john-edwards-pocket-an-enduring-mystery-as-systemic-failures-laid-bare/news-story/d57cd96c41748875cfd60caf95ce48>>.

⁸⁴³ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Letters Patent, 11 January 2013).

⁸⁴⁴ See for example 'Jehovah's Witnesses Destroyed Notes About Child Sex Abuse, Inquiry Told', *The Guardian* (online, 27 July 2015) <<https://www.theguardian.com/australia-news/2015/jul/27/jehovahs-witnesses-destroyed-notes-about-child-sex-abuse-inquiry-told>>; Melissa Cunningham, 'Almost One in Ten Ballarat Priests Accused of Child Sex Abuse, Inquiry Told', *The Courier* (online, 6 February 2017) <<https://www.thecourier.com.au/story/4450467/almost-one-in-ten-ballarat-priests-accused-of-child-sex-abuse-inquiry-told/>>; Melissa Davey, 'Church Response to Melbourne Victims of Child Sexual Abuse "a Betrayal"', *The Guardian* (online, 18 August 2014) <<https://www.theguardian.com/world/2014/aug/18/church-response-to-melbourne-victims-of-child-sexual-abuse-a-betrayal>>; Helen Davidson, 'Swimmers Felt "Insulted" When DPP Dealt with Their Abuse Claims', *The Guardian* (online, 7 July 2014) <<https://www.theguardian.com/world/2014/jul/07/swimmers-felt-insulted-when-dpp-dealt-with-their-abuse-claims>>; Lateline and Emma Alberici, 'Brother Convicted of Sex Abuse a Church "Treasure"', *ABC News* (online, 27 November 2012) <<https://www.abc.net.au/news/2012-11-27/brother-convicted-of-sex-abuse-a-church-treasure/4393618>>; Candice Marcus, 'Child Sex Abuse Royal Commission: SA Government "Knew of Sexual Abuse" at Salvation Army Boys' Home from Early 1940s', *ABC News* (online, 7 October 2015) <<https://www.abc.net.au/news/2015-10-07/sa-govt-knew-sexual-abuse-salvation-army-home-early-1940s/6833036>>; Andrew Thomson, 'Church Head "Moved" Abusive Priests, Says Warrnambool Detective', *The Standard* (online, 14 November 2012) <<https://www.standard.net.au/story/1075280/church-head-moved-abusive-priests-says-warrnambool-detective/>>.

⁸⁴⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 2.

As the Royal Commission into Institutional Responses to Child Sexual Abuse began its work, the World Congress on Family Law and Children's Rights met in Sydney in March 2013.⁸⁴⁶ In research on 'parental alienation', Australian clinical psychologist and family report writer, Vincent Papaleo, drew on outdated assumptions about the credibility of women in advocating for the use of 'parental alienation' theories in family law matters. Papaleo stated:⁸⁴⁷

[T]here are some women who consciously or unconsciously, be they *motivated by vengeance or due to psychological vulnerabilities*, actively alienate their children from fathers with whom previously, the children had at least a good enough relationship. It is also true that a subset of these women may make repeated false allegations of abuse and some may do so intentionally, whilst others may do so unintentionally, truly believing what they say, and never being reassured by an investigative process that does not confirm that abuse did occur.

Australians were again surveyed on their attitudes to family violence in 2013.⁸⁴⁸ The survey constituted a national measure of community attitudes to violence as an outcome of the *National Plan to Reduce Violence against Women and their Children 2010–2022*.⁸⁴⁹ The results, published in 2014, showed that public perceptions of false allegations of family violence in family law had changed little since the 2009 national survey. When asked whether they agreed that “women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case”, 53% of respondents agreed.⁸⁵⁰ The report raised several issues of concern in regard to the attitudes and knowledge of respondents aged 16–24 years. Particularly, while young people demonstrated a solid understanding of physical and sexual violence, they were markedly less likely than older survey respondents to recognise

⁸⁴⁶ '6th World Congress on Family Law and Children's Rights: Voices That Need to Be Heard', (Registration Brochure, Family Court of Australia, 17–20 March 2013).

⁸⁴⁷ V Papaleo, 'When Children Refuse Contact with a Parent: The Language of Conflict and the Reciprocal Relationship between the Court and the Social Sciences' (Conference Paper, World Congress on Family Law and Children's Rights, 17–20 March 2013) 3, cited in Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 12 (emphasis added).

⁸⁴⁸ Kim Webster et al., *Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey* (Full Technical Report, Victorian Health Promotion Foundation, 2014).

⁸⁴⁹ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

⁸⁵⁰ Kim Webster et al., *Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey* (Full Technical Report, Victorian Health Promotion Foundation, 2014) 123.

non-physical forms of abuse.⁸⁵¹ Young people were nine percentage points less likely than older respondents to recognise a woman is more likely to be assaulted by a known person than a stranger, and the percentage of young respondents who recognised that men are the primary perpetrators of intimate partner violence fell from 37% in 2009 to 32% in 2013.⁸⁵²

Twenty-six percent of young respondents excused partner violence under certain conditions, such as regret or losing control (compared to 17% of 35–64 year-olds).⁸⁵³ Twenty-two percent of young people agreed with the statement that “domestic violence is a private matter to be handled in the family”, compared to 12% of older respondents.⁸⁵⁴ In regard to sexual violence, 20% of young Australians agreed with the statement that “women often say ‘no’ when they mean ‘yes’”, compared to 13% of older respondents, and 39% agreed that “a lot of times women who say they were raped led the man on and later had regrets”, compared to 34% of older respondents.⁸⁵⁵ Finally, while violence-supportive attitudes in young men had fallen 10 percentage points since the 2009 survey, young men in 2013 demonstrated poorer understandings of violence against women, less support for gender equality and greater attitudinal support for violence against women than young women did.⁸⁵⁶ The researchers noted that the “high rate of violence” perpetrated against young people, their exposure to discrimination and to violence in the media, and other aspects of the broader social context, including parenting styles and educational cultures, formed young Australians’ attitudes towards violence.⁸⁵⁷

In June 2015, the ABC published an exposé of expert report-writing practices in the family courts. The radio broadcast included an interview with psychiatrist Dr Rikard-Bell who, having penned around 2,000 court-ordered reports over a 25-year period, publicly claimed that the vast

⁸⁵¹ Anita Harris et al., *Young Australians’ Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey for Respondents 16–24 Years* (Report, Victorian Health Promotion Foundation, 2015) 30.

⁸⁵² Ibid 3.

⁸⁵³ Ibid 36.

⁸⁵⁴ Ibid 38.

⁸⁵⁵ Ibid 42.

⁸⁵⁶ Ibid 2.

⁸⁵⁷ Ibid 24.

majority of allegations of child sexual abuse are false.⁸⁵⁸ In his interview, Rikard-Bell cited Gardner's resoundingly discredited 'Parental Alienation Syndrome'⁸⁵⁹ as an area of knowledge he sometimes drew on when evaluating the likelihood of false allegations in a case.⁸⁶⁰ In a February 2016 Senate Estimates hearing, Senator Heffernan raised the statements of Rikard-Bell published by the ABC in questions to representatives of the Family Court and Federal Circuit Court, asking what the Attorney-General or Chief Justice would do to "instruct all Family Court judges to not rely on the unsafe opinion of a person with those views?"⁸⁶¹ The question was taken on notice. A written advice was supplied 10 months later, stating that Family Court Chief Justice Bryant "took the opportunity to ... remind the profession and judges of their obligation to carefully scrutinise expert reports" which, she noted, could be challenged on cross examination.⁸⁶²

⁸⁵⁸ 'In the Child's Best Interests', *Background Briefing* (ABC Radio National, 14 June 2015).

⁸⁵⁹ Deborah Epstein and Lisa A Goodman, 'Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences' (2019) 167 *University of Pennsylvania Law Review* 399–461, 430; Miguel Clemente and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133, 126; Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 232; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 1; Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 955; Lenore EA Walker, Kristi L Brantley and Justin A Rigsbee, 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court' (2004) 1(2) *Child Custody* 47–74, 47; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3.

⁸⁶⁰ 'In the Child's Best Interests', *Background Briefing* (ABC Radio National, 14 June 2015).

⁸⁶¹ Legal and Constitutional Affairs Legislation Committee (Commonwealth), Senate, *Estimates* (Report, 9 February 2016) 55.

⁸⁶² Family Court of Australia and Federal Circuit Court, Legal and Constitutional Affairs Legislation Committee, *Radio National Interview: In the Child's Best Interests* (Response to question taken on notice, AE16/017, 11 December 2016) 2.

The National Community Attitudes towards Violence against Women Survey,⁸⁶³ carried out in 2017, was the fourth such national survey⁸⁶⁴ and constituted one primary measure⁸⁶⁵ of the progress of the *National Plan to Reduce Violence against Women and their Children 2010–2022*.⁸⁶⁶ Published in 2018, the survey engaged 17,500 Australians aged 16 years and over.⁸⁶⁷ The results demonstrated an improvement over the findings published in 2014 in terms of respondents' knowledge of violence against women, support for gender equality and rejection of violence-supportive attitudes.⁸⁶⁸ In response to the statement that “[w]omen going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case”, 43% of respondents agreed, representing a reduction of 10 percentage points from the survey results published in 2014.⁸⁶⁹ The survey also identified improvements in attitudes to sexual violence. Thirty-one percent of respondents in the 2017 survey agreed that “[a] lot of times, women who say they were raped had led the man on and then had regrets” (down from 38% in 2014), and 12% of respondents in 2017 agreed that “[w]omen often say ‘no’ when they mean ‘yes’”, a reduction of four percentage points when compared to 2014, and of six percentage points when compared to the 1995 national survey.⁸⁷⁰ The results, however, also evinced a decline in respondents recognising that domestic violence is primarily perpetrated by men (64% in 2018 compared to 71% in 2014).⁸⁷¹

⁸⁶³ K Webster et al., *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence against Women Survey* (ANROWS Insights No 3, Australia's National Research Organisation for Women's Safety, March 2018).

⁸⁶⁴ The earlier national surveys were: Office of the Status of Women, *Community Attitudes to Violence against Women* (Detailed Report, 1995); Kiah McGregor, *National Community Attitudes Towards Violence against Women Survey 2009* (Project Technical Report, Australian Institute of Criminology, 2009); Kim Webster et al., *Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey* (Full Technical Report, Victorian Health Promotion Foundation, 2014).

⁸⁶⁵ K Webster et al., *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence against Women Survey* (ANROWS Insights No 3, Australia's National Research Organisation for Women's Safety, March 2018) 6.

⁸⁶⁶ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

⁸⁶⁷ K Webster et al., *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence against Women Survey* (ANROWS Insights No 3, Australia's National Research Organisation for Women's Safety, March 2018) 6.

⁸⁶⁸ *Ibid* 5.

⁸⁶⁹ *Ibid* 7.

⁸⁷⁰ *Ibid* 7.

⁸⁷¹ *Ibid* 7.

Despite the gains made, the authors warned that the identified improvements were “modest” and “have yet to show as changes in behaviour”.⁸⁷² The report noted “there has been minimal change in the prevalence of violence against women since 2005”, although it stated the “apparent lack of reduction” may be partly due to increased reporting on the part of survivors.⁸⁷³ The authors also noted the widespread contemporary media reportage of sexual and physical violence, and of high-profile filicides such as the killing of Luke Batty, as motivating attitudinal change, but also potentially simply influencing survey respondents’ answers.⁸⁷⁴ They cautioned “there is the risk that advances gained through such discourse alone may be lost after attention wanes, or if activity is not supported and reinforced by other changes” such as organisational policies and practices, legislative reform and implementation.⁸⁷⁵

3.8 Conclusion of the Royal Commission

The Royal Commission concluded in December 2017. In his opening address to the Commission’s final sitting, Peter McClellan J noted that, while the Royal Commission had been tasked with inquiring into child sexual abuse in institutions, “the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in institutions”.⁸⁷⁶ Justice McClellan highlighted the contemporary nature of much child sexual abuse occurring in Australia and framed prevention as a national responsibility, stating:⁸⁷⁷

Although the primary responsibility for the sexual abuse of a child lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society’s values and the mechanisms which were available to regulate and control aberrant behaviour failed.

⁸⁷² Ibid 138.

⁸⁷³ Ibid 138.

⁸⁷⁴ Ibid 137.

⁸⁷⁵ Ibid 140.

⁸⁷⁶ Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017).

⁸⁷⁷ Ibid (emphasis added).

Notably absent from the Royal Commission's final hearings was the then Social Services Minister, Christian Porter, who posted a picture of himself to social media attending a cricket match with former Prime Minister John Howard.⁸⁷⁸ Porter's Social Services portfolio included responsibility for the redress scheme arising from the Royal Commission.⁸⁷⁹ Porter was made Attorney-General during the month of the Commission's final sittings, which entailed overseeing the administration of Australia's federal courts, including the family courts, and responsibility for responding to the recommendations of the Royal Commission.⁸⁸⁰

Having provided this social history of the development and context of the family courts from the 1970s onwards, including a discussion of the tragic developments in recent decades, the following chapter examines the evolution of Australian family law from a political perspective. This is followed by description and analysis of the case studies that inform this research.

⁸⁷⁸ Liz Burke, 'Social Services Minister Christian Porter Cops It for Skipping Royal Commission Hearings for Cricket', *News.com.au* (online, 15 December 2017) <<https://www.news.com.au/national/politics/social-services-minister-christian-porter-cops-it-for-skipping-royal-commission-hearings-for-cricket/news-story/8f46e08c49211a742a2f5d8bc1802a7d>>.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*

Chapter Four – The Development of Australian Family Law: Legislative Reform, Major Reports, Inquiries and Initiatives

4 Introduction

This chapter examines the history of legislative reform impacting Australian family law and the renewed legislative focus on family violence evidenced in recent decades. It particularly focuses on the key reports, initiatives and reforms, including compliance measures, that affect the operation of Australia's family courts, reflecting a system in crisis and in need of reform. Some of the key initiatives examined here are those that followed the Royal Commission, particularly the *National Strategy to Prevent and Respond to Child Sexual Abuse, 2021-2030*, the *National Framework for Protecting Australia's Children, 2021-2031* and the *National Plan to End Violence Against Women and Their Children, 2022-2032*. Following this chapter is the presentation of the case studies that inform this research. This is succeeded by an analysis of these published judgements against the findings and recommendations of the Royal Commission.

4.1 The Early Reforms

Significant legislative reform occurred in 1995 with the passing of the *Family Law Reform Act*⁸⁸¹ which, in amending the *Family Law Act*, established an underlying principle that "children have a right of contact, on a regular basis, with both of their parents".⁸⁸² The amended *Family Law Act*, which came into effect on 11 June 1996, listed a series of considerations for judges in determining a child's best interests, the seventh of which was "the need to protect the child from physical or psychological harm".⁸⁸³ Although the amended *Family Law Act* stipulated that this "right of contact" was intended to apply "except when it is or would be contrary to a child's best interests",⁸⁸⁴ the legislation had profound impacts in entrenching a pro-contact culture in the family courts.⁸⁸⁵ This reflected the extensive lobbying by men's rights groups at the time.⁸⁸⁶ In effect, the 1995 reforms implicitly elevated children's 'right to

⁸⁸¹ *Family Law Reform Act 1995* (Cth).

⁸⁸² *Family Law Act 1975* (Cth) (comp 16 December 1995) s 60B(2)(b).

⁸⁸³ *Ibid* (comp 16 December 1995) s 68F(2)(g).

⁸⁸⁴ *Ibid* (comp 16 December 1995) s 60B(2).

⁸⁸⁵ Michael Flood, "Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328–347, 333.

⁸⁸⁶ *Ibid*, 333.

contact' above the need to protect them from harm.⁸⁸⁷ Despite subsequent legislative reform, a de facto principle of a 'right to contact' or 'meaningful relationship' continues to influence family court decision-making.⁸⁸⁸

Subsequent evaluation of the 1995 family law reforms highlights the gendered impact of 'parental alienation' theories during this period, by which mothers raising safety concerns about their children were framed as possessing a "deviant, anti-father attitude".⁸⁸⁹ In cases of alleged child sexual abuse, 'parental alienation' theories gave effect to the child's 'right' to contact, instituted by the 1995 reforms, so that any resistance to maintaining the relationship between father and child was viewed through the lens of 'alienation'.⁸⁹⁰ Following the 1995 reforms, the concept of the 'hostile mother' became so powerful that mothers, fearing for the safety of their children in the father's care, rarely requested orders for no contact, as their solicitors commonly warned them of the potential consequences of being perceived as deliberately obstructing contact.⁸⁹¹

In 1998, the Family Law Council reported to the Attorney-General on the enforcement of orders and injunctions of courts exercising family law jurisdiction.⁸⁹² The Family Law Council is a statutory body comprised of judges, public servants and family law professionals, established to advise the Attorney-General on issues to do with family legislation and legal aid.⁸⁹³ The Council's Interim⁸⁹⁴ and Final Reports⁸⁹⁵—building on a two-year survey and an

⁸⁸⁷ Ibid, 333.

⁸⁸⁸ Ibid 333; Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6–7.

⁸⁸⁹ Rae Kaspiew, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' (2007) 29 *Sydney Law Review* 131–161, 145.

⁸⁹⁰ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 9.

⁸⁹¹ Helen Rhoades, Reg Graycar and Margaret Harrison, 'The Family Law Reform Act 1995: The First Three Years' (2001) 15(1) *Australian Family Lawyer* 1–8, 4.

⁸⁹² Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998); Family Law Council, *Penalties and Enforcement: Interim Report to the Attorney-General on the Enforcement of Family Court Orders and Injunctions and Penalties for Non-Compliance with Orders and Injunctions* (Interim Report, March 1998).

⁸⁹³ *Family Law Act 1975* (Cth) s 115, cited in Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998).

⁸⁹⁴ Family Law Council, *Penalties and Enforcement: Interim Report to the Attorney-General on the Enforcement of Family Court Orders and Injunctions and Penalties for Non-Compliance with Orders and Injunctions* (Interim Report, March 1998) 5.

⁸⁹⁵ Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998).

earlier parliamentary inquiry⁸⁹⁶—highlighted issues in enforcing family law orders. Non-resident parents claimed courts often failed to enforce contact orders and that resident parents obstructed contact through “false allegations”.⁸⁹⁷ Concerns shared by resident parents included issues of children’s safety, the misuse of contact for harassment, and children refusing to see the non-resident parent.⁸⁹⁸ The Council recommended a three-tiered regime for enforcing compliance with parenting orders,⁸⁹⁹ comprised of “preventative measures”, aimed at educating and warning parties about their responsibilities under the *Family Law Act*,⁹⁰⁰ “remedial measures”, such as post-separation parenting courses and costs orders;⁹⁰¹ and “punitive action”, including penalties and punishment.⁹⁰² This three-tiered regime was a shift away from a directly punitive approach to enforcement,⁹⁰³ as the Family Law Council acknowledged that fines and imprisonment were rarely effective, and were only employed in roughly 15% of convictions.⁹⁰⁴ While the Council stated it did not recommend removing these penalties, it proposed that resident parents refusing compliance should face a review of their residence order. The Final Report stated, “[a] more acceptable way of conveying this message to residence parents may be to make it clear in their residence orders that a condition of the grant of the order is compliance with the conditions of the contact arrangements in the contact order”.⁹⁰⁵

The report also explored coercive options, suggesting the appointment of another person—such as a grandparent—as resident parent or, in extreme cases, making the child a ward of the State, though the latter was viewed as a last resort due to potential resource implications, as seen in New Zealand.⁹⁰⁶ Consideration of the impact of a change of residence on the child is notably absent from this passage. The Council also considered the power of the family courts to issue

⁸⁹⁶ Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (Commonwealth), House of Representatives, *The Family Law Act 1975: Aspects of Its Operation and Interpretation* (Report, 1992).

⁸⁹⁷ Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998) 7.

⁸⁹⁸ *Ibid* 7.

⁸⁹⁹ *Ibid* [8.01].

⁹⁰⁰ *Ibid* [8.01].

⁹⁰¹ *Ibid* [8.12]–[8.14].

⁹⁰² *Ibid* [8.15].

⁹⁰³ *Ibid* 6.

⁹⁰⁴ *Ibid* [8.16].

⁹⁰⁵ *Ibid* [8.21].

⁹⁰⁶ *Ibid* [8.23]–[8.24].

a recovery order forcibly delivering a child to a parent⁹⁰⁷ under section 67U of the *Family Law Act*,⁹⁰⁸ noting “although these provisions are already in the *Family Law Act*, they do not appear to be widely used, despite their obvious value in certain situations”.⁹⁰⁹ The Council concluded that “in appropriate cases the court should be invited to use its power to issue a recovery order”.⁹¹⁰

4.2 The Early 21st Century: A Renewed Focus on Family Violence

In July 2001, the Family Law Pathways Advisory Group handed down its report on the family law system, titled *Out of the Maze: Pathways to the Future for Families Experiencing Separation*.⁹¹¹ The report emphasised the importance of multidisciplinary service delivery and early intervention in cases of domestic violence, stating “[l]itigation should not be used as a matter of course; it should be used as a last resort, or in cases of emergency, in particular those involving violence, abuse or other risk”.⁹¹² The authors noted the negative impact of disparate state/territory and federal responses on families experiencing violence and other forms of child abuse, and recommended “as a matter of urgency” that the Council of Australian Governments implement changes to the family law system so that “family law, violence and child abuse matters can be dealt with in the same place at the same time”, and such matters can be “streamlined” and “expedited”.⁹¹³ The report also recommended “multidisciplinary education” for judicial officers and training for all legal and non-legal professionals within the family law system.⁹¹⁴

However, the context in which the report was written is evident in the way the authors framed allegations of child abuse. The authors stated that the “Advisory Group has heard about the negative impact that an allegation of child abuse can have on parent–child relationships,

⁹⁰⁷ Ibid [7.19]–[7.40].

⁹⁰⁸ *Family Law Act 1975* (Cth) (comp 16 December 1995) s 67U. This provision remains in the current version of the *ibid* (comp 12 June 2024).

⁹⁰⁹ Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998) [7.23].

⁹¹⁰ Ibid [8.25].

⁹¹¹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001).

⁹¹² Ibid ES11.

⁹¹³ Ibid 100–101, rec 28.

⁹¹⁴ Ibid 26–33, rec 4.

particularly contact arrangements”.⁹¹⁵ They continued, “[w]here violence or abuse is present, these relationships may be harmful to the children and should not continue. In most cases, however, particularly with the right kind of support, there is potential for maintaining parenting relationships, and for agreement between adults”.⁹¹⁶ The perspective of men’s rights advocates on the Group’s deliberations is also clearly apparent in the following statement:⁹¹⁷

A number of significant matters that are outside the Terms of Reference of this inquiry are noted, for referral to appropriate bodies. These matters include suicide of men following separation, the child support formula and male victims of family violence.

A further family law inquiry was concluded in 2003 with the release of the report of the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story*.⁹¹⁸ The primary task was to evaluate factors influencing post-separation parenting time, in light of the child’s best interests.⁹¹⁹ This included a rebuttable presumption of equal shared parental responsibility⁹²⁰ for major decision-making about children,⁹²¹ with a clear exception for cases involving “entrenched conflict, family violence, substance abuse, or established child abuse”.⁹²²

In doing so, the report raised the question, “is changing the *Family Law Act* enough?”.⁹²³ It noted the potential “educative effect” of legislation,⁹²⁴ concluding that “community perception of legislation is as critical to its success as its actual content”.⁹²⁵ The report noted “widespread community dissatisfaction” with the family law system,⁹²⁶ stating that “the dynamics and

⁹¹⁵ Ibid ES19 (emphasis added).

⁹¹⁶ Ibid 3.

⁹¹⁷ Ibid ES24.

⁹¹⁸ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003).

⁹¹⁹ Ibid xvii, Terms of Reference.

⁹²⁰ Ibid 41, rec 1.

⁹²¹ Ibid 41–42, rec 3.

⁹²² Ibid 41, rec 2.

⁹²³ Ibid [2.74].

⁹²⁴ Ibid [2.74].

⁹²⁵ Ibid [2.77].

⁹²⁶ Ibid [4.1].

emotions of family separation make adversarial litigation inappropriate”.⁹²⁷ The Committee also considered evidence from children dissatisfied about their limited involvement in decisions affecting them post-separation.⁹²⁸ Citing Article 12 of the *Convention on the Rights of the Child*,⁹²⁹ the report recommended that children, regardless of age, should be consulted in significant decisions about their lives.⁹³⁰

As with the Family Law Pathways Advisory Group’s report in 2001,⁹³¹ the tension between issues of concern to feminist and men’s rights advocates was highly evident in this report. The Committee expressed concerns about the fragmentation between state child protection and federal family law jurisdictions, stating that limited information sharing between jurisdictions and a lack of investigatory capacity in the family courts⁹³² can cause children subject to violence and sexual abuse to “fall through the jurisdictional gaps”.⁹³³ To address these issues, the report recommended the establishment of a non-adversarial, child-inclusive Commonwealth Families Tribunal with jurisdiction over parenting and property matters,⁹³⁴ and the power to investigate allegations of family violence and other forms of child abuse.⁹³⁵ The authors envisaged that, once the Tribunal was operational, the role of the family courts would be limited to “cases involving entrenched conflict, family violence, substance abuse and child abuse including sexual abuse” as well as enforcement and some review of Tribunal decisions.⁹³⁶ It is notable, however, that as cases concerning allegations of family violence and

⁹²⁷ Ibid [4.3].

⁹²⁸ Ibid [4.137].

⁹²⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS (entered into force 2 September 1990). Article 12 states “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

⁹³⁰ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.158].

⁹³¹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001).

⁹³² Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.20]–[4.27].

⁹³³ Ibid [4.23].

⁹³⁴ Ibid 104, rec 12–13.

⁹³⁵ Ibid 105–106, rec 17.

⁹³⁶ Ibid 105, rec 16.

other forms of child abuse did at that time—and do today—comprise the “core business” of family law matters,⁹³⁷ the proposed Tribunal was unlikely to significantly address extant child safety concerns.

Regarding enhancing the enforcement provisions in the *Family Law Act*, the report proposed the incorporation of “enforcement Registrars” in the new Families Tribunal, granting them authority to issue orders for compensatory parenting time and referrals to parenting programs to address post-order disputes efficiently.⁹³⁸ While maintaining punitive measures like fines or imprisonment for breaches,⁹³⁹ the Committee recommended the addition of several new “contact enforcement options”, such as a cumulative list of consequences, reasonable financial penalties for repeated breaches, and, on a third breach within a pattern of deliberate defiance, consideration of a parenting order in favour of the other parent.⁹⁴⁰ The Committee recommended the equal application of consequences for deliberate breaches, whether a parent fails to make themselves available or wilfully refuses to facilitate contact.⁹⁴¹ They also acknowledged legitimate reasons for contact denial, including genuine fear of violence or abuse,⁹⁴² reflected in the provision of a “reasonable excuse” for contravention.⁹⁴³ On the issue of judicial accountability, the Committee considered the lack of any review of the consequences of final family law orders, outside of the appeal process.⁹⁴⁴ However, the Attorney-General’s Department informed the inquiry:⁹⁴⁵

Family Court judges are as accountable for their judgements as are any other judges in the federal system or the state system, with the possible exception of ... publication of judgements of the court ... If we were to attempt to interpose some

⁹³⁷ S Murray and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011), 74.

⁹³⁸ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.142].

⁹³⁹ Ibid [4.142].

⁹⁴⁰ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) 106–107, rec 21.

⁹⁴¹ Ibid [4.142].

⁹⁴² Ibid [6.113].

⁹⁴³ *Family Law Act 1975* (Cth) (comp 16 December 1995) s 70NE.

⁹⁴⁴ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.28]–[4.35].

⁹⁴⁵ Ibid [4.31].

other form of accountability, it would have significant implications for the separation of powers, the doctrine under the Constitution.

Concurring with Chisholm's recommendation of a study of the long-term impacts of the outcomes of family law decisions,⁹⁴⁶ the Committee stated that "family law judges, possibly more than others, need to be much more conscious of the societal and non-legal consequences of the decisions they make".⁹⁴⁷ It recommended "that a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs".⁹⁴⁸ At the time of writing, there was no indication that any such study had commenced.

The next noteworthy family law reform initiative came to fruition in 2006 with the passing of the *Family Law Amendment (Shared Parental Responsibility) Act*,⁹⁴⁹ which amended the *Family Law Act*, commencing on July 1 of that year. The 2006 reforms relied heavily on a national network of Family Relationship Centres, intended to strengthen family relationships and keep families intact, as well as facilitating positive separation arrangements.⁹⁵⁰ The 2006 reforms introduced a legal requirement that parents attend family dispute resolution before filing an application for orders in the family courts,⁹⁵¹ although this requirement could be waived when a party had concerns about family violence or other forms of child abuse.⁹⁵² The reforms exacerbated a key tension in family law that had begun with the 1995 reforms, that of weighing the importance of the child maintaining a 'meaningful' relationship with both parents, versus protecting them from harm.⁹⁵³ The revised *Family Law Act* moved the principle of protecting children from physical and psychological violence to second place in the list of judicial 'best interests' considerations,⁹⁵⁴ preceded only by "ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, *to the maximum*

⁹⁴⁶ Ibid [4.29]–[4.30].

⁹⁴⁷ Ibid [4.32].

⁹⁴⁸ Ibid 106, rec 19.

⁹⁴⁹ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

⁹⁵⁰ Patrick Parkinson, 'The Idea of Family Relationship Centres in Australia' (2013) 51(2) *Family Court Review* 195–213, 196.

⁹⁵¹ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60I.

⁹⁵² Ibid (comp 25 May 2006) s 60I(9).

⁹⁵³ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6.

⁹⁵⁴ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60B(1)(b).

extent consistent with the best interests of the child".⁹⁵⁵ The reforms placed additional emphasis on meaningful relationships via a presumption of equal shared parental responsibility for decision-making, although again this could be waived in circumstances of family violence or other forms of child abuse.⁹⁵⁶

Of greatest significance for family jurisprudence today, the newly constructed *Family Law Act* contained the 'friendly parent' provision,⁹⁵⁷ which stipulated that an "additional consideration" when determining a child's best interests was "the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent".⁹⁵⁸ While this provision was repealed as part of the subsequent 2012 family violence reforms⁹⁵⁹ to the *Family Law Act*, the concept of the 'friendly parent' remains embedded in the culture of the Australian family courts and continues to influence the advice of lawyers, recommendations of experts and decisions of judges.⁹⁶⁰ The 2006 reforms threw open the door to the concept of 'parental alienation',⁹⁶¹ positioning parents who alleged family violence, and in particular child sexual abuse, at the nexus of the relationship-versus-safety tension.⁹⁶² In the context of the amended *Family Law Act*, protective parents' safety concerns were easily construed as obstructive and acting in contradiction of the 'shared parenting' spirit of the reforms.⁹⁶³ Together, the newly reformed *Family Law Act* and the deployment of contested research into 'parental alienation' created a paradigm in which, "the father [became] a victim and the mother an abuser, denying her children their rightful relationship with their father".⁹⁶⁴

⁹⁵⁵ Ibid (comp 25 May 2006) s 60B(1)(a) (emphasis added). The current *Family Law Act* frames the relationship between children and their parents as one of a series of issues in determining a child's best interests. The court must consider: "the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so": *Family Law Act 1975* (Cth) (comp 12 June 2024) s 60CC (2)(e).

⁹⁵⁶ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 10.

⁹⁵⁷ Camilla Nelson, *"They Thought It Was Safe—but It Wasn't": Recognising Children's Rights as a Means of Securing Children's Safety in Australia's Family Law System* (Report, Whitlam Institute, May 2022) 8.

⁹⁵⁸ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60CC(3)(c).

⁹⁵⁹ *Family Law Legislation Amendment (Family Violence and Other Measures) Act (No 189) 2011* (Cth).

⁹⁶⁰ Camilla Nelson, *"They Thought It Was Safe—but It Wasn't": Recognising Children's Rights as a Means of Securing Children's Safety in Australia's Family Law System* (Report, Whitlam Institute, May 2022) 9.

⁹⁶¹ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6.

⁹⁶² Ibid 7.

⁹⁶³ Ibid 7.

⁹⁶⁴ Ibid 7.

In 2009, the Council of Australian Governments launched a long-term national framework, *Protecting Children is Everyone's Business*,⁹⁶⁵ in response to rising cases of child abuse and neglect. The 12-year framework offered a blueprint for integrated and improved child protection services “across all systems and all jurisdictions”—be they state, territory or national governments—with the support of non-government entities and local communities.⁹⁶⁶ It adopted a preventative approach, noting that “[d]isadvantage and vulnerability can be concentrated in particular neighbourhoods,” creating the need for “area-based interventions” to prevent child abuse and neglect from occurring in the first place.⁹⁶⁷

The framework outlined six high-level outcomes that emphasised early intervention for vulnerable families, creating safe environments for children and providing support to victims.⁹⁶⁸ It also laid out the strategies to achieve these outcomes through a series of three-year Action Plans, and defined the indicators to measure their success.⁹⁶⁹ Under Outcome Three, the framework identified the key risk factors that increase vulnerability to child abuse and neglect, as a way to identify the families most likely to benefit from early intervention.⁹⁷⁰ The major risk factors were families facing domestic violence and those in which one or both parents had a recorded history of substance or alcohol abuse or mental health problems.⁹⁷¹ Outcome Five was dedicated to protecting Indigenous children from harm, underlining the intergenerational cycles of disadvantage and trauma that have historically burdened Indigenous families.⁹⁷² Indigenous-specific strategies to combat child abuse and neglect included expanding access to family health services in Indigenous communities and linking community and family programs for at-risk children with Indigenous Child and Family Centres.⁹⁷³

The filicide of four-year-old Darcey Freeman in January 2009 sparked a “public outcry” that caused the government to commission a review of the capacity of the federal family courts to

⁹⁶⁵ *Protecting Children Is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (Report, 2009).

⁹⁶⁶ *Ibid* 9.

⁹⁶⁷ *Ibid* 17.

⁹⁶⁸ *Ibid* 11.

⁹⁶⁹ *Ibid* 11.

⁹⁷⁰ *Ibid* 21.

⁹⁷¹ *Ibid* 21.

⁹⁷² *Ibid* 28.

⁹⁷³ *Ibid* 28–29.

address family violence,⁹⁷⁴ encompassing the Family Court of Australia and the Federal Magistrates Court.⁹⁷⁵ The review focused on examining the practices and procedures encouraging the disclosure of family violence, ensuring the appropriate sharing of information within the courts.⁹⁷⁶ The Terms of Reference also required assessment of whether “legislation and procedures support best-practice for handling family violence matters”.⁹⁷⁷ The report was publicly released in January 2010. In it the author, Richard Chisholm, emphasised that a principle underpinning his recommendations was that, “[t]he family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding”.⁹⁷⁸

To this end, Chisholm recommended amending section 60CC(3) of the *Family Law Act*,⁹⁷⁹ as it determined that the ‘friendly parent’ provision “has had the undesirable consequence in some cases of discouraging some parents affected by violence from disclosing that violence to the family court”.⁹⁸⁰ The report also recommended that the federal family courts review “their procedures and practices in parenting cases, especially those involving issues of family violence”,⁹⁸¹ and “the extent to which judicial officers ... use and benefit from the *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*”.⁹⁸² The report highlighted the importance of family violence expertise for those involved in children’s cases and made numerous recommendations concerning family violence education for legal professionals and judicial officers.⁹⁸³ In regard to the requirement that parties disclose safety risks to the courts, Chisholm stated it was “not working”.⁹⁸⁴ He recommended section 60K of

⁹⁷⁴ R Field et al., ‘Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?’ (2016) 25 *Judicial Administration* 212–236, 213.

⁹⁷⁵ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 51.

⁹⁷⁶ *Ibid* 18.

⁹⁷⁷ *Ibid* 18.

⁹⁷⁸ *Ibid* 5.

⁹⁷⁹ *Ibid* 104, recs 3.3–3.5.

⁹⁸⁰ *Ibid* 103.

⁹⁸¹ *Ibid* 69, rec 2.2

⁹⁸² *Ibid* 17, rec 4.8. Best practice principles are still available to judicial officers in the federal family courts. The most recent version is: Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (Practice Guidelines, 2023).

⁹⁸³ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 166–168, 172, recs 4.3, 4.4, 4.6.

⁹⁸⁴ *Ibid* 6.

the *Family Law Act* be amended to instead require the family courts to conduct a risk assessment “in each parenting case”.⁹⁸⁵

The release of Chisholm’s *Family Courts Violence Review* coincided with the publication of the Family Law Council’s own report, which had been commissioned to provide strategies to “improve coordination” between responses to family violence by state and territory courts, and the family courts.⁹⁸⁶ The Council explored the identification of, and response to, family violence within the family law system, information sharing between state and territory authorities and the family courts, and the means to “ensure family consultants, registrars and judicial officers are aware of family violence issues in each case and have regard to those issues”.⁹⁸⁷ Their report noted the potential for inconsistency between state and territory protection orders and federal family court orders regulating children’s contact with their parents.⁹⁸⁸ It recommended that information sharing be improved between jurisdictions and that legislative amendments be made requiring parties to inform the court of any family violence orders or child welfare arrangements.⁹⁸⁹ The report also recommended the creation of a “family violence common knowledge base” to be available to family law professionals, and the amendment of section 69ZX(3) of the *Family Law Act* to enable judicial officers to take judicial notice of it.⁹⁹⁰ In regard to the ‘friendly parent’ provision, the Council recommended that:⁹⁹¹

Consideration be given on how to educate the Australian public about certain widespread misunderstandings of the *Family Law Act* including ... [*r*]ecurrent *gossip* that notification of family violence may lead to a judicial perception that the notifier is an “unfriendly parent”.

⁹⁸⁵ Ibid 11, rec 2.3.

⁹⁸⁶ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 18.

⁹⁸⁷ Ibid 18.

⁹⁸⁸ Ibid 57.

⁹⁸⁹ Ibid 61–62, rec 5.

⁹⁹⁰ Ibid 9–10, rec 2.

⁹⁹¹ Ibid 7–8 (emphasis added).

The Australian Institute of Family Studies' *Evaluation of the 2006 Family Law Reforms*⁹⁹² constituted the third major review of the family law system publicly released in January 2010, alongside Professor Chisholm's *Family Courts Violence Review*⁹⁹³ and the Family Law Council's *Improving Responses to Family Violence in the Family Law System*.⁹⁹⁴ In releasing the reports, Attorney-General Robert McClelland acknowledged that together the reviews highlighted "issues relating to the screening and handling of family violence as well as legislative provisions that potentially deter the disclosure of allegations".⁹⁹⁵ In analysing the impacts of the 2006 amendments to the *Family Law Act*, the Australian Institute of Family Studies' review employed data from 28,000 family members and professionals "involved or potentially involved in the family law system", constituting the most extensive evidence base available, concerning the Australian family law system at that time.⁹⁹⁶ The Institute found that, while the 2006 amendments had brought about some improvements in encouraging "a shift away from an automatic recourse to legal solutions",⁹⁹⁷ family law system responses to family violence and other forms of child abuse were still lacking.⁹⁹⁸

The review found that the primary users of family courts and post-separation services were families dealing with family violence, safety concerns, mental health issues and substance misuse problems,⁹⁹⁹ with around 20% expressing ongoing safety concerns related to contact with the other parent, often linked to a history of physical or emotional harm.¹⁰⁰⁰ Despite the amended *Family Law Act* allowing the waiver of mandatory dispute resolution in cases of family violence or other forms of child abuse,¹⁰⁰¹ family dispute resolution was employed by some families in the context of "very significant concerns about violence and safety".¹⁰⁰² Ultimately, the review identified poor understandings on the part of family law professionals

⁹⁹² Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009).

⁹⁹³ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009).

⁹⁹⁴ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009).

⁹⁹⁵ 'Release of Family Law Reviews', (Media Release, Attorney-General Robert McClelland, 28 January 2010).

⁹⁹⁶ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) E1.

⁹⁹⁷ Ibid E4.

⁹⁹⁸ Ibid E4.

⁹⁹⁹ Ibid E4.

¹⁰⁰⁰ Ibid E2.

¹⁰⁰¹ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60I(9).

¹⁰⁰² Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 364.

of the dynamics of family violence and other forms of child abuse, alongside perceptions on the part of family members of the “pressure to reach agreements”, despite their concerns about their children’s safety.¹⁰⁰³ The reviewers determined that some facets of the legislative amendments “discouraged concerns about family violence and child abuse from being raised”,¹⁰⁰⁴ particularly the requirement that courts order costs against parties found to have “knowingly made a false allegation or statement in proceedings”,¹⁰⁰⁵ and the ‘friendly parent’ provision.¹⁰⁰⁶

The effect of the ‘friendly parent’ provision—embodying the relationship-versus-safety tension that continues to plague Australian family law—was evident in the prevalence of post-reform orders for equal time and equal parental responsibility for decision-making in cases of alleged violence. The evaluation showed that the system *had* improved its capacity to identify families at risk of family violence and other forms of child abuse.¹⁰⁰⁷ However, children in families with a history of violence, where one parent had been alleged to pose ongoing safety risks, were subject to equal time with both parents as often as children about whom no safety concerns had been reported.¹⁰⁰⁸ This was true whether parents had negotiated arrangements privately, employed post-separation services such as Family Relationship Centres, or engaged legal services.¹⁰⁰⁹

The evaluation also found that the presumption of equal shared parental responsibility for decision-making¹⁰¹⁰ placed pressure on parents holding safety concerns, as it was hungrily interpreted by lawyers and parents as requiring orders for equal *time* with children.¹⁰¹¹ Despite the reformed legislation’s stated importance of protecting children from harm¹⁰¹² and the provision allowing that the presumption does not apply in instances of family violence and

¹⁰⁰³ Ibid 15.

¹⁰⁰⁴ Ibid 15.

¹⁰⁰⁵ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 117AB.

¹⁰⁰⁶ Ibid (comp 25 May 2006) s 60CC(3)(c).

¹⁰⁰⁷ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 364.

¹⁰⁰⁸ Ibid 364.

¹⁰⁰⁹ Ibid 364.

¹⁰¹⁰ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 61DA.

¹⁰¹¹ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 209–210.

¹⁰¹² *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60B(1)(b).

child abuse,¹⁰¹³ the evaluation found that 75% of post-reform cases concerning allegations of *both* family violence and other forms of child abuse—including sexual abuse—resulted in equal parental responsibility, either via judicial orders or consent orders agreed to by both parties.¹⁰¹⁴

Later in 2010, the Australian Law Reform Commission and the New South Wales Law Reform Commission released a further report, *Family Violence—A National Legal Response*,¹⁰¹⁵ which had been commissioned to explore issues of family violence arising from the 2009 report of the newly formed National Council to Reduce Violence against Women and their Children.¹⁰¹⁶ The Terms of Reference for the joint Law Reform Commissions’ inquiry included consideration of “what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children” in relation to:¹⁰¹⁷

- 1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws; and
- 2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

The authors considered that the “sexual assault of children” sat at the “intersection” of these Terms of Reference.¹⁰¹⁸ It emphasised that sexual assault in a family violence context “comprises the majority of sexual assaults experienced by women and children”, yet is often unreported, and unlikely to result in conviction.¹⁰¹⁹ The authors highlighted that “intimate and familial sexual assaults remain the most hidden in general—and from the view of the legal system in particular—despite forming the largest category of sexual assaults”.¹⁰²⁰ The report

¹⁰¹³ Ibid (comp 25 May 2006) s 61DA(2).

¹⁰¹⁴ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 190.

¹⁰¹⁵ *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010).

¹⁰¹⁶ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (Report, March 2009).

¹⁰¹⁷ *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 11.

¹⁰¹⁸ Ibid [1.63].

¹⁰¹⁹ Ibid [1.60].

¹⁰²⁰ Ibid [1.60].

explored the misconceptions that have underpinned Australian law since its inception, and which paint women and children who make allegations of sexual assault as inherently unreliable, noting the resilience of these arguments to extensive legislative reform.¹⁰²¹ The authors also highlighted the erroneous belief that delay in reporting sexual assault indicates evidence of fabrication, stating “the resilience of this myth as an indicator of truth stands counter to the evidence”.¹⁰²² In particular, the report noted Hale’s 17th century proposition that allegations of sexual assault are easily made and difficult to disprove,¹⁰²³ noting that:¹⁰²⁴

It is a powerful notion not only in positioning women and children as potential liars, but feeds into other conceptions of particular women as vindictive or vengeful—for example, a woman who makes allegations against a former spouse might be characterised in this way ... It is one basis for the ever present concern about “false” allegations.

Most significantly, the report stated that despite efforts to address these erroneous beliefs, “[t]here remain ongoing connections, however, between these historical notions demonstrated in prevailing community attitudes and in the application of the law in some instances”.¹⁰²⁵ The inquiry itself was also criticised extensively in submissions reflecting the values of men’s rights advocates, specifically for its focus, via its Terms of Reference, on gendered violence and its use of the phrase “women and their children”.¹⁰²⁶

The Commissions recommended the implementation and review of family violence education for all professionals working in the family law, family violence and child protection sectors,¹⁰²⁷ as well as measures to improve risk identification by family dispute resolution practitioners and family lawyers.¹⁰²⁸ It also recommended amendments to state and territory family violence education syllabi, and to the *Family Law Act* itself, detailing the “nature, features and dynamics of family violence”, including that “it is predominantly committed by men; it can occur in all

¹⁰²¹ Ibid [24.55], [24.67].

¹⁰²² Ibid [24.63].

¹⁰²³ M Hale, *Historia Placitorum Coronae* (Nutt and Gosling, 1734), cited in Gilbert Geis, 'Revisiting Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10(5) *Criminal Law Journal* 319–329, 328.

¹⁰²⁴ *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) [24.57].

¹⁰²⁵ Ibid [24.65].

¹⁰²⁶ Ibid [1.71]–[1.73] (emphasis added).

¹⁰²⁷ Ibid 1465–1477, recs 31.1–31.5.

¹⁰²⁸ Ibid 33, recs 21.1–21.3.

sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children”.¹⁰²⁹ The report also drew attention to the impacts of family violence on diverse populations, stating:¹⁰³⁰

[F]amily violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

The *National Plan to Reduce Violence against Women and their Children*,¹⁰³¹ released in early 2011, was Australia’s primary policy framework against family violence and sexual assault, which it acknowledged as “gendered crimes”,¹⁰³² aiming for a significant reduction in violence by 2022.¹⁰³³ Its guiding principles included prioritising victims’ needs and focusing on children’s safety and long-term wellbeing.¹⁰³⁴ Our Watch, a key organisation, was established under the Plan to educate the community on respectful relationships.¹⁰³⁵

The Plan included a series of three-year Action Plans. The First Action Plan (2010–2013) focused on improving access to justice,¹⁰³⁶ with initiatives like increased legal funding and new dispute resolution models to “improve the family law system’s response to violence”.¹⁰³⁷ It also led to the development of AVERT, a training package for legal practitioners, and DOORS, a risk assessment tool.¹⁰³⁸ The Second Action Plan (2013–2016) made no mention of the family law system beyond establishing Action 17, focusing on collaboration and information sharing between family and state courts, in family violence matters.¹⁰³⁹ The Third Action Plan (2016–2019) aimed to “enhance services in the family law system for families experiencing, or at risk

¹⁰²⁹ Ibid 39, recs 7.2–7.3.

¹⁰³⁰ Ibid 39, recs 7.2–7.3.

¹⁰³¹ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

¹⁰³² Ibid 1.

¹⁰³³ Ibid 10.

¹⁰³⁴ Ibid 11.

¹⁰³⁵ 'Preventing Violence against Women', *Our Watch* (Web Page, 2024) <<https://www.ourwatch.org.au/>>.

¹⁰³⁶ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010) 27, Strategy 5.1.

¹⁰³⁷ Ibid 27.

¹⁰³⁸ Council of Australian Governments, *Moving Ahead: National Plan to Reduce Violence against Women and Their Children 2010–2022* (Second Action Plan 2013–2016, 2013) 54.

¹⁰³⁹ Ibid 38, Action 17.

of experiencing, violence”, through improved risk assessment and better integration of services between state and federal systems.¹⁰⁴⁰ It committed to “implement supported recommendations” of the Family Law Council’s 2015 and 2016 reports,¹⁰⁴¹ in order to “improve interactions between the family law, child protection and family violence systems and to enhance the family law system’s capacity to identify, assess and respond to domestic and family violence”.¹⁰⁴² The Third Action Plan also planned to improve information sharing between state and territory courts and the family courts.¹⁰⁴³ The Fourth Action Plan (2019–2022)¹⁰⁴⁴ made no mention of family law.

Just two days after the filicide of the Glendinning children in December 2011, another round of major amendments to the *Family Law Act* received Royal Assent. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*¹⁰⁴⁵ was intended to “prioritise the safety of children in parenting matters” and provide “better protection for children and families at risk of violence and abuse” in the federal family courts.¹⁰⁴⁶ The Bill’s Explanatory Memorandum acknowledged reports¹⁰⁴⁷ indicating that the *Family Law Act*, as amended in 2006,¹⁰⁴⁸ “fails to adequately protect children and other family members from family violence and child abuse”.¹⁰⁴⁹ The revised *Family Law Act*,¹⁰⁵⁰ which came into effect in June 2012, included an expanded definition of family violence, to encompass “violent,

¹⁰⁴⁰ Council of Australian Governments, *The National Plan to Reduce Violence against Women and Their Children 2010–2022* (Third Action Plan 2016–2019, 2016) 20, Action 3.10.

¹⁰⁴¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016).

¹⁰⁴² Council of Australian Governments, *The National Plan to Reduce Violence against Women and Their Children 2010–2022* (Third Action Plan 2016–2019, 2016) 28, Action 5.1.

¹⁰⁴³ Ibid 29, Action 5.4.

¹⁰⁴⁴ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Fourth Action Plan 2019–2022, 2019).

¹⁰⁴⁵ *Family Law Legislation Amendment (Family Violence and Other Measures) Act (No 189) 2011* (Cth).

¹⁰⁴⁶ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 1.

¹⁰⁴⁷ See for example Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009); Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009).

¹⁰⁴⁸ *Family Law Act 1975* (Cth) (comp 25 May 2006).

¹⁰⁴⁹ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 1.

¹⁰⁵⁰ *Family Law Act 1975* (Cth) (comp 17 January 2012).

threatening or any other type of behaviour that *coerces or controls* a family member or which causes the family member to be fearful”.¹⁰⁵¹

It also noted that “a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence”.¹⁰⁵² The amending legislation included provisions requiring family law professionals, including family consultants and dispute resolution practitioners, to explain the amended legislation’s privileging of the safety of children to parties when attempting to make parenting agreements.¹⁰⁵³ The new *Act* also clarified arrangements for information sharing with state and territory child protection bodies, and facilitated their participation in family law proceedings when suitable.¹⁰⁵⁴ Of greatest significance, the amending legislation attempted to resolve the tension between a child’s “right to a meaningful relationship” with both parents and the necessity of protecting them from abuse. In what was arguably a nod to men’s rights advocates, the Bill’s Explanatory Memorandum noted that:¹⁰⁵⁵

The Family Violence Bill retains the substance of the shared parenting laws introduced in the *Family Law Amendment (Shared Responsibility) Act 2006* (Cth) and continues to promote a child’s right to a meaningful relationship with both parents where this is safe for the child.

In doing so, the revised *Family Law Act* retained the “primary considerations” for judicial officers in determining a child’s best interests as:¹⁰⁵⁶

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

¹⁰⁵¹ Ibid (comp 17 January 2012) s 4AB(1) (emphasis added).

¹⁰⁵² Ibid (comp 17 January 2012) s 4AB(3).

¹⁰⁵³ Ibid (comp 17 January 2012) s 60D.

¹⁰⁵⁴ Ibid (comp 17 January 2012) ss 60CH, 60CI.

¹⁰⁵⁵ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 2.

¹⁰⁵⁶ *Family Law Act 1975* (Cth) (comp 17 January 2012) s 60CC(2A).

The amending legislation inserted a section into the *Act* which stated that, in determining a child's best interests, greater weight is to be afforded to protecting the child from harm than the benefit of any meaningful relationship.¹⁰⁵⁷ Unfortunately, this "legislative tinkering" has failed to resolve the tension between maintaining parental relationships and keeping children safe from abuse.¹⁰⁵⁸ The amending legislation also repealed the 'friendly parent' provision introduced in the 2006 amendments to the *Family Law Act*,¹⁰⁵⁹ acknowledging its negative impact on discouraging disclosures of family violence and child abuse.¹⁰⁶⁰ By eliminating the criterion related to each parent's willingness and ability to encourage the child's relationship with the other parent from the 'best interests' considerations, the Explanatory Memorandum highlighted that concerns of family violence and child abuse were not being disclosed by parties, due to their fear of being labelled an 'unfriendly parent'.¹⁰⁶¹ Despite its repeal, as the cases analysed in Chapters Five and Six demonstrate, the 'friendly parent' provision remains a powerful cultural force within the family law system.

In February 2012, the Family Law Council released two further reports, one on improving the family law system for Aboriginal and Torres Strait Islander peoples, and the second on improving the family law system for culturally and linguistically diverse clients.¹⁰⁶² Both reports recommended the development of cultural competency training and 'good practice guides' for family law professionals.¹⁰⁶³ Concerning Aboriginal and Torres Strait Islander peoples, the Council referred to numerous submissions highlighting the cultural incompetence of court personnel, particularly family report writers, and the cultural inappropriateness of court processes.¹⁰⁶⁴ It cited reluctance by Aboriginal and Torres Strait Islander peoples to disclose family violence due to distrust of police and courts, and fear of repercussions from family and

¹⁰⁵⁷ Ibid (comp 17 January 2012) s 60CC(2).

¹⁰⁵⁸ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 11.

¹⁰⁵⁹ *Family Law Act 1975* (Cth) (comp 25 May 2006) s 60CC(3)(c).

¹⁰⁶⁰ Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) sch 1 [31].

¹⁰⁶¹ Ibid sch 1 [31].

¹⁰⁶² Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

¹⁰⁶³ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 97–98, rec 2; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) 90–93, rec 2.

¹⁰⁶⁴ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 51–52.

community.¹⁰⁶⁵ The report noted a “need to address resistance to engagement” with the family law system within Aboriginal and Torres Strait communities.¹⁰⁶⁶

The second report stated that culturally and linguistically diverse people avoided engaging with family relationship services for fear this would lead to separation, and avoided the family law system over concerns that involvement could invoke intervention from police or child protection authorities, and even the placement of their children into foster care.¹⁰⁶⁷ The Council recommended community education for culturally and linguistically diverse people about “the family law system’s services, including the role of services, how to access them and what the client should expect from them”.¹⁰⁶⁸

4.3 Family Law Reform Against the Backdrop of the Royal Commission

In 2014, the Productivity Commission published its report, *Access to Justice Arrangements*, which focused on equality and justice in civil dispute resolution.¹⁰⁶⁹ The report described distinct barriers to justice for families experiencing family violence and other risks to children’s safety.¹⁰⁷⁰ It recommended significant “jurisdictional and structural” change aimed at addressing jurisdictional fragmentation in the family law system.¹⁰⁷¹ The report also highlighted, as a matter of priority, the need for improvements in family dispute resolution processes and increased use of appropriate alternative pathways for matters involving violence.¹⁰⁷² It recommended a review of extant family dispute resolution practices and of the support provided to families for whom family dispute resolution is not appropriate.¹⁰⁷³ The filicide of 11-year-old Luke Batty in February 2014 prompted the establishment in 2015 of the Victorian Royal Commission into Family Violence, which was tasked with identifying best-

¹⁰⁶⁵ Ibid 49.

¹⁰⁶⁶ Ibid 96.

¹⁰⁶⁷ Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) 38–39.

¹⁰⁶⁸ Ibid 8, rec 1.

¹⁰⁶⁹ Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014).

¹⁰⁷⁰ Ibid 855.

¹⁰⁷¹ Ibid 869, rec 24.3.

¹⁰⁷² Ibid 860.

¹⁰⁷³ Ibid 861, rec 24.1.

practice approaches to preventing, identifying and responding to family violence.¹⁰⁷⁴ The Final Report of the Victorian Royal Commission was published in March the following year.

The Victorian Royal Commission received numerous submissions from survivors of violence, including children, who stated that they had been put at risk by federal family court orders that mandated children's contact with perpetrators of violence.¹⁰⁷⁵ Many mothers stated they had been re-victimised within the family law system when their reports of family violence were disbelieved, or their ex-partner used family law processes to continue to control them and their children.¹⁰⁷⁶ While the Commission received extensive submissions from the Victorian courts and the federal family courts, it was subject to legislation restricting it from inquiring into the exercise of powers of any Victorian court or judicial officer,¹⁰⁷⁷ and it elected to apply this restriction to the federal family courts as well.¹⁰⁷⁸ In regard to the family courts, the Victorian Royal Commission noted that:¹⁰⁷⁹

Various commissions of inquiry and advisory boards have made recommendations to improve the responsiveness of the family law system to family violence and to overcome the problems caused by the intersections between state and federal courts. Many of these recommendations have not been implemented. It is disappointing that much of what has been recommended in past inquiries, which could substantially improve the experience of family violence victims and their children, has not been implemented and has had to be reiterated to the Commission.

In its submission to the Victorian Royal Commission, the Family Law Section of the Law Council of Australia—the principal Australian body representing lawyers who practise family law—stated that protection order applications are sometimes strategically used in family law disputes.¹⁰⁸⁰ The Commissioners countered this assertion, noting there is little empirical evidence supporting intentional false allegations.¹⁰⁸¹ They highlighted “significant

¹⁰⁷⁴ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 1.

¹⁰⁷⁵ See for example *ibid* 242–243, 262–263.

¹⁰⁷⁶ *Ibid* 23.

¹⁰⁷⁷ *Inquiries Act 2014* (Vic) s 123.

¹⁰⁷⁸ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 9.

¹⁰⁷⁹ *Ibid* 210.

¹⁰⁸⁰ Family Law Section—Law Council of Australia, Submission no 863 to State of Victoria, *Royal Commission into Family Violence* (31 May 2015) 4, cited in *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 200.

¹⁰⁸¹ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

underreporting of family violence”,¹⁰⁸² citing Flood’s literature review of Australian and international research, which determined that false allegations of family violence in the family courts are rare, and no more likely to be made by women than men.¹⁰⁸³ The Commissioners concluded that the operation of inaccurate beliefs about false allegations within the legal system “may imperil the safety of victims of family violence and their children”.¹⁰⁸⁴ The Final Report of the Victorian Royal Commission also highlighted the “fragmentation between state courts and the federal family law courts”, which survivors of violence told the inquiry often necessitated them navigating legal proceedings in multiple courts when seeking protection.¹⁰⁸⁵ The Commissioners recommended that the Victorian Government advocate for reduced jurisdictional fragmentation in matters involving family law and family violence,¹⁰⁸⁶ a national family violence risk assessment framework,¹⁰⁸⁷ and a database accessible by state, territory and federal courts and government agencies, containing family law, family violence and child protection orders, court judgements and transcripts.¹⁰⁸⁸

Families with complex needs and the intersection of the family law and child protection systems became a focus in 2015 and 2016, as the Family Law Council released two reports on the intersection of the family law and child protection systems.¹⁰⁸⁹ The Interim Report recognised the difficulties for families navigating multiple systems in addressing their needs around family law, family violence and child protection.¹⁰⁹⁰ It recommended amending sections 69J and 69N of the *Family Law Act*¹⁰⁹¹ to “remove any doubt that children’s courts,

¹⁰⁸² Belinda Fehlberg et al., *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015), cited in *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

¹⁰⁸³ Michael Flood, *False Allegations of Sexual Assault and Domestic Violence* (Report prepared for VicHealth, 25 June 2014), cited in *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201.

¹⁰⁸⁴ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 214.

¹⁰⁸⁵ *Ibid* 32.

¹⁰⁸⁶ *Ibid* 217, rec 129.

¹⁰⁸⁷ *Ibid* 218, rec 134.

¹⁰⁸⁸ *Ibid* 218, rec 134.

¹⁰⁸⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016).

¹⁰⁹⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 24.

¹⁰⁹¹ *Family Law Act 1975* (Cth).

no matter how constituted, are able to make family law orders”.¹⁰⁹² The report also endorsed improved information sharing between the family courts, and state and territory courts exercising jurisdiction over child protection and family violence matters,¹⁰⁹³ and the development of a national database of court orders.¹⁰⁹⁴

The Final Report recommended improved risk assessment and management within the family law system,¹⁰⁹⁵ enhancing the “family violence competency” of family law professionals, and introducing mandatory child sexual assault training for lawyers accredited as family law specialists.¹⁰⁹⁶ Interestingly, the final report also recommended the establishment of a “young person advisory panel to assist in the design of child-focused family law services”.¹⁰⁹⁷ As well, the final report recommended research examining “[t]he dynamics of matters that resolve by consent, including the extent to which the arrangements consented to respond to any matters of risk that have been raised prior to the consent orders being made”.¹⁰⁹⁸ Both reports emphasised the need to implement recommendations of the Family Law Council’s 2009 and 2012 reports,¹⁰⁹⁹ aimed at facilitating information sharing between commonwealth and state and territory jurisdictions,¹¹⁰⁰ and addressing the needs of Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities in the family courts.¹¹⁰¹

Amid much public debate, the Senate Finance and Public Administration References Committee conducted an inquiry into domestic violence in Australia from 2014 to 2015,

¹⁰⁹² Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 103–104, rec 1.

¹⁰⁹³ Ibid 105–106, rec 5.

¹⁰⁹⁴ Ibid 105–106, rec 5.

¹⁰⁹⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 12–13, recs 2–5.

¹⁰⁹⁶ Ibid 14–15, rec 11.

¹⁰⁹⁷ Ibid 15, rec 13.

¹⁰⁹⁸ Ibid 18, rec 21.

¹⁰⁹⁹ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009); Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

¹¹⁰⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 104–107, rec 6.

¹¹⁰¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 16–17, recs 16–17.

culminating in the publication of its Final Report in August 2015.¹¹⁰² In her submission, Family Court Chief Justice, Diana Bryant, addressed submissions to the inquiry that were critical of the Family Court, stating that “allegations of secrecy or lack of transparency” were “ill informed”, and that the prohibition under the *Family Law Act* of publications identifying parties to family law matters¹¹⁰³ is “designed to protect the people involved in family law proceedings, especially children, from sensationalist or prurient reporting of their dispute”.¹¹⁰⁴

The Senate inquiry echoed previous inquiries in receiving numerous submissions concerning both jurisdictional fragmentation between family law and state and territory family violence systems,¹¹⁰⁵ and a lack of training and evaluation of family law professionals.¹¹⁰⁶ The report recommended commonwealth-facilitated “training of all judicial officers who preside over family violence matters”, “consistent training for and evaluation of family consultants who write family reports”, and development of a national family violence bench book.¹¹⁰⁷ The inquiry was unusual in examining the needs of male victims of family violence, noting submissions stating male victims are averse to seeking help and are prone to re-victimisation by not being believed about their experiences.¹¹⁰⁸ The report recommended a need to provide “appropriate services” to male victims of family violence.¹¹⁰⁹ It made no recommendations regarding transparency and accountability in the family courts.

In 2015, the Special Taskforce on Domestic and Family Violence in Queensland released its report, *Not Now, Not Ever*, which underpinned the development of the state’s family violence strategy.¹¹¹⁰ The report identified three areas of reform necessary to reduce the prevalence of family violence and its impact: improved community attitudes, increasingly integrated

¹¹⁰² Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015).

¹¹⁰³ At this time, the relevant provision was contained in *Family Law Act 1975* (Cth) (comp 17 January 2012) s121. Although the provision has been amended, publications identifying any party to a family law proceeding remain punishable by imprisonment: *ibid* (comp 12 June 2024) ss 114(N)–114(T).

¹¹⁰⁴ Bryant, Diana, Submission no 147 to Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (22 September 2014) 2.

¹¹⁰⁵ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015) [9.43]–[9.44].

¹¹⁰⁶ *Ibid* [9.32]–[9.42], [9.66]–[9.70].

¹¹⁰⁷ *Ibid* 128–129, recs 17–18.

¹¹⁰⁸ *Ibid* [2.35]–[2.38].

¹¹⁰⁹ *Ibid* 109, rec 15.

¹¹¹⁰ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015).

responses to survivors, and enhanced responses from the justice system.¹¹¹¹ The taskforce noted significant concerns held by stakeholders navigating the intersection of family violence and family law proceedings,¹¹¹² and recommended the creation of dedicated domestic violence courts with jurisdiction over child protection and limited family law matters.¹¹¹³ Specialist domestic violence courts have since been piloted or instituted in Queensland and other states, but they still remain fragmented and differ widely in their degree of specialisation.¹¹¹⁴ The report also made numerous recommendations concerning best-practice guidelines and education for legal professionals,¹¹¹⁵ including an “intensive and regular” family violence professional development for magistrates,¹¹¹⁶ “compulsory” education for court and registry staff,¹¹¹⁷ and “continuing professional development” for lawyers practising in the areas of domestic violence and family law, concerning “diversity and ethical conduct for managing intersection [sic] of domestic and family violence and family law”.¹¹¹⁸

In 2015, the Australian Institute of Family Studies released its evaluation of the 2011 reforms of the *Family Law Act*, which had come into effect in 2012.¹¹¹⁹ The evaluation made a significant contribution to the family law evidence base, encompassing surveys of judicial, legal and non-legal professionals in the family law system,¹¹²⁰ studies of separated parents undertaken pre- and post-reform,¹¹²¹ and an analysis of court outcomes based on court files and published judgements.¹¹²² The evaluation found that improvements in responses to family violence and other forms of child abuse since the 2011 amendments had been “minimal at

¹¹¹¹ Ibid 2.

¹¹¹² Ibid 275.

¹¹¹³ Ibid 279–284, recs 96–99.

¹¹¹⁴ Kate Esther Fitz-Gibbon, *The Peter Mitchell Churchill Fellowship to Examine Innovative Legal Responses to Intimate Homicide in the UK, USA and Canada* (Final Report, Winston Churchill Memorial Trust, 2016) 29–30.

¹¹¹⁵ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 288–292, recs 103–110.

¹¹¹⁶ Ibid 288, recs 105.

¹¹¹⁷ Ibid 289, recs 106.

¹¹¹⁸ Ibid 292, recs 110.

¹¹¹⁹ Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015).

¹¹²⁰ Rae Kaspiew et al., *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015).

¹¹²¹ Rae Kaspiew et al., *Experiences of Separated Parents Study* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015).

¹¹²² Rae Kaspiew et al., *Court Outcomes Project* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies October 2015).

best”,¹¹²³ with significant proportions of parents and legal professionals continuing to doubt the capacity of the family courts to “deal adequately” with child safety concerns.¹¹²⁴

The position of families and family lawyers contrasted strongly with the statements of judicial officers and registrars surveyed, 84% of whom *did* believe the family law system dealt adequately with cases involving allegations of family violence and child abuse.¹¹²⁵ Despite the repeal of the ‘friendly parent’ provision, the Institute noted that in families with a history of family violence and other forms of child abuse, “continuing under-disclosure is a significant issue”,¹¹²⁶ with “substantial minorities” of parents choosing not to disclose their concerns in family law proceedings.¹¹²⁷ Research into the impacts of the reforms on family report-writing has raised similar concerns, finding that, while family violence had been mentioned more frequently in family reports since the legislative amendments came into effect, the outcomes of cases involving such allegations remained largely unchanged.¹¹²⁸

In April 2016, the report of the Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children was handed down.¹¹²⁹ The report made recommendations to reduce the prevalence and impact of family violence within six broad “action areas”.¹¹³⁰ Action Area One involved challenging gender inequality and violence-supportive norms through strategies to address gender equity in the public and corporate sectors,¹¹³¹ primary violence-prevention education at a community level¹¹³² and training and professional development of “professionals likely to come into contact with victims and perpetrators of violence”, including legal professionals.¹¹³³ The report advocated recognising

¹¹²³ Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) vii.

¹¹²⁴ Ibid ix.

¹¹²⁵ Rae Kaspiew et al., *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015) 126.

¹¹²⁶ Ibid 174.

¹¹²⁷ Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) x.

¹¹²⁸ R Field et al., ‘Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?’ (2016) 25 *Judicial Administration* 212–236, 236.

¹¹²⁹ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016).

¹¹³⁰ Ibid vi.

¹¹³¹ Ibid 27–31, recs 1.1–1.2.

¹¹³² Ibid 33–37, rec 1.3.

¹¹³³ Ibid 37–38, rec 1.4.

children as “victims of violence against women”,¹¹³⁴ holding perpetrators to account¹¹³⁵ and empowering survivors of violence to make “informed choices”.¹¹³⁶ Action Area Six concerned integrating responses to violence at commonwealth, state, non-government and corporate levels, through a nationally consistent risk assessment framework encompassing both women and children,¹¹³⁷ improved information sharing between jurisdictions¹¹³⁸ and “co-location and integration” of courts, government agencies and services.¹¹³⁹ The report also recommended that commonwealth, state and territory governments implement the recommendations of the Family Law Council’s 2015 Interim Report on families with complex needs,¹¹⁴⁰ specifically through increased collaboration aimed at integrating responses to family law, child protection and family violence, and the development of a national court order database.¹¹⁴¹

The report of the parliamentary inquiry into domestic violence and gender inequality¹¹⁴² was referred to the Senate Finance and Public Administration References Committee in late 2015. It lapsed with the dissolution of the Senate, was re-referred to the Committee after the federal election, and was finally completed in November 2016.¹¹⁴³ The inquiry’s Terms of Reference presented the opportunity to understand the cultural factors underpinning domestic violence. They included investigation of:¹¹⁴⁴

- (a) the role of gender inequality in all spheres of life in contributing to the prevalence of domestic violence ...
- (b) the role of gender stereotypes in contributing to cultural conditions which support domestic violence ...
- (c) the role of government initiatives at every level in addressing the underlying causes of domestic violence ...

¹¹³⁴ Ibid xiii, Action Area 3.

¹¹³⁵ Ibid xiv–xvi, Action Area 4.

¹¹³⁶ Ibid x, Action Area 2.

¹¹³⁷ Ibid 111–113, rec 6.1.

¹¹³⁸ Ibid 116–117, rec 6.4.

¹¹³⁹ Ibid 118–119, rec 6.5.

¹¹⁴⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015).

¹¹⁴¹ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 123–124, rec 6.7.

¹¹⁴² Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016).

¹¹⁴³ Ibid [1.1]–[1.2].

¹¹⁴⁴ Ibid [1.1].

The report stated concerns that “a quarter of Australians still endorse attitudes supportive of male dominance of decision-making in relationships which is identified as a risk factor for partner violence”.¹¹⁴⁵ The Committee commended primary prevention efforts with young people, stating “[i]t is clear that work needs to start early and working with young people is important to embed long-term societal change and establish healthy relationships”.¹¹⁴⁶ The Committee summarised the results of the 2013 National Community Attitudes Survey,¹¹⁴⁷ including its findings that just over half of respondents (53%) believe that “women often fabricate cases of domestic violence in order to improve their prospects in family law cases”, and over one-third of respondents (38%) believe that “a lot of times women who say they were raped led the man on and later had regrets”.¹¹⁴⁸ Yet, the report made no examination of the family law system, or of the role of Australian courts and government institutions in perpetuating gendered violence and violence-supportive attitudes. The Committee noted it “commends the report” of the 2015 parliamentary inquiry, *Domestic Violence in Australia*,¹¹⁴⁹ noting “[i]t contained 25 recommendations. The government has not yet provided a response”.¹¹⁵⁰ The report of the inquiry into domestic violence and gender inequality made no formal recommendations of its own.

In 2017, the House of Representatives Standing Committee on Social Policy and Legal Affairs released a report highlighting the family law system’s inadequacy in responding to family violence,¹¹⁵¹ and stating it exposed parents and children to increased risks post-separation.¹¹⁵² The report cited submissions noting the failings of the current system to “recognise the reality of family violence” and “victims’ right to safety”, and highlighting particular systemic

¹¹⁴⁵ Ibid [4.7].

¹¹⁴⁶ Ibid [4.8].

¹¹⁴⁷ Kim Webster et al., *Australians’ Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey* (Full Technical Report, Victorian Health Promotion Foundation, 2014).

¹¹⁴⁸ Ibid [12.5.3], cited in Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016) [2.37].

¹¹⁴⁹ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015).

¹¹⁵⁰ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016) [4.1]–[4.3].

¹¹⁵¹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017).

¹¹⁵² Ibid [6.6].

difficulties addressing power imbalances and less tangible forms of violence, such as financial and emotional abuse.¹¹⁵³ Despite this, the Committee's approach to allegations of family violence appears to have been influenced by arguments made by men's rights advocates, which often grossly inflate the incidence of false allegations of abuse.¹¹⁵⁴ The report recommended that family violence allegations be resolved early,¹¹⁵⁵ as:¹¹⁵⁶

An early determination of family violence allegations can, if decided in the affirmative, be incredibly important for the court's subsequent consideration of other matters, particularly parenting matters. *Equally, however, an early determination is important where false allegations have been made* against a family member, causing undue distress within that family and adding further to an already heavy workload for the courts.

The Committee identified several challenges in the system, including jurisdictional fragmentation "leading to inconsistent approaches and exposing families to a greater risk of harm" and the inappropriateness of the adversarial system itself in resolving family law matters.¹¹⁵⁷ The report echoed numerous previous reports in recommending enhanced interjurisdictional information sharing via the inclusion of family law and child protection orders in the National Domestic Violence Order Scheme,¹¹⁵⁸ measures to facilitate the hearing of family law issues by state and territory magistrates hearing family violence cases,¹¹⁵⁹ and family violence risk assessment in every family law matter¹¹⁶⁰ using a nationally consistent family violence risk assessment tool.¹¹⁶¹ The Committee also recommended mandatory family violence education for family law professionals,¹¹⁶² and comprehensive professional

¹¹⁵³ Ibid [3.1].

¹¹⁵⁴ Michael Flood, "'Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328–347, 336.

¹¹⁵⁵ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 155–156, rec 7.

¹¹⁵⁶ Ibid [4.259] (emphasis added).

¹¹⁵⁷ Ibid [3.3].

¹¹⁵⁸ Ibid 155, rec 6.

¹¹⁵⁹ Ibid 156–158, recs 10–11.

¹¹⁶⁰ Ibid 150–151, rec 3.

¹¹⁶¹ Ibid 149–150, rec 2.

¹¹⁶² Ibid 284–287 rec 28.

development concerning family violence, cultural competency and trauma-informed practice for judicial officers hearing family law and family violence matters.¹¹⁶³

The report made some innovative recommendations, including the abolition of private family consultants,¹¹⁶⁴ a national accreditation system and complaints mechanism for court-engaged family consultants,¹¹⁶⁵ and a child safety service integrated with the family courts, providing ongoing assessment of children's safety after family law orders are made.¹¹⁶⁶ Finally, the Committee recommended implementation of the Family Law Council's 2012¹¹⁶⁷ and 2015–16¹¹⁶⁸ recommendations aimed at improving family law responses for Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities, and for families with complex needs around family law, family violence and child protection.¹¹⁶⁹

4.4 Inquiries and Reform since the Conclusion of the Royal Commission

4.4.1 National Principles for Child Safe Organisations

Arising from a core component of the Royal Commission's recommendations, and developed under the Third Action Plan of the *National Framework for Protecting Australia's Children 2009–2020*,¹¹⁷⁰ the *National Principles for Child Safe Organisations*¹¹⁷¹ were released in 2018. The Principles provide measurable "Action Areas"¹¹⁷² for the implementation of each of the Royal Commission's ten Child Safe Standards¹¹⁷³ and draw heavily on the *Convention on the Rights of the Child*.¹¹⁷⁴ In doing so, the Principles highlight the importance of cultural safety for Aboriginal and Torres Strait Islander children

¹¹⁶³ Ibid 284–286, rec 27.

¹¹⁶⁴ Ibid 226–228, rec 22.

¹¹⁶⁵ Ibid 287, rec 30.

¹¹⁶⁶ Ibid 223–224, rec 20.

¹¹⁶⁷ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

¹¹⁶⁸ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016).

¹¹⁶⁹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 224–226, 253–258, recs 21, 24–25.

¹¹⁷⁰ *Protecting Children Is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (Third Action Plan 2015–2018, 2015).

¹¹⁷¹ Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018).

¹¹⁷² Ibid 8.

¹¹⁷³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 141.

¹¹⁷⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS (entered into force 2 September 1990).

and young people,¹¹⁷⁵ and emphasise that “[o]rganisations have a responsibility to ensure children’s rights are protected. They can help families to protect children’s rights and create an environment where children can grow and reach their potential”.¹¹⁷⁶ The Principles make no mention, however, of child protection within Australia’s courts or legal systems, and the third Optional Protocol to the *Convention on the Rights of the Child*, which enables parties to lodge complaints about violations of the human rights of children laid out in the *Convention* with the United Nations,¹¹⁷⁷ remains unratified by Australia at the time of writing.

4.4.2 Family Law for the Future

The Australian Law Reform Commission’s 2019 report, *Family Law for the Future*,¹¹⁷⁸ was released in the lead-up to the 2019 federal election. The report identified significant failings in the family law system. Finding that “[c]hildren are not consistently protected from harm; nor are people experiencing family violence”,¹¹⁷⁹ the Commission took issue with many of the underlying structures of the family law system itself. The report argued that frequent amendment had rendered the *Family Law Act* “impenetrable” and stated that a “chronic lack of funding for the appointment and proper training” of judges, independent children’s lawyers and other legal professionals created “obvious risks”, as matters were not given the time and attention needed to adequately address presenting issues.¹¹⁸⁰ The Commissioners also noted the “significant body of evidence that [implies] adversarial court processes exacerbate conflict and trauma and are not in the best interests of children”, stating that, although “the Family Court is empowered to use a less adversarial approach”,¹¹⁸¹ the Commission saw “little evidence that the Family Court is exercising this power”.¹¹⁸² Finally, the Commission raised the ongoing issues arising from jurisdictional fragmentation. It recommended addressing these issues

¹¹⁷⁵ Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018) 4.

¹¹⁷⁶ *Ibid* 18.

¹¹⁷⁷ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 19 December 2011, 330 UNTS (entered into force 14 April 2014) article 5.

¹¹⁷⁸ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019).

¹¹⁷⁹ *Ibid* [6].

¹¹⁸⁰ *Ibid* [1.8].

¹¹⁸¹ The ‘Less Adversarial Trial’ procedures in div 12A of the *Family Law Act* at that time applied to the Family Court but not the Federal Circuit Court.

¹¹⁸² Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [1.53].

through the establishment of state and territory family courts presiding over family law, family violence and child protection issues, and the eventual abolition of the federal family courts.¹¹⁸³

Many of the report's recommendations repeated those of prior inquiries, including improving information sharing between the family law, family violence and child protection systems,¹¹⁸⁴ ongoing family violence training for family law professionals,¹¹⁸⁵ mandatory accreditation for private family report writers¹¹⁸⁶ and children's contact services,¹¹⁸⁷ and the establishment of a board comprised of children and young people to inform policy and practice through information about their own experiences of the family law system.¹¹⁸⁸ The Commission also recommended increasing transparency and accountability through monitoring and reporting on the family law system by the Family Law Council,¹¹⁸⁹ the consideration of judicial officers' aptitude to hear family violence cases in all future appointments to the family courts,¹¹⁹⁰ and the clear prioritisation of the safety of children and their carers when determining parenting matters.¹¹⁹¹ At the conclusion of the inquiry, Chair Sarah Derrington SC publicly raised her concerns about "the mental health of family law judges", describing the material they encounter as "truly horrendous".¹¹⁹² Justice Derrington described judges in the family courts as "flying blind", stating that they make parenting orders without information about child safety and how family violence proceedings affect families in state-based courts, and that this could lead to children's deaths.¹¹⁹³

¹¹⁸³ Ibid 36–38, rec 1.

¹¹⁸⁴ Ibid 36–38, recs 2–3.

¹¹⁸⁵ *Australian Law Reform Commission, Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 405–409, rec 52.

¹¹⁸⁶ Ibid 410–414, rec 53.

¹¹⁸⁷ Ibid 416–421, rec 54.

¹¹⁸⁸ 395–397, *ibid* rec 50.

¹¹⁸⁹ 388–395, *ibid* rec 49.

¹¹⁹⁰ Ibid 397–401, rec 51.

¹¹⁹¹ 165–170, rec 5.

¹¹⁹² Natasha Bitá, 'Court in the Crossfire', *Courier Mail* (online, 16 June 2019) <<https://www.proquest.com/newspapers/court-crossfire/docview/2240824730/se-2>>.

¹¹⁹³ Ibid.

4.4.3 The Commonwealth Child Safe Framework

Instituted in response to the recommendations of the Royal Commission,¹¹⁹⁴ the *Commonwealth Child Safe Framework* establishes minimum organisational standards to ensure that Australian entities are safe for children.¹¹⁹⁵ The Framework mandates compliance for all Commonwealth non-corporate entities, while other Commonwealth bodies are strongly urged to adopt its practices. Central to the Framework is the execution of annual risk assessments, comprehensive staff training, adherence to the *National Principles for Child Safe Organisations* and the obligation of annual progress reports.¹¹⁹⁶ The judicial functions of the family courts are exempt from mandatory participation in the Framework.¹¹⁹⁷ This exemption raises concerns about the consistency of child safety measures across different commonwealth institutions, particularly given the critical role of these courts in receiving and evaluating allegations of child abuse.

4.4.4 Inquiry into Domestic Violence with Particular Regard to Violence against Women and their Children

Early in 2020, the Senate Legal and Constitutional Affairs References Committee was referred an inquiry into domestic violence, with particular regard to violence against women and their children, and asked to report within six months.¹¹⁹⁸ Only three months later, without accepting submissions or holding public hearings, the Committee released its report, stating that “conducting another lengthy, broad-ranging public inquiry into domestic and family violence in Australia at this time would be of limited value”.¹¹⁹⁹ The report—which summarised the reports of four prior inquiries¹²⁰⁰ and made no recommendations of its own—was derided by

¹¹⁹⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 13, rec 6.15.

¹¹⁹⁵ 'Lead the Commonwealth Child Safe Framework', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do/lead-commonwealth-child-safe-framework>>.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ Federal Court of Australia, *Commonwealth Child Safe Framework* (Annual Statement of Compliance, 31 October 2023).

¹¹⁹⁸ Legal and Constitutional Affairs References Committee (Commonwealth), Senate, *Inquiry into Domestic Violence with Particular Regard to Violence against Women and Their Children* (Report, May 2020) [1.1].

¹¹⁹⁹ *Ibid* [1.6].

¹²⁰⁰ These were: Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015); Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016); Finance and Public Administration Committees (Commonwealth), Senate, *Delivery of National Outcome 4 of the National Plan to Reduce Violence against Women and Their Children* (Report, 15 December 2017); Australian National

an “appalled” Law Council of Australia as “little more than a literature review”.¹²⁰¹ Senator Rex Patrick’s dissenting report, appended to the primary report, made one recommendation, that “[t]he committee should take a long hard look at itself and then resolve to bring a motion to the Senate that would direct it to revisit the issue and do the job properly on the second pass”.¹²⁰²

4.4.5 Gendered Violence in Parliament House

In late 2020, the ABC aired allegations about a culture of misogyny and sexual impropriety in federal parliament.¹²⁰³ The media coverage arose in the wake of statements by several female Members of Parliament in the preceding years, critiquing hostile and highly gendered responses to women, including “bullying and intimidation”¹²⁰⁴ and the portrayal of women as “the liar, the troublemaker, the emotionally unstable or weak, or someone who should be silenced”.¹²⁰⁵ The following months saw a cascade of allegations of sexual harassment and assault,¹²⁰⁶ including a historical sexual assault allegation against the federal Attorney-General, Christian Porter,¹²⁰⁷ and the sexual assault of a government staffer inside Parliament House.¹²⁰⁸ A large-

Audit Office, *Auditor-General Report 45 (2018-19): Coordination and Targeting of Domestic Violence Funding and Actions* (Report on the implementation of the National Plan to Reduce Violence Against Women and their Children 2010-2022, 13 June 2019).

¹²⁰¹ 'Law Council President, Pauline Wright, Statement on Abject Failure of Domestic Violence Inquiry', (Media Release, Law Council of Australia, 20 May 2020).

¹²⁰² Dissenting report by Senator Rex Patrick, 'Inquiry, without inquiry' [1.19], cited in Legal and Constitutional Affairs References Committee (Commonwealth), Senate, *Inquiry into Domestic Violence with Particular Regard to Violence against Women and Their Children* (Report, May 2020) 44.

¹²⁰³ 'Inside the Canberra Bubble', *Four Corners* (Australian Broadcasting Corporation, 9 November 2020).

¹²⁰⁴ Member of Parliament Julie Bishop, cited in Angelika Heurich and Jo Coghlan, 'The Canberra Bubble: A Toxic Gender Culture' (2021) 24(1) *M/C Journal*.

¹²⁰⁵ Member of Parliament Julia Banks, cited in *ibid*.

¹²⁰⁶ Tom Stayner, 'How Australian Politics Has Been Shaken to the Core in the Wake of Brittany Higgins' Rape Allegation', *SBS News* (online, 2 March 2021) <<https://www.sbs.com.au/news/how-australian-politics-has-been-shaken-to-the-core-in-the-wake-of-brittany-higgins-rape-allegation>>.

¹²⁰⁷ Jacqueline Maley, 'Her Story: The Woman Who Said the Attorney-General Raped Her as a Teen', *Sydney Morning Herald* (online, 13 March 2021) <<https://www.smh.com.au/politics/federal/her-story-the-woman-who-said-the-attorney-general-raped-her-as-a-teen-20210312-p57a9g.html>>.

¹²⁰⁸ A subsequent defamation trial confirmed that the sexual assault occurred. Justice Lee stated, “(a)s a result of the inconclusive criminal trial, Mr Lehmann remains a man who has not been convicted of any offence, but he has now been found, by the civil standard of proof, to have engaged in a great wrong. It follows Ms Higgins has been proven to be a victim of sexual assault”: *Lehmann v Network Ten Pty Limited* [2024] FCA 369 [1093] (Lee J).

scale public demonstration occurred¹²⁰⁹ and a federal cabinet reshuffle was announced.¹²¹⁰ In March 2021, the Morrison government created a Women's Safety Taskforce. Comprised of seven female cabinet ministers and chaired by Prime Minister Morrison, the taskforce was tasked with addressing gender equality, women's economic security and safety.¹²¹¹ The taskforce quickly announced a national summit to prepare the next stage of the *National Plan to Reduce Violence against Women and their Children*.¹²¹²

4.4.6 Merging of the Federal Circuit Court and Family Court

In February 2021, legislation was passed authorising the merging of the Federal Circuit Court and Family Court of Australia.¹²¹³ In his 2019 Second Reading Speech, Attorney-General Christian Porter stated the package of legislation had been “developed and informed by a number of substantial inquiries over the last decade”,¹²¹⁴ including the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report, *A Better Family Law System*.¹²¹⁵ Porter stated the legislation aimed to “improve user experience for those Australian families that unfortunately need the assistance of the courts to resolve their

¹²⁰⁹ Alicia Nally, 'Women's March 4 Justice: Thousands March at Rallies around Australia to Protest against Gendered Violence', *ABC News* (online, 15 March 2021) <<https://www.abc.net.au/news/2021-03-15/live-blog-canberra-women-march-4-justice-sexual-assault/13246896>>.

¹²¹⁰ Prime Minister Scott Morrison and Minister for Foreign Affairs Marise Payne, 'Press Conference' (Parliament House, 29 March 2021).

¹²¹¹ Sarah Martin, 'Christian Porter and Linda Reynolds Demoted as PM Reshuffles Cabinet with "Fresh Lens" on Women', *The Guardian* (online, 29 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/29/christian-porter-and-linda-reynolds-demoted-as-pm-reshuffles-cabinet-with-fresh-lens-on-women>>.

¹²¹² Jade Macmillan and Nour Haydar, 'Women's Safety Summit to Bring National Leaders Together to Tackle Domestic Violence', *ABC News* (online, 7 April 2021) <<https://www.abc.net.au/news/2021-04-07/womens-safety-meeting-national-summit-anne-ruston/100053944>>.

¹²¹³ *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act (No 13) 2021* (Cth).

¹²¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019 (Christian Porter, Attorney-General).

¹²¹⁵ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017). The other reports cited focused on the efficiency of the federal family courts: Attorney-General's Department, *High Level Financial Analysis of Court Reform Initiatives* (Final Report, February 2015); KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (Report, Attorney-General's Department, 5 March 2014); PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018); Des Semples, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Report, Attorney-General's Department, August 2008).

disputes” by reducing “costs and delays”.¹²¹⁶ An open letter published by family law stakeholders, including 13 retired Family Court and Federal Circuit Court judges, the Law Council of Australia, National Aboriginal and Torres Strait Islander Legal Services, the New South Wales Bar Association, and Women’s Legal Services Australia, expressed staunch opposition to the reforms, stating that the abolition of the “specialist Family Court” would expose family violence survivors to greater risks.¹²¹⁷

4.4.7 Inquiry into Family, Domestic and Sexual Violence

In March 2021, the House of Representatives Standing Committee on Social Policy and Legal Affairs released the report of its inquiry into family, domestic and sexual violence,¹²¹⁸ which was intended to inform the next *National Plan to Reduce Violence against Women and their Children*.¹²¹⁹ In evaluating the impact of the first *National Plan*,¹²²⁰ the report acknowledged:¹²²¹

It is clear that the National Plan has not achieved its objective of a significant and sustained reduction in violence against women and their children ... It is clearly not for the want of trying that we as a nation have not reduced these shocking statistics that see the death of one woman on average every eight days at the hands of her partner or former partner ... Governments cannot eliminate family, domestic and sexual violence alone. A whole-of-society response is vital. All forms of family, domestic and sexual violence start with a lack of respect. We all have a role in changing those entrenched attitudes and behaviours, particularly towards the inequality of women and girls. As a nation we can do better, we must do better.

Despite noting that the inquiry’s Terms of Reference excluded “the broader incidence of sexual violence in Australia outside of the family, domestic or residential context”,¹²²² the report made

¹²¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019 (Christian Porter, Attorney-General).

¹²¹⁷ Law Council of Australia et al., ‘Family Court Merger Opposed by 155 Stakeholders, Including 13 Retired Judges’ (Media Release, 16 February 2021) 1–2.

¹²¹⁸ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021).

¹²¹⁹ *Ibid* xv.

¹²²⁰ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

¹²²¹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) ix.

¹²²² *Ibid* [1.21].

barely any reference—and no recommendations—in regard to intrafamilial child sexual abuse. The Committee made only brief mention of family law issues,¹²²³ citing the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry, *A Better Family Law System*¹²²⁴ and the contemporaneous work of the Joint Select Committee on Australia’s Family Law System, *Improvements in Family Law Proceedings*.¹²²⁵ However, the report noted that the Committee:¹²²⁶

[W]ould hope to see improvements made to the family law system to better support families experiencing family domestic and sexual violence. These improvements should include improved information sharing, mandatory training for family law professionals and holistic service supports for families as they move through the family law system.

The Committee noted continuing problems with jurisdictional fragmentation between state and territory courts and the federal family courts,¹²²⁷ and echoed the 2017 House of Representatives inquiry¹²²⁸ in recommending the expansion of the National Domestic Violence Order Scheme to encompass family law and state child protection orders.¹²²⁹ The Committee also identified ongoing problems with family violence risk assessments, noting that, rather than developing a national risk assessment tool as recommended by the report, *A Better Family Law System*,¹²³⁰ the Government had commissioned the development of a set of national principles,¹²³¹ resulting in a need for further work to implement a consistent, national approach to the assessment of

¹²²³ Ibid [1.20].

¹²²⁴ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017).

¹²²⁵ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021).

¹²²⁶ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) [8.187].

¹²²⁷ Ibid [3.3].

¹²²⁸ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 155, rec 6.

¹²²⁹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 343, rec 82.

¹²³⁰ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 149–150, rec 2.

¹²³¹ Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Family and Domestic Violence* (ANROWS Insights, Australia’s National Research Organisation for Women’s Safety, 2018).

risk.¹²³² It recommended “that the next National Plan include measures ... to support a more consistent national approach to risk assessment and risk management”¹²³³ and a review of risk assessment practices “to ensure that coercive and controlling behaviour is adequately captured”.¹²³⁴ The report recommended that the next *National Plan* “continue with the core philosophy of primary prevention being key to reducing family, domestic and sexual violence”.¹²³⁵ It made a number of recommendations in this regard, including the use of protective behaviours and respectful relationships education campaigns targeting young people,¹²³⁶ broader community-level awareness-raising regarding gender representation¹²³⁷ and the establishment of a “gender equality strategy”.¹²³⁸ Behaviour change was another focus of the report, with recommendations encompassing a range of perpetrator intervention programs.¹²³⁹

4.4.8 Joint Select Committee on Australia's Family Law System

The Joint Select Committee on Australia’s Family Law System conducted a comprehensive two-year inquiry into the family law and child support systems.¹²⁴⁰ With over 1,700 submissions, 13 in-camera hearings and 13 public hearings, the Committee received significant input from individuals and families with first-hand experience of the family law system.¹²⁴¹ The Second Interim Report raised a number of issues concerning the safety of parents and children within the family law system and highlighted “extensive delays, excessive legal costs, the difficulty of enforcing court orders, and the timely and fair resolution of family violence allegations” as common issues in family law proceedings.¹²⁴² The report recommended that the family courts should be made less adversarial and more child-focused,¹²⁴³ and advocated

¹²³² Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) [7.62]–[7.64].

¹²³³ Ibid 292, rec 61.

¹²³⁴ Ibid 161–162, rec 27.

¹²³⁵ Ibid 243–244, rec 55.

¹²³⁶ Ibid 243–245, recs 55, 59.

¹²³⁷ Ibid 243–244, rec 57.

¹²³⁸ Ibid 243–244, rec 58.

¹²³⁹ Ibid 293–296, recs 63–69.

¹²⁴⁰ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021).

¹²⁴¹ Ibid [1.1].

¹²⁴² Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) xix.

¹²⁴³ Ibid 55–56, rec 10.

for urgent legislative amendment to address a recurring misinterpretation of section 61DA of the *Family Law Act*¹²⁴⁴ that “equal shared parental responsibility equates to equal time with the children”.¹²⁴⁵ The report recommended regular training for all family law professionals, including judges, covering areas such as family violence and child abuse (including coercive control), trauma-informed practice and unconscious bias.¹²⁴⁶ However, the report also recommended professional development in “parental alienation dynamics”.¹²⁴⁷ Although the report state that “[t]he committee acknowledges that parental alienation syndrome is not a recognised psychiatric disorder within the scientific community”,¹²⁴⁸ it continued:¹²⁴⁹

The committee considers that better education around family dynamics and family violence for professionals in the family court system will assist the court to identify cases where parental alienation is occurring or where a parent is legitimately seeking to protect their child from harm.

The Final Report built upon recommendations made in the Second and Third Interim Reports,¹²⁵⁰ and addressed government actions and initiatives of the family court since March 2021.¹²⁵¹ This report emphasised the success of the Lighthouse Project pilot in addressing family violence and safety risks, particularly for women and children, which showed promising results, with a majority of litigants accepting the screening process.¹²⁵² It recommended expanding the Project to all Federal Circuit and Family Court of Australia registries and applying it to all parenting and property matters.¹²⁵³ Finally, additional comments from the Australian Greens appended to the Final Report underscored the importance of the next *National Plan for the Elimination of Violence against Women and Their Children*, and

¹²⁴⁴ *Family Law Act 1975* (Cth) s 61DA.

¹²⁴⁵ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 86–88, rec 17.

¹²⁴⁶ *Ibid* 75, rec 15.

¹²⁴⁷ *Ibid* 75, rec 15.

¹²⁴⁸ *Ibid* [4.84].

¹²⁴⁹ *Ibid* [4.87].

¹²⁵⁰ *Ibid*; Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings: Australia’s Child Support Scheme* (Third Interim Report, November 2021). Note, as the Third Interim Report concerns the child support system it is beyond the scope of this research.

¹²⁵¹ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021) [1.7].

¹²⁵² *Ibid* [1.27].

¹²⁵³ *Ibid* 7–9, rec 1.

advocated for reform in the family law system and culturally safe, responsive support services for those leaving abusive relationships.¹²⁵⁴ It also called for a standalone *National Plan for First Nations Women and Children*, with substantial funding for family violence prevention and support services.¹²⁵⁵

4.4.9 National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030

The *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*¹²⁵⁶ derived from a major recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse¹²⁵⁷ and represents a nationwide approach to child protection. Acknowledging that “[w]hile the Royal Commission focused on child sexual abuse in institutional settings ... the majority of child sexual abuse is perpetrated by someone known to the child or young person, including family members,” the National Strategy aims to improve prevention and response to child sexual abuse “in all settings, including in organisations, online, within families”.¹²⁵⁸ The National Strategy is intended to be enacted through successive Action Plans.¹²⁵⁹ The initial phase comprised two plans spanning 2021 to 2024—the First National Action Plan contained in the National Strategy,¹²⁶⁰ and the First Commonwealth Action Plan,¹²⁶¹—which introduced measures such as public awareness campaigns, in-depth population studies and proactive steps to prevent potential offenders from acting.¹²⁶² The First National Action Plan focuses on five key themes: raising awareness and building child safe cultures, supporting and empowering victims and survivors, enhancing approaches to children with harmful sexual behaviours, offender prevention and intervention, and improving the evidence base.¹²⁶³ The First Commonwealth Action Plan, specifically addresses priorities such

¹²⁵⁴ Senator Larissa Waters, ‘Additional comments from the Australian Greens’ in *ibid* [1.16]–[1.17].

¹²⁵⁵ Senator Larissa Waters, ‘Additional comments from the Australian Greens’ in *ibid* [1.18].

¹²⁵⁶ Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021).

¹²⁵⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 4, rec 6.1.

¹²⁵⁸ Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) 15.

¹²⁵⁹ *Ibid* 14.

¹²⁶⁰ *Ibid* 33.

¹²⁶¹ Department of the Prime Minister and Cabinet, *First Commonwealth Action Plan to Prevent and Respond to Child Sexual Abuse 2021–2024* (Report, 2021).

¹²⁶² Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) 16.

¹²⁶³ *Ibid* 35–36.

as combating child sexual abuse online, enhancing border security to identify offenders and improving access to legal aid for at-risk children and adult survivors.¹²⁶⁴ These Action Plans complement state and territory efforts to implement the Royal Commission's 409 recommendations.¹²⁶⁵

The National Strategy not only builds upon existing initiatives such as the *National Plan to End Violence against Women and Children*,¹²⁶⁶ but also introduces a multi-tiered prevention approach.¹²⁶⁷ The primary prevention layer aims to address the underlying causes of child sexual abuse, fostering environments where children are safe, while the secondary prevention layer focuses on early signs of harmful behaviour to prevent such abuse.¹²⁶⁸ Tertiary intervention measures focus on providing support and trauma-informed care to survivors.¹²⁶⁹ Additionally, a set of evaluation measures have been designed to assess the effectiveness of these interventions.¹²⁷⁰ The National Strategy frames protecting children as “everyone’s responsibility”, including government bodies, non-government organisations, communities and individuals.¹²⁷¹ It adopts a public health approach,¹²⁷² intending to prevent and respond to child sexual abuse in all settings, guided by the *National Principles for Child Safe Organisations*.¹²⁷³ Furthermore, the National Strategy acknowledges the need for more comprehensive national data on the link between child sexual abuse and other forms of child maltreatment, such as physical and emotional abuse, and neglect.¹²⁷⁴

¹²⁶⁴ Department of the Prime Minister and Cabinet, *First Commonwealth Action Plan to Prevent and Respond to Child Sexual Abuse 2021–2024* (Report, 2021) 20.

¹²⁶⁵ Royal Commission into Institutional Responses to Child Sexual Abuse: *Recommendations* (Final Report, 15 December 2017).

¹²⁶⁶ Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (Report, 2022).

¹²⁶⁷ Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) 19.

¹²⁶⁸ Ibid 19, 60.

¹²⁶⁹ Ibid 19, 61.

¹²⁷⁰ Ibid 19, 60.

¹²⁷¹ Ibid 21.

¹²⁷² Ibid 18.

¹²⁷³ Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018), cited in Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) 63.

¹²⁷⁴ Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) 64.

4.4.10 *The National Framework for Protecting Australia's Children 2021–2031*

Safe and Supported: the National Framework for Protecting Australia's Children 2021–2031 is a 10-year strategy aimed at reducing child abuse and neglect and addressing their intergenerational impacts.¹²⁷⁵ *Safe and Supported* builds on the previous 2009–2020 framework.¹²⁷⁶ It focuses on collective efforts across governments and sectors to improve the safety and wellbeing of children and young people, with an emphasis on early intervention, family and community empowerment and the strengthening of the child protection system.¹²⁷⁷ The Framework builds on two Action Plans per five-year period: a general Action Plan, and another specifically for Aboriginal and Torres Strait Islander peoples,¹²⁷⁸ developed in collaboration with Indigenous leaders and communities.¹²⁷⁹ The Framework aligns with other national initiatives,¹²⁸⁰ including as the *National Plan to End Violence against Women and Children*,¹²⁸¹ the *National Strategy to Prevent and Respond to Child Sexual Abuse*¹²⁸² and the *National Aboriginal and Torres Strait Islander Early Childhood Strategy*.¹²⁸³

The first Focus Area of the National Framework prioritises prevention and early intervention, through a focus on the early identification of risks and the strengthening of community support.¹²⁸⁴ Focus Area Two aims to address the over-representation of Aboriginal and Torres Strait Islander children in the child protection system through culturally appropriate services and enhanced collaboration and representation in decision-making.¹²⁸⁵ Empowering children and young people is a key aspect of the Framework, as it aims to promote their right to be heard

¹²⁷⁵ Commonwealth of Australia, *Safe and Supported: National Framework for Protecting Australia's Children 2021–2031* (Report, 2021) 2–3.

¹²⁷⁶ Council of Australian Governments, *National Framework for Protecting Australia's Children: Implementing the First Three-Year Action Plan 2009–2012* (Report, 2009).

¹²⁷⁷ Commonwealth of Australia, *Safe and Supported: National Framework for Protecting Australia's Children 2021–2031* (Report, 2021) 7.

¹²⁷⁸ *Ibid* 58.

¹²⁷⁹ *Ibid* 6.

¹²⁸⁰ *Ibid* 6.

¹²⁸¹ Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (Report, 2022).

¹²⁸² Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, (2021).

¹²⁸³ National Indigenous Australians Agency, *National Aboriginal and Torres Strait Islander Early Childhood Strategy* (Report, 07 Dec 2021).

¹²⁸⁴ Commonwealth of Australia, *Safe and Supported: National Framework for Protecting Australia's Children 2021–2031* (Report, 2021) 26–27.

¹²⁸⁵ *Ibid* 28–29.

and be involved in policy and service development. Finally, the Framework aims to improve service quality and responsiveness in the child protection system through enhanced data collection and information sharing,¹²⁸⁶ and training family sector professionals in culturally safe, trauma-informed practice.¹²⁸⁷

4.4.11 The National Plan to End Violence against Women and their Children, 2022–2032

Built on the previous 2010–2022 National Plan¹²⁸⁸ and incorporating feedback from various stakeholders, the *National Plan to End Violence against Women and Children 2022–2032* is a joint initiative by Australian state and territory governments, aiming to end gender-based violence within a generation.¹²⁸⁹ It acknowledges the significant social, cultural, political and economic factors driving gendered violence, emphasising the need for concerted action.¹²⁹⁰ The 2022–2032 National Plan adopts a holistic and inclusive strategy, targeting a spectrum of violence issues including coercive control, intimate partner homicide, sexual violence, economic abuse and technology-facilitated abuse,¹²⁹¹ which it states are particularly relevant in light of the societal changes following the COVID-19 pandemic and the abundance of newer technologies and services such as drones, artificial intelligence and online dating apps.¹²⁹² The National Plan emphasises the disproportionately high rates of violence against Aboriginal and Torres Strait Islander women and children, advocating for culturally sensitive, community-driven solutions and integrated cross-sectoral efforts.¹²⁹³

The implementation of the Plan is structured through successive five-year Action Plans, encompassing a full spectrum of violence prevention, early intervention, response, recovery and healing.¹²⁹⁴ The Plan underlines the critical role of robust data collection and utilises measurable targets in evaluating its effectiveness, drawing on detailed statistics on the

¹²⁸⁶ Commonwealth of Australia, *Safe and Supported: National Framework for Protecting Australia's Children 2021–2031* (Report, 2021) 32–33, Focus Area Three.

¹²⁸⁷ Ibid 34, Focus Area Four.

¹²⁸⁸ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

¹²⁸⁹ Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) 14.

¹²⁹⁰ Ibid 15.

¹²⁹¹ Ibid 49–54.

¹²⁹² Ibid 54.

¹²⁹³ Ibid 92–94.

¹²⁹⁴ Ibid 19.

incidence of family, domestic and sexual violence and comprehensive data on family and domestic homicide cases.¹²⁹⁵ The First Action Plan introduces a comprehensive, multifaceted approach that focuses on 10 key actions to reduce gender-based violence.¹²⁹⁶ These include promoting gender equality, enhancing the national evidence base, improving workforce capability, building service capacity, holding perpetrators accountable, addressing sexual violence, partnering with Aboriginal and Torres Strait Islander peoples, developing age-appropriate programs, improving police and justice responses, and improving housing access for affected women and children.¹²⁹⁷

The Aboriginal and Torres Strait Islander Action Plan¹²⁹⁸ (2023-2025) complements the First Action Plan and focuses on addressing the high rates of violence experienced by Aboriginal and Torres Strait Islander women.¹²⁹⁹ Developed in partnership with the Aboriginal and Torres Strait Islander Advisory Council, it aims to meet Target 13 of the *National Agreement on Closing the Gap*:¹³⁰⁰ reducing violence against Aboriginal and Torres Strait Islander women and children by at least 50% by 2031.¹³⁰¹ The National Plan incorporates community, sector and academic insights, acknowledging the unique factors contributing to gendered violence, such as the impacts of colonisation, intergenerational trauma and systemic racism.¹³⁰²

4.4.12 The Family Law Act Amendments, 2023

Two pieces of legislation were passed by federal parliament in 2023—the *Family Law Amendment Act 2023*¹³⁰³ and the *Family Law Amendment (Information Sharing) Act 2023*¹³⁰⁴—which came into effect on 6 May 2024. The *Family Law Amendment Act* (the *Amendment Act*) revised the *Family Law Act* by removing the presumption of equal shared

¹²⁹⁵ Ibid 26–27.

¹²⁹⁶ Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (First Action Plan 2023–2027, 2023) 13.

¹²⁹⁷ Ibid 13.

¹²⁹⁸ Commonwealth of Australia, *Aboriginal and Torres Strait Islander Action Plan 2023–2025 under the National Plan to End Violence against Women and Children 2022–2032* (Report, 2023).

¹²⁹⁹ Ibid 16.

¹³⁰⁰ Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, *National Agreement on Closing the Gap* (Report, July 2020) 37, Target 13.

¹³⁰¹ Commonwealth of Australia, *Aboriginal and Torres Strait Islander Action Plan 2023–2025 under the National Plan to End Violence against Women and Children 2022–2032* (Report, 2023) 8.

¹³⁰² Ibid 18.

¹³⁰³ *Family Law Amendment Act (No 87) 2023* (Cth).

¹³⁰⁴ *Family Law Amendment (Information Sharing) Act (No 88) 2023* (Cth).

parental responsibility previously contained in section 61DA.¹³⁰⁵ Consequently, all parenting orders, including those regarding parental responsibility, must be evaluated with the child's best interests as the primary consideration.¹³⁰⁶ The court must also place greater weight on the relevance of past family violence, abuse and neglect in determining those best interests.¹³⁰⁷ Additionally, the *Amendment Act* introduced several changes to court procedures, including the power to regulate family report writers¹³⁰⁸ and the expansion of the definitions of 'relative' and 'member of the family',¹³⁰⁹ which recognise extended family and kinship systems in matters involving Aboriginal and Torres Strait Islander children.¹³¹⁰

Of note, section 68LA(5A) provides that the independent children's lawyers must meet with the children they represent to ensure they can present any views expressed by the child, unless there are "exceptional circumstances".¹³¹¹ Critics of the amendments have expressed concern about the redefined quasi-criminal contravention regime, which allows the court to impose a fine or a sentence of imprisonment when it finds "beyond reasonable doubt" that a party has contravened any child-related order.¹³¹² As non-compliance with family court orders often stems from complex family violence and safety issues, the new regime arguably may further compromise children's safety.¹³¹³

The Family Law Amendment (Information Sharing) Act 2023 (the *Information Sharing Act*) facilitates information exchange between the family law, family violence and child protection systems. The *Information Sharing Act* aims to ensure that crucial data regarding family violence and child abuse and neglect are available to family courts during the resolution of parenting cases.¹³¹⁴ Notably, these changes involve the introduction of two new information

¹³⁰⁵ *Family Law Amendment Act (No 87) 2023* (Cth) sch 1. See *Family Law Act 1975* (Cth) (comp 12 June 2024) s 61DAA.

¹³⁰⁶ *Family Law Act 1975* (Cth) (comp 12 June 2024) s 60CC.

¹³⁰⁷ *Ibid* (comp 12 June 2024) s 60CC(2A).

¹³⁰⁸ *Family Law Amendment Act (No 87) 2023* (Cth) sch 7, s 11K.

¹³⁰⁹ *Ibid* sch 3.

¹³¹⁰ *Ibid* sch 3, s 4(1AC).

¹³¹¹ *Ibid* sch 4, s 68LA(5A)–(5D).

¹³¹² *Family Law Act 1975* (Cth) (comp 12 June 2024) s 70NAA.

¹³¹³ Women's Legal Services Australia, Submission no 49 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment Bill 2023* (23 June 2023) sch 2.

¹³¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 17 October 2023 (Anthony Chisholm, Senator).

sharing provisions,¹³¹⁵ which empower courts to request information from police, child protection and firearms agencies at any point during proceedings.¹³¹⁶

The following chapter presents the case studies that inform this research. This is followed by analysis and discussion.

¹³¹⁵ *Family Law Amendment (Information Sharing) Act (No 88) 2023* (Cth) sch 1, ss 67ZBD, 67ZBE.

¹³¹⁶ *Ibid* sch 1, s 67ZBJ.

Chapter Five – Case Studies

5 Introduction

This chapter illustrates concerning judicial approaches to allegations of child sexual abuse identified within Australia’s family law system. The featured case studies reveal recurring themes of judicial reliance on erroneous cultural and gendered beliefs, the evidence of poorly trained court-appointed experts and pseudoscientific theories with tenuous links to evidence-based research. Each case study underscores the long-term implications for the children involved as the family courts attempt to evaluate hotly contested allegations of child sexual abuse without reference to the findings and best-practice recommendations of the Royal Commission.

5.1 *Ainsley & Ainsley*

The research project considered two cases involving the Ainsley family.¹³¹⁷ The interim hearing in the Federal Circuit Court concerned two children, four-year-old ‘X’ and three-year-old ‘Y’,¹³¹⁸ who—up to that point—had always lived with their mother, Ms Ainsley.¹³¹⁹ During the interim hearing, Ms Ainsley deposed that her relationship with Mr Ainsley had been characterised by his drug abuse, coercive and controlling behaviour towards her and physical maltreatment of Y,¹³²⁰ who was described as a “hard kid to manage”.¹³²¹ X had made numerous disclosures of being subject to sexual abuse by the father to her mother and other family members, staff at her preschool, contact supervisors, and in interviews with the New South Wales Police and then-named Department of Family and Community Services.¹³²² In response, the father alleged that the mother was mentally ill and X’s disclosures were the product of ‘coaching’ by the mother.¹³²³

¹³¹⁷ *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019); *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023).

¹³¹⁸ *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [1] (Altobelli J).

¹³¹⁹ Ibid [84] (Altobelli J).

¹³²⁰ Report of Single Joint Expert, Dr J (2 October 2019) [5]–[6], cited in ibid [34] (Altobelli J).

¹³²¹ Report of Single Joint Expert, Dr J (2 October 2019) [16], cited in ibid [35] (Altobelli J).

¹³²² Chronology prepared by the Independent Children’s Lawyer, cited in ibid sch 1.

¹³²³ Report of Single Joint Expert, Dr J (2 October 2019) [69], cited in ibid [46] (Altobelli J).

In the months before the first reported hearing, the mother and children were the subject of a protection order,¹³²⁴ X attended counselling for victims of abuse¹³²⁵ and the children's time with their father was professionally supervised at a contact centre.¹³²⁶ Justice Altobelli stated in the 2019 judgement that:¹³²⁷

X and Y are manifesting very concerning behaviours, both sexualised behaviours and other what I will call unusual behaviours. It has gotten to the point that those who care for them have had to place limits on the availability of their services. It means the children are vulnerable. The children have special needs and concerning behaviours. In reality, even when looking at all the evidence in this case, we just do not know why X and Y are manifesting these worrying behaviours ... It is interesting that even Dr J really cannot explain this ...

The case is notable for its reliance on a mixture of contested social science research and fringe theories that have been soundly debunked by the literature. Justice Altobelli quoted extensively from the report of a Single Joint Expert, 'Dr J', which referred to speculative theories about 'false memories' and 'alienation', all of which were unreferenced and presented as fact.¹³²⁸

At the interim hearing, X and Y were ordered to immediately begin living with their paternal grandmother.¹³²⁹ They were permitted limited, supervised time with both their mother and father.¹³³⁰ The final trial, which occurred in 2023,¹³³¹ centred around the issues of whether the allegations of child sexual abuse could be verified and whether the mother had 'coached' Y to make disclosures.¹³³² Again, the reports of Dr J were influential although, throughout the proceedings, the expert professed a belief in 'false memories'¹³³³ and 'coaching',¹³³⁴ classified the mother as "a delusional parent"¹³³⁵ and stated that the disclosures of the older child, X,

¹³²⁴ Chronology prepared by the Independent Children's Lawyer, cited in *ibid* sch 1.

¹³²⁵ Report of Single Joint Expert, Dr J (2 October 2019) [6], cited in *ibid* [34] (Altobelli J).

¹³²⁶ *Ibid* [2] (Altobelli J).

¹³²⁷ *Ibid* [30]–[31] (Altobelli J).

¹³²⁸ Report of Single Joint Expert, Dr J (2 October 2019) [74], [85], cited in *ibid* [46] (Altobelli J).

¹³²⁹ *Ibid* ord 1, annex A(1) (Altobelli J).

¹³³⁰ *Ibid* ord 1, annex A(2)–(4) (Altobelli J).

¹³³¹ *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023).

¹³³² *Ibid* [35], [148] (Rees J).

¹³³³ Report of Single Joint Expert, Dr J (2 October 2019) [74], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J).

¹³³⁴ *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [61] (Rees J).

¹³³⁵ *Ibid* [236] (Rees J).

were “histrionic”.¹³³⁶ Ultimately, Rees J was not satisfied that the father had sexually abused X and physically abused Y.¹³³⁷ Her Honour determined that the mother had “coached the children” to make false allegations,¹³³⁸ and therefore the mother’s parenting was harmful to the children’s psychological wellbeing.¹³³⁹ The children were ordered to remain living with their paternal grandmother on a final basis.¹³⁴⁰ The children were permitted supervised time with their mother on three occasions per year, while the father was ordered regular unsupervised time with the children.¹³⁴¹

5.2 *Belton & Braim*

Belton & Braim involved evaluation of the best interests of eight-year-old ‘X’.¹³⁴² The mother, Ms Braim, sought for the child to live with her and for the father’s visitation to be supervised, citing allegations made against the father by Z, another child of the mother from a previous relationship.¹³⁴³ The father, Mr Belton, asked that X reside with him and spend substantial time with the mother.¹³⁴⁴ In hearing these competing claims, Carew J aimed to determine whether the father posed an unacceptable risk to X if she was to be placed in his care, and whether the mother was fit to care for X, given that her other two children from previous relationships—then 18-year-old ‘Z’ and 14-year-old ‘Y’—were cared for by others for significant periods of time.¹³⁴⁵ The mother had a history of poor mental and physical health¹³⁴⁶ and periodically suffered significant epileptic seizures.¹³⁴⁷ Both parents had been the subject of allegations of family violence in the past, both towards each other¹³⁴⁸ and towards Z.¹³⁴⁹

¹³³⁶ Ibid [141] (Rees J).

¹³³⁷ Ibid [156] (Rees J).

¹³³⁸ Ibid [148] (Rees J).

¹³³⁹ Ibid [290] (Rees J).

¹³⁴⁰ Ibid ord 2 (Rees J).

¹³⁴¹ Ibid ords 4–5 (Rees J).

¹³⁴² *Belton & Braim* (No 2) [2019] FamCA 840 (15 November 2019) [1] (Carew J).

¹³⁴³ Ibid [5], [7(1)] (Carew J).

¹³⁴⁴ Ibid [4] (Carew J).

¹³⁴⁵ Ibid [7(2)] (Carew J).

¹³⁴⁶ Ibid [86] (Carew J).

¹³⁴⁷ Ibid [88] (Carew J).

¹³⁴⁸ Ibid [123] (Carew J).

¹³⁴⁹ Ibid [37] (Carew J).

The risk posed to X of sexual abuse was considered in light of the then-named Department of Child Safety, Youth and Women’s substantiation of the sexual abuse of Z by Mr Belton,¹³⁵⁰ five years earlier.¹³⁵¹ Referring to the substantiated sexual abuse as “historic allegations”,¹³⁵² Carew J found the evidence insufficient to support a finding that the father posed an unacceptable risk of sexual harm to X.¹³⁵³ Ultimately, the court ordered X to live with the mother,¹³⁵⁴ noting that the mother was X’s primary attachment figure, and stressing the emotional and psychological harm that might result from changing the child’s residence.¹³⁵⁵ X was ordered to have regular time with her father that was initially supervised “in order to allay any residual concerns held by the mother”,¹³⁵⁶ with a structured plan for a gradual transition to unsupervised time.¹³⁵⁷

5.3 *Bentleigh & Bentleigh*

*Bentleigh & Bentleigh*¹³⁵⁸ involved two girls, ‘B’ and ‘C’, who began disclosing sexual abuse by their father, Mr Bentleigh, in 2014, when the children were approximately five and three years old.¹³⁵⁹ The mother, Ms Bentleigh, had made numerous reports of abuse to various authorities, based on the girls’ disclosures to her and to a number of professionals.¹³⁶⁰ The father consistently refuted the allegations,¹³⁶¹ arguing that the mother posed a risk of psychological harm to the children due to her belief that he had sexually abused them.¹³⁶²

¹³⁵⁰ Ibid [63] (Carew J).

¹³⁵¹ Ibid [32] (Carew J).

¹³⁵² Ibid [32] (Carew J).

¹³⁵³ Ibid [130] (Carew J).

¹³⁵⁴ Ibid ord 3 (Carew J).

¹³⁵⁵ Ibid headnote.

¹³⁵⁶ Ibid [3] (Carew J).

¹³⁵⁷ Ibid ords 4–5 (Carew J).

¹³⁵⁸ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018).

¹³⁵⁹ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [12]–[15] (Hannam J).

¹³⁶⁰ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) (Rees J) [78], [81], [84], [85], [91], [93], [99], [130]–[132], [135]; *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [73] (Hannam J).

¹³⁶¹ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) (Rees J) [74], [113].

¹³⁶² *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [61] (Hannam J).

Shortly before a final hearing in 2017, the mother stated that she accepted the expert opinions of ‘Dr G’ that no abuse had occurred.¹³⁶³ Accordingly, the final orders provided that the children live with their mother while spending unsupervised time with their father.¹³⁶⁴ The mother was restrained from “presenting the children to a medical or health practitioner for the purposes of the children making a disclosure about the father”.¹³⁶⁵ However, after the 2017 orders were made, the children continued to make further disclosures of sexual abuse by their father.¹³⁶⁶ The mother reported their disclosures and regressive behaviours to the then-named Department of Family and Community Services and took the older child, B, to a medical centre and a hospital where she made further disclosures to medical professionals.¹³⁶⁷ Ms Bentleigh enrolled the children in counselling facilitated by Victims Services New South Wales¹³⁶⁸ and withheld the children from contact with the father for four months during this time.¹³⁶⁹

Nearly one year later, when the children were aged seven and nine years,¹³⁷⁰ the father lodged an application seeking orders that the children be placed in his care, spend no time with their mother for three months and be restricted to supervised time with her at a contact centre thereafter.¹³⁷¹ He argued that enabling the children to make further disclosures of sexual abuse by him to medical professionals was a breach of the 2017 orders,¹³⁷² claiming that the mother posed:¹³⁷³

[An] unacceptable risk of emotional and psychological harm ... due to her persistence in giving weight to the children’s allegations that he has sexually abused them and presenting them to medical professionals for the purposes of making disclosures of abuse.

¹³⁶³ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [48] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [17] (Hannam J).

¹³⁶⁴ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) (Rees J) ords 3, 5–8.

¹³⁶⁵ *Ibid* ord 22 (Rees J).

¹³⁶⁶ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [20] (Hannam J).

¹³⁶⁷ *Ibid* [20]–[25] (Hannam J).

¹³⁶⁸ *Ibid* [73] (Hannam J).

¹³⁶⁹ *Ibid* [124] (Hannam J).

¹³⁷⁰ *Ibid* [1] (Hannam J).

¹³⁷¹ *Ibid* [8] (Hannam J).

¹³⁷² *Ibid* [54] (Hannam J).

¹³⁷³ *Ibid* [61] (Hannam J).

The judgement is significant in framing the children's numerous and continued disclosures of sexual abuse by their father in terms of their mother's beliefs,¹³⁷⁴ and in the emphasis placed by the father, the Independent Children's Lawyer and the Judge on the 'risk' these beliefs posed to the children.¹³⁷⁵ Notably, numerous child sexual abuse disclosures made after the May 2017 order were left unaddressed in the judgement and merely listed as events,¹³⁷⁶ while allegations of physical violence by the father towards the children were extensively and meticulously discussed.¹³⁷⁷

The mother's 2017 retraction of the allegations of sexual abuse¹³⁷⁸ is also pertinent as it reflects a phenomenon documented in the literature internationally, in which alleging parents withdraw or cease making allegations of harm in response to the hostile and often threatening response they receive within the family courts.¹³⁷⁹ Ultimately, Hannam J did not make a conclusive finding of sexual abuse against the father, and instead avoided making any findings about the veracity of the sexual abuse allegations in the 2018 judgement. No other explanation for the children's ongoing disclosures was attempted by either Her Honour or the Independent Children's Lawyer. Under the 2018 orders, the children were ultimately permitted to continue living with their mother.¹³⁸⁰ Hannam J resolved the problem of the children continuing to disclose sexual abuse by heavily restricting the children's access to counselling,¹³⁸¹ and thus their ability to disclose sexual abuse to anyone besides their mother. Her Honour did not alter the orders mandating the children's unsupervised contact with their father.

¹³⁷⁴ Ibid [59], [78] (Hannam J).

¹³⁷⁵ Ibid [68]–[71], [86]–[87] (Hannam J).

¹³⁷⁶ Ibid [20]–[22], [25], [27] (Hannam J).

¹³⁷⁷ Ibid [94]–[106] (Hannam J).

¹³⁷⁸ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [48] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [17] (Hannam J).

¹³⁷⁹ Robert Nonomura et al., *When the Family Court Becomes the Continuation of Family Violence after Separation: Understanding Litigation Abuse* (Family Violence & Family Law Brief No 15, Alliance of Canadian Research Centres on Gender-Based Violence, July 2022) 7.

¹³⁸⁰ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [149] (Hannam J).

¹³⁸¹ Ibid ord 1 (Hannam J).

5.4 *Fletcher & Littlemore*

Fletcher & Littlemore concerned a discrete hearing to determine whether nine-year-old ‘X’ was at risk of sexual abuse in the care of her father, Mr Littlemore.¹³⁸² The child had demonstrated sexualised behaviours since a young age, as agreed by her parents and documented by her kindergarten and preparatory school.¹³⁸³ When the child was nine, she disclosed to her mother, Ms Fletcher, that her father had been sexually abusing her.¹³⁸⁴ The child subsequently repeated her disclosure in detail in an interview with Queensland Police, and later to a psychologist.¹³⁸⁵ After the disclosures were made, the father submitted affidavit material to the court stating that he was reluctant to participate in further family law proceedings, believing the family courts were “biased against fathers”.¹³⁸⁶ In conducting the 2018 hearing, Baumann J stated that “a discrete hearing on the sexual abuse allegation might have ‘cleared’ the air”, enabling the father to reengage in proceedings.¹³⁸⁷

The significance of the case lies in the Judge’s disregard for the repeated disclosures of the child, particularly in light of the lack of an alternative explanation for both her disclosures and her significant sexualised behaviours. Justice Baumann concluded that, while “[i]t is a very serious matter for a child to *believe* a parent has sexually abused them ... I make a finding that the child is not at an unacceptable risk of sexual harm or sexual abuse in the care of the father”.¹³⁸⁸ Nevertheless, two months later, the father withdrew completely from proceedings.¹³⁸⁹ This was described by Baumann J as “a tragic ... outcome for this child”.¹³⁹⁰

¹³⁸² *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [11] (Baumann J).

¹³⁸³ *Ibid* [2] (Baumann J).

¹³⁸⁴ *Ibid* [7] (Baumann J).

¹³⁸⁵ *Ibid* [22], [28] (Baumann J).

¹³⁸⁶ *Ibid* [9] (Baumann J).

¹³⁸⁷ *Ibid* [10] (Baumann J).

¹³⁸⁸ *Ibid* [32] (Baumann J) (emphasis added).

¹³⁸⁹ *Fletcher & Littlemore* [2019] FamCA 119 (13 February 2019) [3] (Baumann J).

¹³⁹⁰ *Ibid* [8] (Baumann J).

5.5 *Hammond & Hammond*

Hammond & Hammond evaluated the risk of sexual abuse posed to two girls, ‘Y’ and ‘Z’, by their father, Mr Hammond.¹³⁹¹ At the time of the hearing in question, Z was aged 10 and Y was aged six.¹³⁹² The mother, Ms Hammond, argued that Mr Hammond presented an unacceptable risk of harm to both children, based on Z’s history of sexualised behaviours,¹³⁹³ and the disclosures of sexual abuse by her father¹³⁹⁴ that Z had made to several people, including a psychotherapist¹³⁹⁵ and a psychologist,¹³⁹⁶ in interviews with police¹³⁹⁷ and the then-named Department of Family and Community Services.¹³⁹⁸

Prior to and following separation, the mother had reported her concerns to the police,¹³⁹⁹ and risk of harm reports were received by the Department.¹⁴⁰⁰ Following the parents’ separation in 2018,¹⁴⁰¹ when Z was around seven years old, she was interviewed by New South Wales Police and the Department.¹⁴⁰² The following year, the Department *substantiated* both the sexual harm of Z and a significant risk of sexual harm to Y by the father.¹⁴⁰³ However, the substantiation was subsequently the subject of some debate,¹⁴⁰⁴ as the Magellan Report of the following year—which was prepared within the Family Court of Australia’s fast-track case management program—noted “concerns that the allegations of sexual abuse perpetrated by the father have been substantiated without any clear disclosure and within the context of Family Court proceedings these matters require careful consideration”.¹⁴⁰⁵ The father commenced proceedings in the Federal Circuit Court in 2018, claiming that the mother was “emotionally

¹³⁹¹ *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [3] (Hannam J).

¹³⁹² *Ibid* [1] (Hannam J).

¹³⁹³ *Ibid* [11] (Hannam J).

¹³⁹⁴ *Ibid* [3] (Hannam J).

¹³⁹⁵ *Ibid* [100] (Hannam J).

¹³⁹⁶ *Ibid* [161]–[164] (Hannam J).

¹³⁹⁷ *Ibid* [119]–[131] (Hannam J).

¹³⁹⁸ *Ibid* [153] (Hannam J).

¹³⁹⁹ *Ibid* [20]–[22] (Hannam J).

¹⁴⁰⁰ *Ibid* [17], [21], [24] (Hannam J).

¹⁴⁰¹ *Ibid* [19] (Hannam J).

¹⁴⁰² *Ibid* [22]–[25] (Hannam J).

¹⁴⁰³ *Ibid* [155] (Hannam J).

¹⁴⁰⁴ *Ibid* [24], [31]–[32] (Hannam J).

¹⁴⁰⁵ Magellan Report (29 March 2019), cited in *ibid* [160] (Hannam J).

manipulating” the children, had “coached the older child to make false allegations against him”¹⁴⁰⁶ and had “alienated” him from his children.¹⁴⁰⁷

The case is significant for its evaluation of Z’s many disclosures of sexual abuse. Both Hannam J and the court-appointed expert, ‘Ms C’, considered that ‘coaching’ and ‘false memories’ may account for Z’s disclosures.¹⁴⁰⁸ The court’s consideration of the risk of child sexual abuse largely hinged on the testimony of Ms C, a forensic and clinical psychologist, who was tasked by the court with evaluating Z’s forensic interviews in order to report on “whether they complied with best practise [sic] in relation to the forensic interviewing of children”.¹⁴⁰⁹

As reported by Hannam J, the expert concluded that, although Z “provided police investigators a broad narrative of her experience of abuse and her certainty that she and the younger child were both sexually abused by the father, little meaningful specific information was gained during those interviews”.¹⁴¹⁰ In her report, the expert also opined that Z may have been “coached by the psychotherapist prior to the forensic interviews”,¹⁴¹¹ or that the mother may have inadvertently implanted a “false memory” of sexual abuse in Z via her “genuine belief” that such abuse had occurred.¹⁴¹² Justice Hannam also noted approaching Z’s disclosures “with caution”,¹⁴¹³ stating “there is no evidence that the older child had made any disclosure of sexual abuse prior to her parents’ separation”.¹⁴¹⁴ Despite observing that Z “focused on the father having hurt her and was anxious about spending time with him”,¹⁴¹⁵ the expert argued that “both children wished to maintain a meaningful relationship” with the father.¹⁴¹⁶ Discounting Z’s expressed ambivalence, Hannam J concurred with the expert, stating that “it is appropriate to give significant weight to the children’s views about spending time with their father”.¹⁴¹⁷

¹⁴⁰⁶ Ibid [26] (Hannam J).

¹⁴⁰⁷ Ibid [171] (Hannam J).

¹⁴⁰⁸ Report of Single Joint Expert, Ms C (September 2019), cited in *ibid* [196] (Hannam J); Report of Single Joint Expert, Ms C (5 March 2020), cited in *ibid* [41], [203] (Hannam J); *ibid* [218], [290], [306] (Hannam J).

¹⁴⁰⁹ Ibid [40] (Hannam J).

¹⁴¹⁰ Ibid [41] (Hannam J).

¹⁴¹¹ Ibid [41] (Hannam J).

¹⁴¹² Ibid [289] (Hannam J).

¹⁴¹³ Ibid [251] (Hannam J).

¹⁴¹⁴ Ibid [252] (Hannam J).

¹⁴¹⁵ Ibid [370] (Hannam J).

¹⁴¹⁶ Ibid [37] (Hannam J).

¹⁴¹⁷ Ibid [369] (Hannam J).

A pertinent aspect of the case lies in the way in which the parties contemplated constructing orders for the children, in the event that the father *was* found to pose an unacceptable risk of harm. The expert recommended that the children should have “an *opportunity* to spend supervised time with the father”, *even if the court determined that he had sexually abused one or both children*.¹⁴¹⁸ The Independent Children’s Lawyer, Mr Roberts, proposed that if the father *was* found to pose an unacceptable risk of sexual harm, the children should remain living with their mother and “spend time with the father in accordance with their wishes”.¹⁴¹⁹ Expecting 10- and six-year-old children to evaluate the risks of spending time with a parent who has sexually abused them in the past clearly contradicts best-practice responses to child sexual abuse.

Justice Hannam, placing considerable weight on the expert’s opinion, concluded that there was insufficient evidence to deem Mr Hammond an unacceptable risk of sexual harm to his daughters.¹⁴²⁰ Her Honour also addressed the requirement of the *Family Law Act* when determining a child’s best interests to “protect the child from physical or psychological harm, from being subjected to or exposed to abuse, neglect or family violence”.¹⁴²¹ Justice Hannam discounted any need to protect Z from psychological harm arising from mandated contact with her father, given “her belief that the father had sexually abused her in the past”, stating that this was unnecessary as the harm potentially caused “is not harm arising from abuse, neglect or family violence”.¹⁴²² Consequently, the judgement allowed the children to continue living with their mother, while ordering that they spend time with their father, transitioning to unsupervised time after four months.¹⁴²³

¹⁴¹⁸ Report of Single Joint Expert, Ms C (September 2019), cited in *ibid* [37] (Hannam J) (emphasis added).

¹⁴¹⁹ *Ibid* [5] (Hannam J).

¹⁴²⁰ *Ibid* [365] (Hannam J).

¹⁴²¹ *Family Law Act 1975* (Cth) (comp 27 November 2020) s 60CC(2)(b), cited in *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [352] (Hannam J). The current *Family Law Act* requires courts to consider “what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of: (i) the child; and (ii) each person who has care of the child (whether or not a person has parental responsibility for the child)”: *Family Law Act 1975* (Cth) (comp 12 June 2024) s 60CC(2)(a).

¹⁴²² *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [365] (Hannam J).

¹⁴²³ *Ibid* ord 14 (Hannam J).

5.6 *Martin & Payne*

Martin & Payne concerned twin girls, ‘B’ and ‘C’, who were eight years old at the time of the final hearing.¹⁴²⁴ The final hearing was conducted between mid-2016 and mid-2017, against the background of the running Royal Commission, and the final judgement was handed down on 18 December 2017, just three days after the Commission’s conclusion.

The parents, Ms Martin and Mr Payne, met when Ms Martin was a high school student,¹⁴²⁵ and commenced a relationship when she was 19 and he was 28.¹⁴²⁶ The parents first separated not long after the children were born in 2009.¹⁴²⁷ They finally separated around six months later¹⁴²⁸ and the father commenced supervised contact with the children.¹⁴²⁹ Around 16 months later, the parties entered into final consent orders that saw the children living with their mother and spending weekend and holiday time with their father,¹⁴³⁰ with changeover taking place at a supervised contact centre.¹⁴³¹ The mother deposed to a long history of coercive, controlling, physically intimidating, and verbally and financially abusive behaviour perpetrated by the father against her and the children during their relationship, some aspects of which continued after separation.¹⁴³² The year the children turned four, the mother began to report to the then-named Department of Family and Community Services regarding sexualised behaviours by the children, physical signs of sexual abuse and the children’s disclosures that the father had strangled C.¹⁴³³

The following year, in 2014, the mother ceased allowing the father to have contact with the children¹⁴³⁴ and initiated proceedings in the Federal Circuit Court.¹⁴³⁵ During this period, the children made several disclosures regarding sexual abuse and the strangling incident to the mother, her friends, the maternal grandmother and the director of their childcare centre,¹⁴³⁶ and

¹⁴²⁴ *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [1] (Tree J).

¹⁴²⁵ *Ibid* [7]–[8] (Tree J).

¹⁴²⁶ *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [107] (Tree J).

¹⁴²⁷ *Ibid* [12] (Tree J).

¹⁴²⁸ *Ibid* [12]–[13] (Tree J).

¹⁴²⁹ *Ibid* [16] (Tree J).

¹⁴³⁰ *Ibid* [17] (Tree J).

¹⁴³¹ *Ibid* [22] (Tree J).

¹⁴³² *Ibid* [99]–[106] (Tree J).

¹⁴³³ *Ibid* [21], [80] (Tree J).

¹⁴³⁴ *Ibid* [22]–[26] (Tree J).

¹⁴³⁵ *Ibid* [23] (Tree J).

¹⁴³⁶ *Ibid* [80] (Tree J).

C was taken to the hospital by the mother's friend as her genitals and bottom were red.¹⁴³⁷ The childcare centre made a report to the Department,¹⁴³⁸ as did the hospital.¹⁴³⁹ The mother and a friend also reported concerns about the father to New South Wales Police, which included the sexual and physical abuse of the children, possible corruption in the course of his employment in the public service, and links to outlaw motorcycle gangs and drug dealing.¹⁴⁴⁰

The father became the subject of two police investigations based on these allegations and on sensitive documents the father had retained from his workplace, as provided by the mother to police,¹⁴⁴¹ and these investigations were subsequently concluded by police without charge.¹⁴⁴² The judgement notes that the report of the father choking C was subsequently unsubstantiated by the Department due to a lack of medical evidence,¹⁴⁴³ but remains silent as to the Department's conclusions about the other reports of harm.

The case is significant for two reasons. First, the mother's allegations about the father to the Department and police were found by Tree J to constitute family violence.¹⁴⁴⁴ Conversely, His Honour concluded that, while the father did exert control over the mother, "I am far from satisfied that he therefore poses a risk of family violence of any kind being perpetrated in the children's presence".¹⁴⁴⁵

Second, the case epitomises the pressures documented in the literature, as faced by alleging parents in the family courts, which results in some parties concealing abuse and downplaying or even retracting allegations of such harm.¹⁴⁴⁶ The mother's 2014 initiating application sought orders that the father's contact be limited to two hours of supervised time with the children per

¹⁴³⁷ Ibid [24] (Tree J).

¹⁴³⁸ Ibid [80] (Tree J).

¹⁴³⁹ Ibid [24] (Tree J).

¹⁴⁴⁰ Ibid [25]–[27] (Tree J).

¹⁴⁴¹ Ibid [30] (Tree J).

¹⁴⁴² Ibid [41] (Tree J).

¹⁴⁴³ Ibid [82] (Tree J).

¹⁴⁴⁴ Ibid [88]–[92] (Tree J).

¹⁴⁴⁵ Ibid [105], [110] (Tree J).

¹⁴⁴⁶ See for example Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 79, 81; Wendy Lee Foote, 'Child Sexual Abuse Allegations in the Family Court' (PhD Thesis, University of Sydney, 2006) 55; Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 11; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 10, 55.

fortnight,¹⁴⁴⁷ but by the time of the final hearing, the mother sought only that the current arrangements, under which the children lived with her and spent unsupervised weekend and holiday time with the father, continue.¹⁴⁴⁸ She ceased pressing her allegations of sexual and physical harm, submitted evidence to the court that she had sought the assistance of a psychologist in changing her view of the father¹⁴⁴⁹ and apologised to the court “*for being so sensitive*” with regard to the father’s actions.¹⁴⁵⁰ The final orders required the children to remain living with their mother and continue spending substantial unsupervised time with their father.¹⁴⁵¹ Justice Tree also ordered the mother to continue attending psychological counselling “for the purpose of consulting on her acceptance of the final orders”.¹⁴⁵²

5.7 *Palmer & Kagan*

Palmer & Kagan was heard in mid-2019, almost two years after the close of the Royal Commission, when the subject child, ‘X’, was six years old.¹⁴⁵³ At the time her case came before the Federal Circuit Court, X had lived all her life with her mother, Ms Kagan.¹⁴⁵⁴ X also had a close relationship with her 21-year-old brother, referred to in the judgement as ‘Mr E’.¹⁴⁵⁵ X’s father, Mr Palmer, was the subject of allegations of family violence towards the mother,¹⁴⁵⁶ and had a documented history of public aggression, both in the workplace and in a road rage incident,¹⁴⁵⁷ as well as a history of alcohol misuse.¹⁴⁵⁸ X’s mother and brother alleged that the father posed a risk of sexual abuse to X, based on his prior conduct towards two girls, 11-year-old ‘A’ and 15-year-old ‘R’, which included supplying one or both of them with gifts, drugs and alcohol, becoming heavily intoxicated with them, lying with them on the couch and floor, having them sit on his lap and spending hours alone with them.¹⁴⁵⁹ Both X’s mother and

¹⁴⁴⁷ *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [23] (Tree J).

¹⁴⁴⁸ *Ibid* [1] (Tree J).

¹⁴⁴⁹ *Ibid* [95] (Tree J).

¹⁴⁵⁰ *Ibid* [79] (Tree J) (emphasis added).

¹⁴⁵¹ *Ibid* ords 4–5 (Tree J).

¹⁴⁵² *Ibid* ords 23 (Tree J).

¹⁴⁵³ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [1] (Altobelli J).

¹⁴⁵⁴ *Ibid* [4] (Altobelli J).

¹⁴⁵⁵ *Ibid* [2] (Altobelli J).

¹⁴⁵⁶ *Ibid* [47] (Altobelli J).

¹⁴⁵⁷ *Ibid* [48] (Altobelli J).

¹⁴⁵⁸ *Ibid* [45], [47] (Altobelli J).

¹⁴⁵⁹ *Ibid* [52]–[58], [61], [113]–[114] (Altobelli J).

brother characterised this behaviour as “grooming”.¹⁴⁶⁰ X’s brother also deposed to witnessing an incident in which it appeared that the father had sexually assaulted the 15-year-old girl.¹⁴⁶¹

X was two years old when her parents separated.¹⁴⁶² Since that time, she had been subject to parenting plans made by consent and then interim orders of the Federal Circuit Court which had governed her time with her father, eventually mandating supervised contact and then limited overnight time in his care.¹⁴⁶³ The mother deposed that during this period, X had disclosed witnessing the father heavily intoxicated¹⁴⁶⁴ and that the child had one night left the father’s house and hid behind some garbage bins.¹⁴⁶⁵ Ms Kagan also alleged that X had to be taken to the supervised contact centre “kicking and screaming”¹⁴⁶⁶ and had returned from contact with her father in soiled underwear on two occasions.¹⁴⁶⁷ The child appeared to have little relationship with her father, and had been documented by the supervised contact centre calling him “the stranger”.¹⁴⁶⁸

The present litigation was commenced by the father in 2016.¹⁴⁶⁹ In 2019, the father amended his application, seeking orders that X live with him and that he have sole parental responsibility for major decisions about her life.¹⁴⁷⁰ The case was heard by Altobelli J who, at the time of the final hearing, had published several articles on ‘parental alienation’.¹⁴⁷¹ Justice Altobelli drew on the evidence of a court-appointed Single Joint Expert, ‘Dr J’, who analysed both parents via psychometric testing, itself a contested area of inquiry.¹⁴⁷² Dr J concluded that, while the father

¹⁴⁶⁰ Affidavit of Mr E (12 July 2019) [3], cited in *ibid* [50], [52] (Altobelli J); Affidavit of Ms Kagan (25 March 2019) [97]–[98], cited in *ibid* [116] (Altobelli J).

¹⁴⁶¹ Affidavit of Mr E (12 July 2019) [34]–[39], cited in *ibid* [68]–[76] (Altobelli J).

¹⁴⁶² *Ibid* [4] (Altobelli J).

¹⁴⁶³ *Ibid* [5], [154], [159] (Altobelli J).

¹⁴⁶⁴ Affidavit of Ms Kagan (13 December 2019) [59], [71], cited in *ibid* [215]–[217] (Altobelli J).

¹⁴⁶⁵ Affidavit of Ms Kagan (13 December 2019) [59], [71], cited in *ibid* [213]–[214] (Altobelli J).

¹⁴⁶⁶ Affidavit of Ms Kagan (13 December 2019) [74], cited in *ibid* [218] (Altobelli J).

¹⁴⁶⁷ Affidavit of Ms Kagan (13 December 2019) [53]–[55], cited in *ibid* [212]–[214] (Altobelli J).

¹⁴⁶⁸ *Ibid* [171] (Altobelli J).

¹⁴⁶⁹ *Ibid* [5] (Altobelli J).

¹⁴⁷⁰ *Ibid* [13] (Altobelli J).

¹⁴⁷¹ See for example T Altobelli, 'When a Child Rejects a Parent: Why Children Resist Contact' (2011) 25(3) *Australian Journal of Family Law* 185–209; Shely Polak, Tom Altobelli and Linda Popielarczyk, 'Responding to Severe Parent-Child Rejection Cases without a Parentectomy: A Blended Sequential Intervention Model and the Role of the Courts' (2020) 58(2) *Family Court Review* 507–524.

¹⁴⁷² See for example Karen M Davis and Robert P Archer, 'A Critical Review of Objective Personality Inventories with Sex Offenders' (2010) 66(12) *Clinical Psychology* 1254–1280, 1265; N Heersink and DS Strassberg, 'A Normative and Descriptive Study of the MMPI with Acknowledged Child Molesters' (1995) 17(4) *Psychopathology and Behavioral Assessment* 377–391, 569; Rebecca Jean Fisher, 'A Descriptive Analysis of

posed no risk of harm to X,¹⁴⁷³ the psychometric tests revealed the mother to be “a person with chronic, intense anger”, “demanding of attention and approval from others”, “sensitive to rejection” and “hostile when criticised”, with a “lack of insight”.¹⁴⁷⁴ Dr J stated that this provided an “explanation” for Ms Kagan’s allegations against the father.¹⁴⁷⁵ The allegations of X’s adult brother and maternal grandparents were construed by His Honour as further evidence that, due to the mother’s influence, the primary members of the maternal family possessed a “shared intractable negative view about [the] father”¹⁴⁷⁶ and would resist the child’s relationship with him.¹⁴⁷⁷ The Independent Children’s Lawyer also argued that X would “assimilate” the mother’s “entrenched belief” about the father.¹⁴⁷⁸

Ultimately, Altobelli J determined that the mother was unable to support X’s relationship with her father. In large part this appears to be based on her disobedience of prior court orders mandating X’s contact with her father, and her continued belief that X was at risk in his care.¹⁴⁷⁹ Justice Altobelli ordered X to live with her father.¹⁴⁸⁰ The orders stipulated that the six-year-old’s transition to her father’s care was to take place without warning to X, and included a moratorium on all contact between mother and child for approximately two months.¹⁴⁸¹ His Honour stated that these measures were necessary for X to successfully transition into her father’s care, as the likelihood that the mother would refuse to deliver X to the father presented “the real danger for X”.¹⁴⁸² Acknowledging that a moratorium on even verbal communication between mother and child “was not proposed by the Independent Children’s Lawyer and indeed resisted by Dr J”, His Honour decided that it was “in the best interests of X” who “needs to be protected from the highly contagious anxiety that her mother feels, and which has been communicated to X in the past”.¹⁴⁸³ The father was given sole parental responsibility for long-

MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations’ (PsyD Thesis, Chestnut Hill College, 2019) 97–98.

¹⁴⁷³ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [230] (Altobelli J).

¹⁴⁷⁴ Report of Single Joint Expert, Dr J (24 April 2018) 41–42, cited in *ibid* [127] (Altobelli J).

¹⁴⁷⁵ Report of Single Joint Expert, Dr J (24 April 2018) 41–42, cited in *ibid* [127] (Altobelli J).

¹⁴⁷⁶ *Ibid* [149] (Altobelli J).

¹⁴⁷⁷ *Ibid* [146]–[149] (Altobelli J).

¹⁴⁷⁸ *Ibid* [233] (Altobelli J).

¹⁴⁷⁹ *Ibid* [255] (Altobelli J).

¹⁴⁸⁰ *Ibid* ords 1, 3 (Altobelli J).

¹⁴⁸¹ *Ibid* ords 3–4 (Altobelli J).

¹⁴⁸² *Ibid* [280] (Altobelli J).

¹⁴⁸³ *Ibid* [280]–[281] (Altobelli J).

term decisions about X's life.¹⁴⁸⁴ The orders provided X with alternate weekends and half of each school holidays with her mother,¹⁴⁸⁵ once the moratorium on contact was complete.

5.8 *Tabano & Yabon*

*Tabano & Yabon*¹⁴⁸⁶ began in 2016, when the father, Mr Yabon, initiated proceedings at the Federal Circuit Court. It concerned three children, 'X', 'Y' and 'Z', aged approximately 10, eight and six at the time of the first judgement.¹⁴⁸⁷ There are eight reported judgements in the case, which spanned four years, all of which were penned after the close of the Royal Commission. The case is significant because the primary person violating family court orders was not the mother or the father, but an adolescent child. The eldest child, X, repeatedly resisted living in the mother's home, alleging abuse by her mother, Ms Tabano, and her stepfather, who was referred to in the judgement as 'Mr V'.¹⁴⁸⁸

In 2017, the parties reached an agreement for the children to reside with their mother, spending alternate weekends with their father.¹⁴⁸⁹ However, in early 2018, Judge Egan issued orders sending the three subject children, without warning, into the father's care.¹⁴⁹⁰ The orders were made, Judge Egan stated, in response to communication from the mother received on the day of the February hearing, stating that she was in hospital giving birth to a child.¹⁴⁹¹ Judge Egan's reasoning in making this sweeping change in the children's lives was that the mother had provided no information "either to the Court, to the ICL [or Independent Children's Lawyer], or to the father" as to the care arrangements for the children "during any period of hospitalisation on behalf of the mother".¹⁴⁹²

¹⁴⁸⁴ Ibid ords 1, 3 (Altobelli J).

¹⁴⁸⁵ Ibid ord 4 (Altobelli J).

¹⁴⁸⁶ *Tabano & Yabon* [2018] FCCA 2313 (13 August 2018); *Yabon & Tabano* [2019] FamCAFC 159 (17 September 2019); *Tabano & Yabon* [2019] FamCA 952 (10 December 2019); *Yabon & Tabano* [2020] FamCAFC 22 (31 January 2020); *Tabano & Yabon (No 2)* [2020] FamCA 831 (1 May 2020); *Tabano & Yabon* [2020] FamCA 643 (5 August 2020); *Tabano & Yabon (No 3)* [2020] FamCA 923 (3 November 2020); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020).

¹⁴⁸⁷ These approximated ages are based on *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) ords 2, 5 (Forrest J), which provides the year each child was born.

¹⁴⁸⁸ Ibid [47] (Forrest J).

¹⁴⁸⁹ *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [2] (Forrest J).

¹⁴⁹⁰ Orders of Egan J (27 February 2018), cited in *Tabano & Yabon* [2018] FCCA 2313 (13 August 2018) [2] (Egan J).

¹⁴⁹¹ Ibid [1], [4] (Egan J).

¹⁴⁹² Ibid [2] (Egan J).

Judge Egan acknowledged that he directed the Independent Children’s Lawyer and the father to draft orders for the children to live with the father and spend time with their mother.¹⁴⁹³ His Honour then approved these orders in chambers, without providing the mother or children any opportunity to be heard on the matter.¹⁴⁹⁴ While His Honour did ultimately recuse himself from the case,¹⁴⁹⁵ the children remained in the primary care of their father for close to another year, until they were transferred into their mother’s care in July 2019 under orders stating that the children would have no time or communication with their father.¹⁴⁹⁶ While there are no publicly available Reasons for Judgement detailing this decision, the orders were made due to “an unacceptable risk of psychological harm to the children should they continue to reside with the father due to his overtly negative views of the mother”.¹⁴⁹⁷

From this point onwards, the court issued numerous recovery orders as the oldest child, X, repeatedly ran away from her mother’s home,¹⁴⁹⁸ stating that she was subject to neglect and abuse, including sexual abuse, in her mother’s household,¹⁴⁹⁹ and that her mother and siblings were also subject to abuse.¹⁵⁰⁰ In December 2019, the case fell to Forrest J, who evaluated X’s allegations of abuse and threats of self-harm if returned to her mother and stepfather.¹⁵⁰¹ Justice Forrest continued forcibly returning X to her mother, citing the unsubstantiated findings of the Queensland Police Service and the then-named Department of Child Safety, Youth and Women.¹⁵⁰² The parties underwent a 19-day trial before Forrest J, ending in May 2020¹⁵⁰³ and His Honour reserved his decision.¹⁵⁰⁴

In November of that year, when the children were aged 14, 12 and 10, Forrest J’s final orders were handed down. Unable to prevent X from running away from her mother’s home, the court ordered the permanent separation of the children. Having determined that the father had

¹⁴⁹³ Ibid [4] (Egan J).

¹⁴⁹⁴ Ibid [5] (Egan J).

¹⁴⁹⁵ Ibid [6] (Egan J).

¹⁴⁹⁶ Unpublished orders of the Federal Circuit Court (26 July 2019), cited in *Yabon & Tabano* [2020] FamCAFC 22 (31 January 2020) [4] (Kent J).

¹⁴⁹⁷ Unpublished orders of the Federal Circuit Court (26 July 2019), cited in *ibid* [6] (Kent J).

¹⁴⁹⁸ *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [7] (Forrest J).

¹⁴⁹⁹ Ibid [12] (Forrest J).

¹⁵⁰⁰ Ibid [16]–[17] (Forrest J).

¹⁵⁰¹ Ibid [18] (Forrest J).

¹⁵⁰² Ibid [18] (Forrest J).

¹⁵⁰³ *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [1] (Forrest J).

¹⁵⁰⁴ Ibid [6] (Forrest J).

“weaponised” X and “fractured her relationship with the mother”,¹⁵⁰⁵ Forrest J held that it was in X’s “best interests that her wishes to live with her father be respected, for better or for worse”.¹⁵⁰⁶ Justice Forrest ordered X to live with her father.¹⁵⁰⁷ The two younger children, Y and Z, were ordered to live with their mother and have no time or communication with their father.¹⁵⁰⁸ Justice Forrest made no orders facilitating contact between X and her younger siblings.¹⁵⁰⁹

5.9 *Welby & Raine*

Welby & Raine concerned two children: ‘X’, a boy of 9 years old and ‘Y, who was 14 at the time of the final judgement.¹⁵¹⁰ ‘Ms P’, the mother’s 18-year-old daughter from a previous relationship, also lived in the household at various times.¹⁵¹¹ The parties were married for eight years,¹⁵¹² and at the time of their marriage, Ms P was approximately three years old.¹⁵¹³ The mother, Ms Welby, alleged that this relationship was characterised by substance abuse and physical assaults on the mother, children and family pets by the father, Mr Raine.¹⁵¹⁴

In 2013, the parties separated, and Ms Welby and the children moved temporarily to the home of Mr Raine’s first wife, ‘Ms C’,¹⁵¹⁵ who, along with Ms P and Ms C’s older children, supported Ms Welby in her allegations against the father.¹⁵¹⁶ An Apprehended Domestic Violence Order was made to protect the mother and subject children from the father.¹⁵¹⁷ Both X and Y had been living with their mother since that time¹⁵¹⁸ and were subject to court orders to spend unsupervised time with their father.¹⁵¹⁹ Also that year, the family was the subject of several reports to the then-named Department of Family and Community Services alleging that the father had sexually abused Ms P, and had verbally and physically abused some or all of the

¹⁵⁰⁵ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [84] (Forrest J).

¹⁵⁰⁶ *Ibid* Headnote.

¹⁵⁰⁷ *Ibid* ord 2 (Forrest J).

¹⁵⁰⁸ *Ibid* ords 5, 7 (Forrest J).

¹⁵⁰⁹ *Ibid* [32] (Forrest J).

¹⁵¹⁰ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [1], [5] (Cleary J).

¹⁵¹¹ *Ibid* [13] (Cleary J).

¹⁵¹² *Ibid* [7]–[8] (Cleary J).

¹⁵¹³ *Ibid* [5]–[7] (Cleary J).

¹⁵¹⁴ *Ibid* [69] (Cleary J).

¹⁵¹⁵ *Ibid* [58] (Cleary J).

¹⁵¹⁶ *Ibid* [69] (Cleary J).

¹⁵¹⁷ *Ibid* [64] (Cleary J).

¹⁵¹⁸ *Ibid* [36], [232] (Cleary J).

¹⁵¹⁹ *Ibid* [50] (Cleary J).

children of the mother, Ms Welby, and of his first wife, Ms C.¹⁵²⁰ These allegations were not substantiated by the Department.¹⁵²¹ However, the alleged sexual abuse of Ms P was noted in 2014 family law proceedings, and the father agreed to have no further contact with that child.¹⁵²² Since that time, the mother had repeatedly withheld both X and Y from their father, stating that she did so on the advice of counsellors.¹⁵²³ Tragically, Y underwent surgery in 2016 resulting in an acquired brain injury.¹⁵²⁴ Shortly thereafter, Y made disclosures that the father had inappropriately touched her while in hospital.¹⁵²⁵ She later disclosed violent sexual assaults by the father to a Victims Services counsellor.¹⁵²⁶ The mother began the 2020 proceedings requesting sole parental responsibility and ongoing residence for both X and Y, with the children to have no time or communication with their father.¹⁵²⁷ As is common, the mother's position was amended during the trial to propose that X spend unsupervised time with the father.¹⁵²⁸ The father sought sole parental responsibility and residence for X, and for the child to spend no time with the mother for two years, and thereafter only as agreed.¹⁵²⁹ Due to Y's serious health conditions, he did not seek orders for time with Y.¹⁵³⁰

The case epitomises gendered family law discourse in portraying the mother as overly protective¹⁵³¹ and overly emotional,¹⁵³² while also accusing her of making strategic allegations of physical and sexual abuse in order to gain residence of the children.¹⁵³³ As relayed by Cleary J, Ms D, the Family Consultant reported that the mother “strategically recruited and aligned professionals to assist her case ... by reporting her expressed fears to professionals who accepted the children's disclosures as truth without considering alternative reasons as to why the children may be reporting the information”.¹⁵³⁴

¹⁵²⁰ Ibid [58]–[63] (Cleary J).

¹⁵²¹ Ibid [60], [249] (Cleary J).

¹⁵²² Ibid [49] (Cleary J).

¹⁵²³ Ibid [51]–[52] (Cleary J).

¹⁵²⁴ Ibid [97] (Cleary J).

¹⁵²⁵ Ibid [102], [104] (Cleary J).

¹⁵²⁶ Ibid [110]–[111] (Cleary J).

¹⁵²⁷ Ibid [27] (Cleary J).

¹⁵²⁸ Ibid [29] (Cleary J).

¹⁵²⁹ Ibid [32] (Cleary J).

¹⁵³⁰ Ibid [31] (Cleary J).

¹⁵³¹ Ibid [42], [92]–[93], [190] (Cleary J).

¹⁵³² Ibid [81], [99] (Cleary J).

¹⁵³³ Ibid [100], [123], [131], [137] (Cleary J).

¹⁵³⁴ Ibid [123] (Cleary J).

Justice Cleary echoed this perspective, concluding that the allegations made against the father by his first wife, Ms C, in a separate application involving that couple's two children¹⁵³⁵ were "triggered by discussions" with the mother, Ms Welby.¹⁵³⁶ Her Honour cited the Magellan Report prepared by Ms D, who stated that, "independent material strongly suggests that the mother has utilised the parent/child relational dynamic to nurture dependency and enmeshment between her and the children and between the children themselves to place loyalty demands on the children and *influence, coerce and coach the children to make allegations against the father*".¹⁵³⁷ Her Honour also alluded to the potential for the mother's own experience of childhood sexual abuse to cloud her perception of the risks faced by her children,¹⁵³⁸ stating that she "reacts to threats of harm to herself and to her children with all means available to her, at times in a disproportionate way".¹⁵³⁹

Although stating that "X has his closest, most dependent, relationship with his mother and a loving protective relationship with his sister, Y [and] X and Y express anxious fears about the father",¹⁵⁴⁰ Cleary J determined that the mother was unlikely to promote a meaningful relationship between X, his father and extended paternal family.¹⁵⁴¹ X was ordered to live with his father, commencing immediately, with the father gaining sole parental responsibility for him.¹⁵⁴² Under the orders, X was to have no contact with his mother for six months, followed by two hours per month in a supervised contact centre for a further six months.¹⁵⁴³ Any time between the mother and X after this time was only to occur "at the discretion of the father".¹⁵⁴⁴ There was no order made for Y to spend time with the father, or for any contact between X and Y.¹⁵⁴⁵

¹⁵³⁵ Ibid [65] (Cleary J).

¹⁵³⁶ Ibid [149] (Cleary J).

¹⁵³⁷ Magellan Report of the Family Consultant, Ms D (21 May 2019), cited in *ibid* [124] (Cleary J) (emphasis added).

¹⁵³⁸ Ibid [134]–[135] (Cleary J).

¹⁵³⁹ Ibid [136] (Cleary J).

¹⁵⁴⁰ Ibid [203]–[204] (Cleary J).

¹⁵⁴¹ Ibid [174]–[175] (Cleary J).

¹⁵⁴² Ibid *ords* 2–3 (Cleary J).

¹⁵⁴³ Ibid *ords* 7–8 (Cleary J).

¹⁵⁴⁴ Ibid *ord* 10 (Cleary J).

¹⁵⁴⁵ Ibid [39] (Cleary J).

5.10 *Zaida & Badouri*

*Zaida & Badouri*¹⁵⁴⁶ was heard during the last year of the Royal Commission, and the final judgement was delivered in late August 2018, eight months after the Commissioners had released their Final Report. Despite this, the Commission's findings regarding profiling of perpetrators of child sexual abuse are wholly absent from the judgement. The case is particularly notable for the way in which both the history of family and sexual violence towards the mother, and the prospect of future risk to the child, were evaluated through a cultural lens.

'X' was seven years old when the case came before Forrest J, and eight at the time the final judgement was published.¹⁵⁴⁷ Her parents, who were born and lived in different countries, met through an Islamic dating website and immigrated to Australia after marrying.¹⁵⁴⁸ Both possessed significant academic qualifications, with multiple degrees.¹⁵⁴⁹ The mother, Ms Badouri, deposed that their marriage was characterised by sexual and economic coercion and control by the father, Mr Zaida, and that his attempts to control her and the child extended post-separation.¹⁵⁵⁰ The mother adduced into evidence digital images and videos of the couple engaging in sexual acts, which the mother alleged were coerced and the father alleged were consensual.¹⁵⁵¹ She alleged that when X was a baby, the father had repeatedly inspected X's genitals—which he denied—and encouraged X to suck on his tongue and nipple—which he admitted.¹⁵⁵² The mother secretly left the family home when X was 18 months old, first moving with X to a refuge in Brisbane at some distance from the father, and then into government accommodation.¹⁵⁵³ The father later followed the mother and child to Brisbane, renting accommodation a few hundred metres away from their home.¹⁵⁵⁴ X spent time with her father during this period under her mother's supervision.¹⁵⁵⁵

¹⁵⁴⁶ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018).

¹⁵⁴⁷ *Ibid* [1]–[2] (Forrest J).

¹⁵⁴⁸ *Ibid* [13], [15] (Forrest J).

¹⁵⁴⁹ *Ibid* [11]–[12] (Forrest J).

¹⁵⁵⁰ *Ibid* [19]–[20], [22], [29] (Forrest J).

¹⁵⁵¹ *Ibid* [29], [31] (Forrest J).

¹⁵⁵² *Ibid* [30]–[31] (Forrest J).

¹⁵⁵³ *Ibid* [17] (Forrest J).

¹⁵⁵⁴ *Ibid* [19] (Forrest J).

¹⁵⁵⁵ *Ibid* [18] (Forrest J).

From the time X was two years old, the father and paternal grandmother reported to the Queensland Police and then-named Department of Child Safety, Youth and Women that X had repeatedly disclosed that she was subject to sexual and physical abuse at the hands of her mother's new partner, and that she had been physically abused by the partner's mother and sons.¹⁵⁵⁶ The father took X for a physical examination at the local hospital and she was twice interviewed by police, at three-and-a-half and four years old.¹⁵⁵⁷ Although X's statements during these interviews reflected the allegations of the father and paternal grandmother, Forrest J discounted the child's disclosures.¹⁵⁵⁸ The claims of sexual and physical abuse by the mother's partner and his family were ultimately unsubstantiated by the Department and no charges were laid by police.¹⁵⁵⁹ By the time of the trial, the mother deposed that she was no longer in a relationship with this man, although she indicated they would like to resume their relationship if they could be sure the father would cease making allegations against him and his family.¹⁵⁶⁰

As is often the case in family law proceedings dominated by a 'friendly parent' paradigm, the position of each parent changed significantly during the trial. While each parent had initially raised significant concerns that X was at risk of sexual harm in the care of the other, by the trial's conclusion the father ceased pressing these concerns,¹⁵⁶¹ while the mother alleged that X was at risk of only emotional abuse in the unsupervised care of the father, based on alleged past attempts to disrupt X's relationship with her.¹⁵⁶²

The cultural overtones of the judgement are hard to ignore. Evaluation of the mother's argument that the father posed a risk of emotional harm to X was deeply culturally embedded. Via counsel, she argued that the father would interfere in X's relationship with her due to "the father's attitude to the Court and its authority vis his devotion to the Islamic faith", a prospect that was considered at some length by Forrest J.¹⁵⁶³ The mother's ex-partner, against whom the

¹⁵⁵⁶ Ibid [36]–[37] (Forrest J).

¹⁵⁵⁷ Ibid [37]–[38] (Forrest J).

¹⁵⁵⁸ Ibid [39] (Forrest J).

¹⁵⁵⁹ Ibid [40] (Forrest J).

¹⁵⁶⁰ Ibid [41]–[43] (Forrest J).

¹⁵⁶¹ Ibid [44] (Forrest J).

¹⁵⁶² Ibid [55] (Forrest J).

¹⁵⁶³ Ibid [55]–[57] (Forrest J).

child had made repeated disclosures of sexual abuse, featured in the judgement as a “non-Muslim, European Australian man”¹⁵⁶⁴ and “an apparently decent man”.¹⁵⁶⁵

In sharp contrast to many cases before the family courts involving allegations of family violence, His Honour made a clear finding that “the father’s sexual conduct towards the mother was plainly abusive”.¹⁵⁶⁶ Justice Forrest consequently drew on section 61DA(2) of the *Family Law Act* to rebut the presumption of equal shared parental responsibility, awarding sole parental responsibility for X to the mother.¹⁵⁶⁷ Further highlighting the cultural underpinnings of the decision, His Honour made a set of culturally specific orders, without the request of either parent or the Independent Children’s Lawyer,¹⁵⁶⁸ including restraining the father from having the child wear a hijab or other religious dress without the written consent of the mother.¹⁵⁶⁹ Ultimately, His Honour ordered that X should continue to live with her mother and spend substantial, unsupervised overnight time with her father.¹⁵⁷⁰ Although His Honour acknowledged that X was likely to have contact with her mother’s ex-partner against whom she had made disclosures, no orders were made restricting that contact.¹⁵⁷¹ The following chapter compares the approaches to reports of child sexual abuse adopted in these family law case studies with the findings and recommendations of the Royal Commission.

¹⁵⁶⁴ Ibid [36] (Forrest J).

¹⁵⁶⁵ Ibid [42] (Forrest J).

¹⁵⁶⁶ Ibid [64] (Forrest J).

¹⁵⁶⁷ *Family Law Act 1975* (Cth) (comp 17 January 2012) s 61DA(2). The *Family Law Act* at the time stated that the presumption of equal shared parental responsibility enshrined in ss 61B and 61C of the *Act* does not apply in cases of child abuse or family violence. The presumption was removed from the *Family Law Act* by the *Family Law Amendment Act (No 87) 2023* (Cth) sch 1, pt 2.

¹⁵⁶⁸ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [80] (Forrest J).

¹⁵⁶⁹ Ibid ord 8 (Forrest J).

¹⁵⁷⁰ Ibid ords 2–4 (Forrest J).

¹⁵⁷¹ Ibid [44] (Forrest J).

Chapter Six – Analysis: Comparing the Family Courts’ Responses to Allegations of Child Sexual Abuse with the Best-practice Recommendations of the Royal Commission

6 Introduction

A key component of the Royal Commission’s work was establishing best-practice in identifying and responding to child sexual abuse.¹⁵⁷² The formation of best-practice by the Commission was underpinned by a deep understanding of the nature and causes of child sexual abuse, and the ways in which it is concealed and identified.¹⁵⁷³ The Commission debunked many myths permeating common understandings of child sexual abuse and, through commissioned academic research and extensive interviews with survivors, established a solid research base from which to best prevent child sexual abuse and respond to it when it occurs.¹⁵⁷⁴

Analysis of the chosen case studies identified a stark distinction between the handling of child sexual abuse allegations by the family courts and the recommendations of the Royal Commission. This resulted in judicial decisions that not only mandated ongoing contact between children and the parents and stepparents who had allegedly sexually abused them, but also in many cases actively removed these children from the family members who reported the abuse. This chapter identifies and analyses the main themes underpinning the discursive practices supporting those judicial decisions. The themes explored include interpreting the disclosure of child sexual abuse, reliance on erroneous beliefs, the use of pseudoscience, identifying perpetrators of child sexual abuse, normalising and excusing child sexual abuse, punitive responses to reports of child sexual abuse, and preventing further disclosures and reporting.

The present discourse analysis examines the reasoning employed by judicial officers as the narrators of these published judgements, however the study findings demonstrate that the attitudinal problems identified extend far beyond judges and, in fact, permeate the practices of professionals across the spectrum of family law. Within a broader, more nuanced context, each

¹⁵⁷² *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 17.

¹⁵⁷³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 22.

¹⁵⁷⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 23–24.

court proceeding may be seen as both an individual and ideological battleground, as each judgement delivers consequences that are at once deeply personal and starkly political. The featured case studies include numerous instances of judges relying heavily on the reports of family consultants and single expert witnesses which refer repeatedly to erroneous myths and psychosocial theories about the veracity and sanity of women and children.

The study findings accord with the consensus reached by decades of inquiries and academic research highlighting the difficulties, within diverse aspects of the family law system, in appropriately addressing family violence and child sexual abuse. When analysed in light of the theoretical literature presented in the preceding chapters, the case studies demonstrate that, within the family courts, the knowledge central to the discourse of child sexual abuse and family law overrides the learning gained through decades of inquiries and mainstream academic research, and the findings and recommendations of the Royal Commission.

6.1 Interpreting and Understanding the Disclosure of Child Sexual Abuse

The Final Report of the Royal Commission emphasised that, as child sexual abuse is frequently not witnessed and leaves no medical evidence,¹⁵⁷⁵ “disclosure is often one of the only ways in which child sexual abuse can be identified”.¹⁵⁷⁶ As a result, it is imperative that disclosures of child sexual abuse coming before the family courts are treated seriously and with the expertise needed to understand them and respond appropriately. Yet, in many of the cases examined, children’s disclosures were misunderstood and dismissed by the legal and allied professionals handling their cases. The Final Report defined disclosure of child sexual abuse by children as “a process by which a child conveys or attempts to convey that they are being or have been sexually abused”.¹⁵⁷⁷ The Commissioners noted that disclosure can be intentional or accidental, expressed in verbal or non-verbal forms, and that children might disclose sexual abuse through “emotional or behavioural cues, such as heightened anxiety, withdrawal or aggression”.¹⁵⁷⁸ The Commissioners stated that disclosure is “critical to stopping child sexual abuse and addressing

¹⁵⁷⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 169.

¹⁵⁷⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 25.

¹⁵⁷⁷ *Ibid* 22.

¹⁵⁷⁸ *Ibid* 22.

the immediate impacts on the child” while also forming an important step in the child’s recovery from trauma.¹⁵⁷⁹

The Commissioners also emphasised that the process of disclosure varies from child to child and that children may make partial or fragmented disclosures, in which they disclose parts of the abuse to different people, describing events out of chronological order.¹⁵⁸⁰ Delayed disclosure is also common, more so in younger children,¹⁵⁸¹ with some victims never disclosing during their lifetimes.¹⁵⁸² The Commissioners highlighted international research showing that only around one-third of sexually abused children disclosed the abuse during childhood¹⁵⁸³ and that, even in these cases, delays could occur between the occurrence of the abuse and its disclosure.¹⁵⁸⁴ The Royal Commission found that “[m]any victims do not disclose child sexual abuse until many years after the abuse occurred, often when they are well into adulthood”.¹⁵⁸⁵ Of the close to 7,000 survivors who attended private sessions of the Royal Commission, “survivors took on average 23.9 years to disclose child sexual abuse, with men taking longer than women to disclose”.¹⁵⁸⁶

As the Royal Commission has profoundly stressed the importance of disclosure as the primary means of learning about child sexual abuse,¹⁵⁸⁷ a thorough understanding of the complex nature

¹⁵⁷⁹ Ibid 157.

¹⁵⁸⁰ Ibid 30.

¹⁵⁸¹ Ibid 42.

¹⁵⁸² Ibid 9.

¹⁵⁸³ K London et al., 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11(1) *Psychology, Public Policy and Law* 194–226, 201; Shin Shin Tang, Jennifer J Freyd and Meggy Wang, 'What Do We Know About Gender in the Disclosure of Child Sexual Abuse?' (2008) 6(4) *Psychological Trauma* 1–26, 14; E Jonzon and F Lindblad, 'Disclosure, Reactions, and Social Support: Findings from a Sample of Adult Victims of Child Sexual Abuse' (2004) 9(2) *Child Maltreatment* 190–200, 194, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 33.

¹⁵⁸⁴ Jan Breckenridge, Joan Cunningham and Karen Jennings, *Cry for Help: Client and Worker Experiences of Disclosure and Help Seeking Regarding Child Sexual Abuse* (Report, Relationships Australia & University of New South Wales, 2008) [4.3]; Rosaleen McElvaney, 'Disclosure of Child Sexual Abuse: Delays, Non-Disclosure and Partial Disclosure. What the Research Tells Us and Implications for Practice' (2013) 24(3) *Child Abuse Review* 147–165, 160; TD Lyon, 'Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation' in JR Conte (ed), *Critical Issues in Child Sexual Abuse: Historical, Legal and Psychological Perspectives* (Sage, 2002) 107–138, 116, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 33.

¹⁵⁸⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 9.

¹⁵⁸⁶ Ibid 16 (emphasis added).

¹⁵⁸⁷ Ibid 25.

of disclosure is inextricably linked with correctly identifying child sexual abuse. Yet, the case studies in the section below reveal a troubling pattern in the family courts’ approach to sexual abuse allegations arising from children.

6.1.1 *Ainsley & Ainsley*

In *Ainsley & Ainsley*, Single Joint Expert psychologist, Dr J, wrote three reports for the court during the family’s four years of litigation. The expert considered the four-year-old child X’s ongoing disclosures of sexual abuse and expressed concern that “unusual CSA [or child sexual abuse] allegations continued to arise in forms and contexts which made such spontaneous disclosures by children seem improbable”.¹⁵⁸⁸ The 2019 report of Dr J recommended that “change of residence should be considered in the event that new CSA allegations continually arose only to be proven false. Any bizarre and/or inherently improbable CSA allegations emerging should alert the Court to a looming problem”.¹⁵⁸⁹ During the 2023 hearing, Dr J gave evidence about the “usual” behaviours exhibited by children when disclosing sexual abuse, stating that it is not typical for children to make elaborate or “histrionic” disclosures.¹⁵⁹⁰ The court’s confidence in Dr J’s testimony exemplifies a broader reliance, within the family law system, on social science theories that deviate from evidence-based research. This reliance can significantly impact the outcomes of cases involving child sexual abuse allegations. In this instance, Dr J’s interpretation of X’s disclosures as “improbable”¹⁵⁹¹ and “histrionic”,¹⁵⁹² influenced Rees J’s decision to issue orders for a change of residence for the child.¹⁵⁹³

6.1.2 *Bentleigh & Bentleigh*

In the 2017 judgement of *Bentleigh & Bentleigh*, Single Joint Expert psychiatrist, Dr G presented a strong opinion that the children were unreliable witnesses, dismissing their disclosures of abuse. The expert cited eight-year-old B’s unaffected disclosures as evidence that she was not relaying “an actual experience” of abuse, and dismissed six-year-old C’s

¹⁵⁸⁸ Report of Single Joint Expert, Dr J (30 March 2020), cited in *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [12] (Rees J).

¹⁵⁸⁹ Report of Single Joint Expert, Dr J (2 October 2019) [101], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [47] (Altobelli J).

¹⁵⁹⁰ *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [141] (Rees J).

¹⁵⁹¹ Report of Single Joint Expert, Dr J (30 March 2020), cited in *ibid* [12] (Rees J).

¹⁵⁹² *Ibid* [141] (Rees J).

¹⁵⁹³ *Ibid* [299]–[301] (Rees J).

statements due to her age, stating “she was a very poor reporter”.¹⁵⁹⁴ The following passage, in which Rees J quoted Dr G’s report, highlights the disregard by both the judicial officer and the expert for the Royal Commission’s findings regarding the many and varied ways in which children disclose sexual abuse,¹⁵⁹⁵ as the expert analysed B’s disclosures through the lens of her own “experience”:¹⁵⁹⁶

When I interviewed [B], she ran through the usual disclosures which were recited in a bored, detached way, while she continued to play with Lego. Given how often she has been interviewed over the same allegations, I was not surprised that she was bored. She did not seem [as] involved with disclosures as I would expect. Nor did she appear fearful, distressed or dissociated on relating her disclosures.

My experience of when children disclose abuse is that they relate an enthralling experience for the listener, who participates in reliving the occurrence. Even given the child’s age and capacity, she could relate easily to me how her naughty sister would muck around at bedtime, using words, actions and facial expressions.

I do not believe that the child was disclosing an actual experience when she said that Dad touched her vagina. It was said as if she were reciting homework she had learnt by heart without emotion or relation to the words that she expressed.

This is, in fact, contrary to the Commission’s findings that highlighted the many forms that disclosure can take.¹⁵⁹⁷

Victims and survivors of child sexual abuse may disclose in a range of different ways. Some victims will make a direct and unambiguous verbal disclosure to a trusted adult or friend. Others will disclose part of the experience, withhold some information and rely on adults to understand what they are trying to convey. Some victims will display physical indicators of sexual abuse such as injuries, but many will not show any physical signs of the abuse. Many survivors told us during private sessions that they tried to disclose the abuse in indirect ways, through their behaviour or emotional and physical reactions.

¹⁵⁹⁴ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J).

¹⁵⁹⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 22, 30, 42.

¹⁵⁹⁶ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J).

¹⁵⁹⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 50–51.

6.1.3 *Belton & Braim*

In *Belton & Braim*, Z—who was the mother’s older child from a previous relationship—made sexual abuse disclosures about the father of the subject child, X, which were *substantiated* by the then-named Department of Child Safety, Youth and Women.¹⁵⁹⁸ In making this finding, the Child Safety Officer reflected evidence-based knowledge of child sexual abuse disclosure,¹⁵⁹⁹ stating it is “not common” for children to lie about sexual abuse.¹⁶⁰⁰ However, Carew J expressed reservations about the Child Safety Officer’s reasoning, stating “[w]hile the experience of the [Child Safety Officer] may well be that it is not common for children to lie about sexual abuse, it certainly cannot be ruled out”.¹⁶⁰¹ In saying this, Her Honour construed the Child Safety Officer’s assertion as based on anecdotal evidence, rather than evidence-based best-practice, and replaced it with her own set of beliefs.

Consequently, Carew J did not make a definitive finding about the veracity of the allegations concerning Z,¹⁶⁰² and determined that the father *did not* pose an unacceptable risk of sexual abuse to the subject child, X.¹⁶⁰³ This case is troubling in that, despite occurring two years after the Royal Commission concluded, and despite being presented with accurate, timely best-practice knowledge in child sexual abuse disclosure, the court disregarded it.

6.1.4 *Tabano & Yabon*

In *Tabano & Yabon*, the child X made numerous disclosures of sexual abuse against the stepfather to a youth worker, family members and other parties.¹⁶⁰⁴ She exhibited several behavioural indicators, as identified by the Royal Commission, of being a victim of child sexual abuse, such as ceasing school attendance and threatening suicide.¹⁶⁰⁵ Throughout the case, these disclosures were interpreted by the court as evidence of X being “weaponised” by her

¹⁵⁹⁸ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [63] (Carew J).

¹⁵⁹⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137.

¹⁶⁰⁰ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [66] (Carew J).

¹⁶⁰¹ *Ibid* [77] (Carew J).

¹⁶⁰² *Ibid* [68] (Carew J).

¹⁶⁰³ *Ibid* [82]–[85], [130] (Carew J).

¹⁶⁰⁴ *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [12] (Forrest J).

¹⁶⁰⁵ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [47] (Forrest J). See *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 62.

father,¹⁶⁰⁶ in order to undermine her relationship with her mother.¹⁶⁰⁷ In December 2019, the case fell to Forrest J, who evaluated X’s allegations of abuse as presented to the court in a letter from a Youth Worker, who reported that X had disclosed:¹⁶⁰⁸

That she does not want to live with her mother and stepfather due to “abuse, neglect and inappropriate sexual acts she has experienced in the household”;

That she will “kill herself if she is forced to go back to live with her mother and stepfather”;

That she wishes to be placed back with her father and stepmother;

That she does not want to be forcibly placed back into an environment in which she feels unsafe and neglected.

Similarly, the father appended a document titled “Statement by X” to his affidavit, in which X alleged being subject to abuse by her mother and stepfather, and witnessing abuse of the mother by her stepfather.¹⁶⁰⁹ Casting doubt on whether the child’s purported views were truly her own, His Honour concluded, “I am deeply concerned that *it is reported that X says she will self-harm* if she is returned to the care of her mother and stepfather”.¹⁶¹⁰ In light of the lack of action by the Queensland Police Service and findings by the then-named Department of Child Safety, Youth and Women that allegations of abuse of X, her subject siblings, the mother’s baby girl and the mother herself were unsubstantiated, Forrest J stated, “it would be a knee-jerk response simply to dismiss the application for a recovery order and to order that X live with her father”.¹⁶¹¹

¹⁶⁰⁶ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [84] (Forrest J).

¹⁶⁰⁷ *Ibid* [50]–[51] (Forrest J).

¹⁶⁰⁸ Letter from Community Youth Response Practitioner, Ms J, cited in *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [12] (Forrest J).

¹⁶⁰⁹ *Ibid* [14]–[15] (Forrest J).

¹⁶¹⁰ *Ibid* [18] (Forrest J).

¹⁶¹¹ *Ibid* [18] (Forrest J).

It is important to note the Royal Commission's clear advice regarding the substantiation of child sexual abuse. Discussing child sexual abuse in institutional settings, the Commissioners noted that:¹⁶¹²

Victims can find it difficult – or *impossible* – to have their complaint of institutional child sexual abuse substantiated. Reasons for this include that child sexual abuse is generally committed by the perpetrator when they are alone with the victim. That a complaint remains unsubstantiated does not mean that the alleged abuse did not occur.

This finding is equally applicable to sexual abuse occurring within families. Within the family law system, researchers have examined the reasons that state child protection departments may not substantiate allegations of child sexual abuse, and the impact that this can have on family law proceedings. The literature overwhelmingly identifies a reluctance by state bodies to substantiate allegations of all forms of child abuse when made within family law contexts.¹⁶¹³ Research into cases of child abuse investigated by state child protection departments in the United States has found that substantiation status has little impact on a risk of future child abuse.¹⁶¹⁴

Milchman's research into child sexual abuse allegations within Australian and international family law jurisdictions highlights a heavy reliance on experts within the family courts, many of whom are poorly trained in the identification of child sexual abuse.¹⁶¹⁵ Experts may attempt to assess the veracity of child sexual abuse allegations through “superficial ‘checklist’ assessments of alienation” and may misunderstand the failure of state child protection bodies

¹⁶¹² *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136 (emphasis added).

¹⁶¹³ Madelyn Simring Milchman, 'Oversimplified Beliefs About Child Abuse Allegations in Custody Cases with Alienation Rebuttals: Review of Empirical Data' (2024) 21(2) *Journal of Family Trauma, Child Custody & Child Development* 165–192, 177.

¹⁶¹⁴ Patricia L Kohl, Melissa Jonson-Reid and Brett Drake, 'Time to Leave Substantiation Behind: Findings from a National Probability Study' (2009) 14(1) *Child Maltreatment* 17–26, 17.

¹⁶¹⁵ Madelyn Simring Milchman, 'Oversimplified Beliefs About Child Abuse Allegations in Custody Cases with Alienation Rebuttals: Review of Empirical Data' (2024) 21(2) *Journal of Family Trauma, Child Custody & Child Development* 165–192, 168.

to substantiate abuse.¹⁶¹⁶ The author notes that experts conducting assessments for family law proceedings:¹⁶¹⁷

[M]ay misinterpret the failure of CPS [or state child protection services] to substantiate abuse as proof that abuse did not occur, erroneously equating the absence of evidence with evidence of absence and ignoring the many institutional obstacles to conducting thorough CPS investigations in custody cases.

Similarly, Silberg and Dallam studied child abuse allegations made in the context of family law proceedings in the United States, which were initially unsubstantiated based on expert recommendations, and later substantiated after subsequent evidence of abuse.¹⁶¹⁸ The authors found that the children studied spent an average 3.2 years engaged in unsupervised contact—or even living with—the alleged abuser before courts reversed the orders upon receiving further “compelling” evidence of abuse.¹⁶¹⁹ In the interim, the authors state, the “abuse often became increasingly severe and the children’s mental and physical health frequently deteriorated”.¹⁶²⁰

Within Australia, approximately 10% of children who were subject to state or territory department decisions not to substantiate reports of all forms of abuse, saw their cases substantiated within 12 months, as further evidence of abuse arose.¹⁶²¹ Additionally, Ferguson et al. note that judicial officers in Australia’s family courts, in turn, substantiate child sexual abuse allegations even less readily than their international counterparts,¹⁶²² and mothers’ allegations of child sexual abuse are disproportionately unsubstantiated, compared to fathers’ allegations.¹⁶²³

¹⁶¹⁶ Ibid 168.

¹⁶¹⁷ Ibid 168.

¹⁶¹⁸ Joyanna Silberg and Stephanie Dallam, 'Abusers Gaining Custody in Family Courts: A Case Series of over Turned Decisions' (2019) 16(2) *Child Custody* 140–169, 140.

¹⁶¹⁹ Ibid, 148.

¹⁶²⁰ Ibid 140.

¹⁶²¹ Based on data from the 2020–21 financial year, rates of unsubstantiated cases subsequently substantiated within 12 months varied within states and territories between 7.8% and 14.3%: Productivity Commission, *Report on Government Services 2020: Part F, Section 16: Child Protection Services* (Report, 22 January 2024) figure 16.13, table 16A.38.

¹⁶²² Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 108.

¹⁶²³ Ibid 102.

In *Tabano & Yabon*, over the next two years of litigation X and her two younger siblings, Y and Z, continued to live with their mother and stepfather.¹⁶²⁴ During this time, X persisted in making threats of self-harm, including suicide, and made numerous attempts to run away from her mother's home.¹⁶²⁵ The child was repeatedly returned to her mother's care under multiple recovery orders of the family courts.¹⁶²⁶

However, in the final decision, Forrest J stated, "I simply do not believe X's claims".¹⁶²⁷ The case warrants concern as to "simply ... not believe" a child's many disclosures of abuse, without acknowledging the statistical rarity of false allegations of child sexual abuse,¹⁶²⁸ demonstrates either a lack of knowledge of contemporary research into child sexual abuse, or a determined disregard for that knowledge.

6.1.5 *Zaida & Badouri*

In some cases, a child's disclosures of sexual abuse were deemed so unimportant that they did not receive substantial discussion. In *Zaida & Badouri*, Forrest J provided very little consideration for the veracity of the disclosures made by the seven-year-old child, X, simply stating:¹⁶²⁹

The child did say things during the interviews that, *if true*, could implicate the mother's new partner in sexual abuse of her. She also said things that, *if true*, could implicate his sons and his mother in bullying and physical abuse of her. However, there was a lot of inconsistency in the things the child said during the interviews.

¹⁶²⁴ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [11] (Forrest J).

¹⁶²⁵ *Ibid* [47]–[48] (Forrest J).

¹⁶²⁶ *Ibid* [18]–[21], [25] (Forrest J).

¹⁶²⁷ *Ibid* [48] (Forrest J).

¹⁶²⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016), 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

¹⁶²⁹ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [39] (Forrest J) (emphasis added).

There was also an innocent but telling assertion by her that her grandmother had taught her one of the big words that she used in telling her story that I am satisfied she would not have known herself.

6.2 Children's Disclosures to Their Mothers

The Royal Commission also drew together research regarding to whom victims of child sexual abuse make disclosures. The Final Report revealed that while younger children are most likely to disclose to a parent, particularly their mother,¹⁶³⁰ adolescents are more likely to disclose to a friend.¹⁶³¹ Just under 20% of adult survivors participating in private sessions of the Royal Commission stated that they had disclosed their childhood sexual abuse to the police.¹⁶³² The Commissioners also highlighted research indicating that after children disclose to a trusted person they may then disclose to people in positions of authority.¹⁶³³ However, the Commissioners noted that, as revealed in private sessions, this is only the case when an initial disclosure to a trusted person results in some protective action.¹⁶³⁴

¹⁶³⁰ See for example, Jan Breckenridge, Joan Cunningham and Karen Jennings, *Cry for Help: Client and Worker Experiences of Disclosure and Help Seeking Regarding Child Sexual Abuse* (Report, Relationships Australia & University of New South Wales, 2008) [4.5]; ML Paine and DJ Hansen, 'Factors Influencing Children to Self-Disclose Sexual Abuse' (2002) 22(2) *Clinical Psychology Review* 271–295, 279; S Kogan, 'Disclosing Unwanted Sexual Experiences: Results from a National Sample of Adolescent Women' (2004) 28(2) *Child Abuse and Neglect* 147–165, 154; LC Malloy, SP Brubacher and ME Lamb, '"Because She's One Who Listens": Children Discuss Disclosure Recipients in Forensic Interviews' (2013) 18(4) *Child Maltreatment* 245–251, 250, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 36.

¹⁶³¹ Catherine Esposito, *Child Sexual Abuse and Disclosure: What Does the Research Tell Us?* (Literature Review, NSW Department of Family and Community Services, 2014) 15; LC Malloy, SP Brubacher and ME Lamb, '"Because She's One Who Listens": Children Discuss Disclosure Recipients in Forensic Interviews' (2013) 18(4) *Child Maltreatment* 245–251, 250, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 36.

¹⁶³² I Katz et al., *Life Journeys of Victim/Survivors of Child Sexual Abuse in Institutions: An Analysis of Royal Commission Private Sessions* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 140.

¹⁶³³ M Ungar et al., 'Patterns of Abuse Disclosure among Youth' (2009) 8(3) *Qualitative Social Work* 341–356, 343; ND Kellogg and RL Huston, 'Unwanted Sexual Experiences in Adolescents: Patterns of Disclosure' (1995) 34(6) *Clinical Pediatrics* 306–312, 310, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 39.

¹⁶³⁴ M Ungar et al., 'Patterns of Abuse Disclosure among Youth' (2009) 8(3) *Qualitative Social Work* 341–356, 343; ND Kellogg and RL Huston, 'Unwanted Sexual Experiences in Adolescents: Patterns of Disclosure' (1995) 34(6) *Clinical Pediatrics* 306–312, 310, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 39.

In the family courts, a child’s disclosures will generally be presented to the court by a parent who is raising concerns about the child’s safety in another person’s care. The court may then consider other material, such as the records of the police or child protection department, as well as reports from court-appointed experts in assessing the risks the child faces. In the cases analysed, when a child disclosed only to a parent, especially their mother, it was common for the disclosures to be doubted by the judges and other professionals involved in the case. Similarly, when disclosures were delayed, or disclosures to parents were followed by disclosures to police or department staff, they were often treated with suspicion, particularly as the family was involved with the family law system. In such cases, claims that the child had been ‘coached’ to make the disclosure or was subject to ‘parental alienation’ formed an effective defence. In this way, the alleging parent—usually the mother—was deemed to present a risk of emotional abuse to the child, subsuming the question of protecting the child from sexual harm.

6.2.1 *Fletcher & Littlemore*

In *Fletcher & Littlemore*, the child X had undisputedly displayed significantly sexualised behaviours over many years, as documented by her kindergarten, preparatory school and both parents.¹⁶³⁵ At the age of nine, the child disclosed to her mother, to Queensland Police during an interview, and to a psychologist that her father had been sexually abusing her by tickling and touching her “private parts”.¹⁶³⁶ Despite the specificity of the child’s disclosures,¹⁶³⁷ Baumann J decontextualised the child’s disclosures by separating the statements made to her mother from those made to the police and psychologist, extricating the child’s disclosures from her ongoing sexualised behaviour and from other unspecified “conduct” of the father’s, stating:¹⁶³⁸

I emphasise, this is the only disclosure made by the child to the mother of sexually inappropriate behaviour by the father, essentially, since the birth of the child and 25 January 2018, some nine years. I acknowledge that there were suggestions of some conduct very early in the piece, but that has been usurped by many years of

¹⁶³⁵ *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [2] (Baumann J).

¹⁶³⁶ Ibid [7], [22], [28] (Baumann J).

¹⁶³⁷ See for example ibid [22(c)] (Baumann J).

¹⁶³⁸ Ibid [20] (Baumann J) (emphasis added).

unsupervised substantial time where the child has either spent time with the father or, as I have already indicated, lived with the father.

His Honour then considered the child's statements that she did not want to return to her father's place, not as a reaction to the abuse she had disclosed, but as the result of boredom. Justice Baumann stated:¹⁶³⁹

[I]n exploring why the child said to the mother that she did not want to go to the father's home, the child told police in the interview that her father's house is "boring" and if the father is asleep "there is nothing to do in my room", whilst at the mother's home she gets to play with her little brother. I regard these comments by the child as significant because it is my view that the mother has taken the view that the child expressing a wish not to go to the father's home is connected in some way with her disclosure said to be of sexual abuse, whereas it seems more likely to me that it was her nine year old expression of being bored. She also said to police that she told her mother "that dad touched me in my private part areas and I don't want to go back to him." I can see why the mother may have misinterpreted the connection between these factors.

Justice Baumann determined that if the father had touched the child as disclosed, it was accidental, and the father did not gain sexual gratification from it.¹⁶⁴⁰ His Honour's conclusion was that while it "is a very serious matter for a child to *believe* a parent has sexually abused them ... I make a finding that the child is not at an unacceptable risk of sexual harm or sexual abuse in the care of the father".¹⁶⁴¹ Another concerning aspect of the case is the court's analysis of the manner in which the child disclosed. Discussing the treatment of child sexual abuse allegations within the criminal justice system, the Commissioners noted:¹⁶⁴²

[C]hildren's behaviours and reactions to child sexual abuse can be counterintuitive and inconsistent with juror expectations. This may lead jurors to question whether abuse has in fact occurred, with child complainants' credibility undermined on the basis of incorrect assumptions.

¹⁶³⁹ Ibid [22] (Baumann J) (emphasis added).

¹⁶⁴⁰ Ibid [32] (Baumann J).

¹⁶⁴¹ Ibid [32] (Baumann J) (emphasis added).

¹⁶⁴² *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 133.

While not overtly accepting that the child had been ‘coached’ to make disclosures, His Honour did raise the issue of the ways in which X had made these disclosures, stating that her disclosures to police had been made “almost immediately, and with little prompting”,¹⁶⁴³ while her disclosures to the psychologist were made without any acute sign of distress.¹⁶⁴⁴

6.3 Reliance on Erroneous Beliefs

Comparison of the findings of the Royal Commission with the responses of the family courts to allegations of child sexual abuse reveals two competing paradigms: the position of the Royal Commission—based on extensive research—that child sexual abuse is common¹⁶⁴⁵ and grossly underreported,¹⁶⁴⁶ and that false allegations of child sexual abuse are rare,¹⁶⁴⁷ versus the conviction among family law judges, independent children’s lawyers and experts—evidenced in the case studies—that child sexual abuse is rare and false allegations are frequently made.

The case studies evinced many ways in which the purported objectivity of law gave way to family law judges’ reliance on gendered personal beliefs about the veracity and sanity of

¹⁶⁴³ *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [22(c)] (Baumann J).

¹⁶⁴⁴ *Ibid* [28(c)] (Baumann J).

¹⁶⁴⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 65. See also the Australian Child Maltreatment Study, which found that the prevalence of child sexual abuse reported by adult survivors was 28.5%: Ben Mathews et al., ‘The Prevalence of Child Maltreatment in Australia: Findings from a National Survey’ (2023) 218(6) *Medical Journal of Australia* S13–S18, S13.

¹⁶⁴⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 52; *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 52.

¹⁶⁴⁷ Research consistently shows that child sexual abuse is both prevalent and underreported in Australia, and that false allegations of child sexual abuse and family violence are exceedingly rare, including within family law settings: Jodi Death, Claire Ferguson and Kylie Burgess, ‘Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia’ (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, ‘Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law’ (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., ‘The Child Abuse and Divorce Myth’ (2001) 10(2) *Child Abuse Review* 113–124, 113; Catherine Esposito and Ellen Field, *Child Sexual Abuse: What Does the Research Tell Us?* (Literature Review, Office of the Senior Practitioner & NSW Department of Family and Community Services, December 2016), cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 53.

women and children.¹⁶⁴⁸ This echoes the findings of the Royal Commission’s Criminal Justice Report, which highlights the prevalence of erroneous beliefs—many of them gendered—in the criminal justice system, and their impact on responses to disclosures and reports of child sexual abuse.¹⁶⁴⁹ While fathers accused of child sexual abuse in many cases studied attributed allegations of sexual abuse to maliciousness on the part of the mother, overwhelmingly, the discourse of judicial officers and court-appointed experts concerning alleging mothers explained the allegations as arising from emotional instability, rather than from a deliberately malicious intent, or framed them as an attempt to gain an advantage in the family law proceedings.

6.3.1 *Palmer & Kagan*

In *Palmer & Kagan*, the report of the Single Joint Expert, Dr J, depicted the mother using gendered stereotypes and characterised her as “angry and demanding”.¹⁶⁵⁰ Dr J reported that the psychometric tests he administered revealed the mother to be “a person with chronic, intense anger”, belonging to a class of people “demanding of attention and approval from others ... sensitive to rejection ... hostile when criticised”, and with “poor insight into their own behaviour”.¹⁶⁵¹

It is notable that the Reasons for Judgement do not reference any affidavit material indicating that the mother had exhibited angry or aggressive behaviour. Conversely, the judgement detailed instances of the father’s violence towards the mother and within the community,¹⁶⁵² which were framed as “historical”¹⁶⁵³ and therefore irrelevant to the assessment of the child’s

¹⁶⁴⁸ See for example *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [77] (Carew J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [50]–[51], [84] (Forrest J); Report of Single Joint Expert, Dr J (24 April 2018) 37–38, 41–42, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [127], [139] (Altobelli J); *ibid* [45]–[49], [131], [149], [243], [253] (Altobelli J); Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); *ibid* [69]–[72] (Altobelli J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [42], [69], [81], [92]–[93], [99], [100], [123], [131], [134]–[136], [137], [178], [190], [238] (Cleary J); *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) 57–58, 63, 65–66 (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [61], [69] (Hannam J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [90], [114] (Tree J).

¹⁶⁴⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 86–87, 171.

¹⁶⁵⁰ Report of Single Joint Expert, Dr J (24 April 2018) 41–42, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [127] (Altobelli J).

¹⁶⁵¹ Report of Single Joint Expert, Dr J (24 April 2018) 37–38, cited in *ibid* [139] (Altobelli J).

¹⁶⁵² *Ibid* [45]–[48] (Altobelli J).

¹⁶⁵³ *Ibid* [45] (Altobelli J).

wellbeing in his care.¹⁶⁵⁴ This is indicative of a masculinist model in which male aggression is cast as natural, while female aggression is denounced as deviant.¹⁶⁵⁵ Notably, Altobelli J stated:¹⁶⁵⁶

In relation to violence, there may well have been conduct amounting to family violence as defined in the *Family Law Act* during the short and tumultuous relationship of the parents but the evidence suggests that this was *historical, and situational in nature*. There is no evidence of any coercive and controlling behaviour by the Father. Indeed, if this were the test, it would be the Mother who could be found the perpetrator ...

In forming this opinion, His Honour appeared to draw on a perceived “toxic environment in X’s home”, due to “a shared intractable negative view about her father”.¹⁶⁵⁷ While Altobelli J construed both parents as emotional and prone to subjective thinking,¹⁶⁵⁸ his view of the mother was disproportionately negative. His Honour stated the mother “chose to believe” the allegations against the father despite there being “no objective basis” for doing so,¹⁶⁵⁹ and noted that “the Mother would probably say or do anything if it meant that X would not have a relationship with her father”.¹⁶⁶⁰ This case exemplifies the systemic barriers faced by mothers in family courts, where gendered stereotypes can influence judicial perceptions and decisions, resulting in biased outcomes that undermine the credibility of women’s allegations of abuse, while minimising the significance of documented male violence.

¹⁶⁵⁴ Ibid [45]–[49] (Altobelli J).

¹⁶⁵⁵ Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57(1) *Modern Law Review* 10–37, 10.

¹⁶⁵⁶ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [47] (Altobelli J) (emphasis added).

¹⁶⁵⁷ Ibid [149] (Altobelli J).

¹⁶⁵⁸ Ibid [9] (Altobelli J).

¹⁶⁵⁹ Ibid [253] (Altobelli J).

¹⁶⁶⁰ Ibid [243] (Altobelli J).

6.3.2 *Ainsley & Ainsley*

In *Ainsley & Ainsley*, the mother alleged that the father had exerted coercive control over her and physically maltreated the younger child, Y.¹⁶⁶¹ The older child, X, had begun making disclosures indicative of sexual abuse from the age of two¹⁶⁶² and, over the following years, had continued to disclose sexual abuse by her father to family members and professionals, including at her preschool, to contact supervisors, and in interviews with the New South Wales Police and Department of Family and Community Services.¹⁶⁶³ Also in evidence was a letter from ‘Dr R’, an “experienced sexual assault examiner”, stating that X was “displaying behaviour that is often found in young victims of sexual assault and for this reason needs ongoing clinical psychological therapy”.¹⁶⁶⁴ At the time of the first reported hearing, X was receiving counselling for victims of abuse,¹⁶⁶⁵ the mother and both children were the subject of a protection order,¹⁶⁶⁶ and a contact centre provided professional supervision for the children’s visits with their father.¹⁶⁶⁷ The father, in turn, alleged that the mother had coerced and controlled him, both while they were together and after their separation.¹⁶⁶⁸

A Single Joint Expert was commissioned to write a report, and the mother disclosed to the reporter that she herself had been the victim of childhood abuse.¹⁶⁶⁹ The Single Joint Expert Report, which was quoted extensively by Altobelli J, concluded that the mother’s own experience of childhood abuse and her victimisation as an adult, had rendered her incapable of effectively managing stress.¹⁶⁷⁰ Accordingly, the mother was deemed unable to protect the

¹⁶⁶¹ Report of Single Joint Expert, Dr J (2 October 2019) [5]–[6], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [34] (Altobelli J); *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [157] (Rees J).

¹⁶⁶² Report of Single Joint Expert, Dr J (2 October 2019) [11], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [35] (Altobelli J).

¹⁶⁶³ Report of Single Joint Expert, Dr J (2 October 2019) [6], [68], cited in *ibid* [34], [45] (Altobelli J); Chronology prepared by the Independent Children’s Lawyer, cited in *ibid* sch 1.

¹⁶⁶⁴ Chronology prepared by the Independent Children’s Lawyer, cited in *ibid* sch 1.

¹⁶⁶⁵ Report of Single Joint Expert, Dr J (2 October 2019) [5]–[6], cited in *ibid* [34] (Altobelli J).

¹⁶⁶⁶ Report of Single Joint Expert, Dr J (2 October 2019) [6], cited in *ibid* [36] (Altobelli J).

¹⁶⁶⁷ *Ibid* [2] (Altobelli J).

¹⁶⁶⁸ Report of Single Joint Expert, Dr J (2 October 2019) [25], cited in *ibid* [37] (Altobelli J).

¹⁶⁶⁹ Report of Single Joint Expert, Dr J (2 October 2019) [85], cited in *ibid* [46] (Altobelli J).

¹⁶⁷⁰ Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *ibid* [46] (Altobelli J).

children from her ‘irrational fears’ that the father had sexually abused the children.¹⁶⁷¹ The expert stated:¹⁶⁷²

Ms Ainsley has a history of childhood trauma and repeat victimisation in adulthood likely to produce PTS [post traumatic stress] symptoms, anxiety and maladaptive ways of managing interpersonal tension. Children who have been victimised in their early attachment relationships have been deeply betrayed by those they trusted, becoming hyper-sensitive to threats to security. Separation, property disputes and parenting disputes are major threats to financial security and to attachment relationships ...

The stress response may be easily triggered and/or chronically over-activated for those with a trauma history, who may thus show emotional/behavioural dyscontrol and irrationality in response to lower levels of threat than normally stress-hardy, distress-tolerant individuals ... This may be Ms Ainsley’s predicament.

The expert’s reference to the mother’s “repeat victimisation in adulthood”¹⁶⁷³ is notable. The only adverse events that the mother had experienced as an adult, which were before the court and the expert, were an assault by a stranger in which the mother had lost an eye,¹⁶⁷⁴ and the behaviour allegedly perpetrated by the father.¹⁶⁷⁵ In referring to the impact of the mother’s “repeat victimisation in adulthood”, the expert implicitly accepted that the father did perpetrate family violence, yet its only significance was that it impaired the *mother’s capacity* to parent the children.

In this way, the mother’s own victimisation as a child and, later, at the hands of the father, was implicitly construed as the source of both children’s sexualised behaviours and X’s repeated disclosures of child sexual abuse by their father. There was no consideration in the expert’s report, or in the judgement as a whole, of the father’s parenting capacity in light of his violent history, or of the impact on the children of maintaining contact with a parent who had—at the very least—perpetrated family violence in their presence.

¹⁶⁷¹ Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *ibid* [46] (Altobelli J).

¹⁶⁷² Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *ibid* [46] (Altobelli J).

¹⁶⁷³ Report of Single Joint Expert, Dr J (2 October 2019) [80], cited in *ibid* [46] (Altobelli J).

¹⁶⁷⁴ Report of Single Joint Expert, Dr J (2 October 2019) [22], cited in *ibid* [34] (Altobelli J).

¹⁶⁷⁵ Report of Single Joint Expert, Dr J (2 October 2019) [5]–[6], cited in *ibid* [34] (Altobelli J); *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [157] (Rees J).

6.3.3 *Welby & Raine*

Welby & Raine exemplifies the portrayal of the mother in family law proceedings as overly protective¹⁶⁷⁶ and emotional,¹⁶⁷⁷ while also accusing her of making allegations of harm for strategic purposes.¹⁶⁷⁸ In this case, the mother alleged that the father had sexually abused her daughter from a previous relationship, Ms P, and posed a risk of sexual harm to the subject child, Y.¹⁶⁷⁹ The husband's first wife, Ms C, also made allegations against the father of verbal and physical abuse directed at herself and her children.¹⁶⁸⁰ The court concluded that Ms C's allegations against the father were "triggered by discussions with Ms B [the mother]",¹⁶⁸¹ suggesting that Ms C was an unreliable witness¹⁶⁸² and subtly hinting that both mothers were and hypervigilant to risk.¹⁶⁸³

Justice Cleary appeared to believe that the mother's judgement was impaired by her own traumatic childhood experience of sexual abuse which, Her Honour concluded, she projected onto her understanding of the situation with her own children.¹⁶⁸⁴ Her Honour stated:¹⁶⁸⁵

Cross-examination of the mother, prompted information about a childhood marred by sexual abuse of her as a young girl; by "someone outside the family and a doctor and young males in a children's hospital."

If that is the case it is unsurprising that the mother would be attuned to the possibility of sexual abuse of her own children.

Whatever the cause of it, in my impression the mother reacts to threats of harm to herself and to her children with all means available to her, at times in a disproportionate way. *She relies on and uses the system to generate evidence of what she believes to be true.* As a result the mother does not trust the outcome of the work of government agencies such as JIRT [or the Joint Investigation Response Team] if it does not accord with her own view of what has happened.

¹⁶⁷⁶ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [42], [92]–[93], [190] (Cleary J).

¹⁶⁷⁷ *Ibid* [81], [99] (Cleary J).

¹⁶⁷⁸ *Ibid* [100], [123], [131], [137] (Cleary J).

¹⁶⁷⁹ *Ibid* [60], [98]–[102] (Cleary J).

¹⁶⁸⁰ *Ibid* [60] (Cleary J).

¹⁶⁸¹ *Ibid* [149] (Cleary J).

¹⁶⁸² *Ibid* [66] (Cleary J).

¹⁶⁸³ *Ibid* [42], [92]–[93], [136] (Cleary J).

¹⁶⁸⁴ *Ibid* [134]–[136] (Cleary J).

¹⁶⁸⁵ *Ibid* [134]–[136] (Cleary J) (emphasis added).

This framing supports a pattern seen in other cases analysed, in which family law discourse was influential in dismissing child sexual abuse allegations by construing alleging parents—usually, but not always, mothers—as both mentally unbalanced *and* strategic. These cases illustrate the persistent gendered beliefs within the family court system, in which mothers’ concerns about abuse are often dismissed as overreactions influenced by their own trauma, rather than as legitimate attempts to protect their children.

6.4 Erroneous Beliefs about the Comorbidity of Family Violence and Child Sexual Abuse

In the Final Report of the Royal Commission, the Commissioners stated, “[w]e heard in private sessions and public hearings that many children experienced other forms of abuse, including physical and emotional abuse, and neglect, related to the sexual abuse”.¹⁶⁸⁶ This is consistent with research suggesting that sexual abuse is often connected to other forms of child maltreatment.¹⁶⁸⁷

Yet, in the cases analysed, judicial officers and other professionals in the family law system overwhelmingly failed to recognise that family violence and child sexual abuse frequently co-occur. Within the family courts, allegations of child sexual abuse alongside a history of physical violence or coercive control were not viewed as comorbidities, even when supported by external documentation such as an apprehended violence order or a police decision to charge the alleged offender. Instead, a parent’s—usually the mother’s—victimisation was often viewed as indicative that she was mentally unstable or unable to support the children’s relationship with their father.

Also of great relevance when evaluating family law cases in which child sexual abuse is alleged, the Royal Commission’s Final Report highlighted the influence of family relationships and the impact of family violence on victims’ capacity to *disclose* sexual abuse.¹⁶⁸⁸ The

¹⁶⁸⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 166.

¹⁶⁸⁷ Keith Kaufman et al., *Risk Profiles for Institutional Child Sexual Abuse: A Literature Review* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, October 2016) 30, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 166.

¹⁶⁸⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 42.

Commissioners stated that victims' decisions whether or not to disclose are made within the context of an implicit analysis of their vulnerability as a child within unbalanced power dynamics, and an assessment of the risks and benefits—such as the cessation of further abuse of themselves or others—that they anticipate will arise from the disclosure.¹⁶⁸⁹

6.4.1 *Bentleigh & Bentleigh*

In *Bentleigh & Bentleigh*, the children, B and C, began disclosing sexual abuse by their father, when they were approximately five and three years old,¹⁶⁹⁰ and numerous allegations of family violence were made by the mother and maternal grandmother.¹⁶⁹¹ The father admitted under cross-examination to several incidents of family violence, including punching a hole in a wall, grabbing the mother by the throat and kicking the family dog.¹⁶⁹² Some of these events resulted in police attendance and were witnessed by the children.¹⁶⁹³

The case is notable for the utter disregard paid by Single Joint Expert, Dr G, to the context of violence in which the child sexual abuse was alleged. As reported by Rees J, when cross-examined, Dr G:¹⁶⁹⁴

[D]own played the incident where he [sic] father punched the wall, saying that *such conduct only amounted to family violence if the mother's head had been closer than three metres away*. Asked whether the mother would have been affected by the incident Dr G said that she understood that *the mother had carried on unaffected after the father punched the wall in the past*.

In her report, Dr G also dismissed the disclosures of sexual abuse made to her by the children when interviewing them. Specifically of B's disclosure, the expert stated:¹⁶⁹⁵

I do not believe that the child [B] was disclosing an actual experience [of sexual abuse]. It was said as if she were reciting homework she had learnt by heart without emotion or relation to the words that she expressed ...

¹⁶⁸⁹ Ibid 40.

¹⁶⁹⁰ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [12]–[15] (Hannam J).

¹⁶⁹¹ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) 50–64 (Rees J).

¹⁶⁹² Ibid 57–58, 63 (Rees J).

¹⁶⁹³ Ibid 65–66 (Rees J).

¹⁶⁹⁴ Ibid 71 (Rees J) (emphasis added).

¹⁶⁹⁵ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J).

On the disclosures of both children, Dr G wrote:¹⁶⁹⁶

The nature of the disclosures was very concrete and repetitive as if given to the children to learn by heart. They showed no engagement with the words of the disclosure when they said them.

Dr G recommended that the children live with the father, stating that the allegations of child sexual abuse were “spurious”, and the family violence was “sporadic, usually in the context of alcohol and unlikely to occur given that there will be no further contact between the parents”.¹⁶⁹⁷

6.4.2 *Welby & Raine*

In *Welby & Raine*, despite the allegations made by various witnesses of “excessive use of alcohol and marijuana, excessive discipline of the children and physical assaults on the mother, the children and family pets”,¹⁶⁹⁸ Cleary J was not convinced that the father was violent, nor that any of these acts had posed or would pose an unacceptable risk of harm to the subject children. Her Honour stated, “[t]he mother describes herself as having been in a family violence relationship with the father. She is of course entitled to her view based on her own lived experience”,¹⁶⁹⁹ and “I am independently satisfied that the children were not exposed to risk of unacceptable harm in the household prior to separation”.¹⁷⁰⁰

A 2013 Single Expert Report similarly did not conclude that the father posed a risk of harm to the children.¹⁷⁰¹ A subsequent Magellan Report went much further, construing the children’s disclosures of sexual abuse and the reports of violence made by professionals involved with the family as evidence of the mother’s deviance. Justice Cleary stated:¹⁷⁰²

¹⁶⁹⁶ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J).

¹⁶⁹⁷ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [178] (Rees J).

¹⁶⁹⁸ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [69] (Cleary J).

¹⁶⁹⁹ *Ibid* [238] (Cleary J).

¹⁷⁰⁰ *Ibid* [178] (Cleary J).

¹⁷⁰¹ *Ibid* [149] (Cleary J).

¹⁷⁰² Magellan Report of the Family Consultant, Ms D (21 May 2019), cited in *ibid* [123] (Cleary J).

The family consultant reported that the material read by her does not support that the children are at risk of sexual harm in the care of the father. She expressed the opinion that the mother strategically recruited and aligned professionals to assist her case. In the view of the family consultant the mother did so by reporting her expressed fears to professionals who accepted the children's disclosures as truth without considering alternative reasons as to why the children may be reporting the information.

Citing the Magellan Report prepared by the Family Consultant, Her Honour stated:¹⁷⁰³

It is reported that “independent material strongly suggests that the mother has utilised the parent/child relational dynamic to nurture dependency and enmeshment between her and the children and between the children themselves to place loyalty demands on the children and influence, coerce and coach the children to make allegations against the father”.

6.4.3 *Martin & Payne*

Equally, in *Martin & Payne*, the mother was portrayed as strategic, disingenuous and anxious.¹⁷⁰⁴ Justice Tree construed the mother's reports of the children's disclosures to authorities, and her subsequent restriction of the children's time with their father, as a form of family violence.¹⁷⁰⁵ His Honour determined that the mother's reports to the then-named Department of Family and Community Services and New South Wales Police about the father's conduct were both malicious and intended to disrupt the paternal relationship:¹⁷⁰⁶

The mother's conduct, particularly given that the allegations she made from time to time were of such a *serious* nature, can be seen as a concerted campaign. I am satisfied that its purpose was, at least in part, to *impede the father's relationship with the children* ... her likely motivation in doing so was substantially to, if not wholly remove the father from the children's lives, then to at least have the control over the times and circumstances in which he would spend time with them.

¹⁷⁰³ Magellan Report of the Family Consultant, Ms D (21 May 2019), cited in *ibid* [124] (Cleary J).

¹⁷⁰⁴ *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [90], [114] (Tree J).

¹⁷⁰⁵ *Ibid* [87], [91] (Tree J).

¹⁷⁰⁶ *Ibid* [91] (Tree J) (emphasis added).

It is notable that the seriousness of the conduct reported by the mother was deemed to make her act of reporting it even more egregious. His Honour concluded:¹⁷⁰⁷

I am further satisfied that the mother's conduct in seeking to restrict the children's relationship with the father, is family violence as that term is defined in s 4AB of the *Act*, as it was likely to prevent the father from keeping connections with the children, perhaps even severing the relationship altogether. Further, the desire to circumscribe that relationship does carry with it a risk of emotional harm which, albeit somewhat circularly, is itself abuse as that term is used in s 60CC(2)(b), albeit that the harm and the abuse are the one and the same.

It is also remarkable that the mother's allegations were seen by His Honour to constitute a form of family violence against the father in forming a "concerted campaign" to disrupt the father's relationship with the children. Section 4AB of the *Family Law Act* defines family violence as "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".¹⁷⁰⁸ The *Act* then provides a non-exhaustive list of examples of family violence,¹⁷⁰⁹ which includes assault, sexual abuse, stalking, repeated derogatory taunts, intentional destruction of property, killing or injuring animals, deprivation of liberty, financial abuse and "preventing the family member from making or keeping connections with his or her family, friends or culture".¹⁷¹⁰ Justice Tree's conclusion that the mother's reports to government agencies constitute behaviour circumscribed by the *Act* is starkly at odds with the tone of section 4AB and the gravity of the examples of family violence provided in the *Act*.

In a darkly ironic twist, the approach of the family courts in the cases analysed is comparable to the 'coercive controlling violence' described in Kelly and Johnson's typology of family violence.¹⁷¹¹ The authors characterise coercive controlling violence as "a pattern of *emotionally abusive intimidation, coercion, and control* coupled with physical violence".¹⁷¹² This aligns with the *Family Law Act*'s definition of family violence, and the typology is routinely referred

¹⁷⁰⁷ Ibid [88]–[89] (Tree J).

¹⁷⁰⁸ *Family Law Act* 1975 (Cth) s 4AB(1).

¹⁷⁰⁹ Ibid s 4AB(2).

¹⁷¹⁰ Ibid s 4AB(2)(i).

¹⁷¹¹ JB Kelly and MP Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476–499.

¹⁷¹² Ibid 478 (emphasis added).

to in family violence training provided to family law professionals in Australia.¹⁷¹³ Yet, the case studies herein demonstrate numerous instances of such violence directed by judges, independent children's lawyers and experts at parents who reported family violence and child sexual abuse in the context of family law proceedings.

6.5 The Use of Pseudoscience

The Royal Commission relied heavily on social science evidence in its investigations, and as support for its recommendations. The Commission utilised literature reviews, meta-analyses, newly commissioned research and qualitative and quantitative research with survivors, in seeking to understand, prevent and respond effectively to child sexual abuse.¹⁷¹⁴ In contrast, the case studies herein demonstrate the family courts resisting social science evidence, while relying on tenuous pseudoscientific theories, particularly in the psychological field.¹⁷¹⁵ As detailed below, child sexual abuse allegations were discounted in many cases through the use of unsubstantiated theories—many of them gendered—including 'parental alienation', 'false memories' and the 'coaching' of children to disclose abuse, alongside poorly applied psychometric testing and sweeping diagnoses of alleging parents as overprotective or delusional. In several cases, pseudoscientific theories played a key role in determining the risks children faced which, in turn, impacted the court orders made.

6.5.1 *Ainsley & Ainsley*

Ainsley & Ainsley is notable for its reliance on a mixture of contested social science research and fringe theories that have been soundly debunked by the literature. In the 2019 judgement, Altobelli J quoted extensively from the report of a Single Joint Expert, Dr J, which cited a selective review of largely American literature by O'Donohue et al., acknowledging that false

¹⁷¹³ R Field et al., 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25 *Judicial Administration* 212–236, 219.

¹⁷¹⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, ch 3.

¹⁷¹⁵ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175], [178] (Rees J); *ibid* 71 (Rees J); Report of Single Joint Expert, Dr J (2 October 2019) [72], [74], [80]–[82], [85], [101] cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46]–[47] (Altobelli J); Report of Single Joint Expert, Dr J (30 March 2020), cited in *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [12] (Rees J); Magellan Report of the Family Consultant, Ms D (21 May 2019), cited in *Welby & Raine* [2020] FamCA 189 (7 April 2020) [123]–[124] (Cleary J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [88]–[89], [91] (Tree J).

allegations of child sexual abuse by children are rare, but claiming that they are more common in divorce proceedings.¹⁷¹⁶ In fact, false allegations of all forms of child abuse have been identified as occurring at similar rates in family law proceedings as in other contexts.¹⁷¹⁷

O'Donohue et al.'s conclusions were presented within a broader context of claims about "false memory due to suggestible influences" and "conscious manipulation" by parents,¹⁷¹⁸ theories referenced as if they were recognised phenomena. In fact, 'False Memory Syndrome' was developed alongside 'Parental Alienation Syndrome', against the backdrop of increasing recognition of child sexual abuse in the 1980s and 1990s, and both theories have been widely used to defend parents accused of child sexual abuse.¹⁷¹⁹ Despite their lack of evidentiary basis, beliefs concerning 'false memories' and 'parental alienation' continue to be identified in family law discourse worldwide.¹⁷²⁰

In *Ainsley & Ainsley*, the Single Joint Expert Report of Dr J echoed this approach, raising speculative theories about 'false memories' and 'alienation', all of which were presented as fact.¹⁷²¹ Dr J then analysed the subject child X's disclosures of sexual abuse using ten "key dimensions"¹⁷²² developed by the same lead author, who claimed to "provide a comprehensive model for analysing allegations of child sexual abuse with careful attention being paid to factors that indicate that the child may not be telling the truth or, alternatively, may have

¹⁷¹⁶ William O'Donohue, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475, cited in Report of Single Joint Expert, Dr J (2 October 2019) [72], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J).

¹⁷¹⁷ Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341; M Hume, 'The Relationship between Child Sexual Abuse, Domestic Violence and Separating Families' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), cited in Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 955; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9.

¹⁷¹⁸ William O'Donohue, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475, 460.

¹⁷¹⁹ Ruth Blizard and Morgan Shaw, 'Lost-in-the-Mall: False Memory or False Defense' (2019) 16(1) *Child Custody* 1–22, 1.

¹⁷²⁰ Morgan Shaw, 'Misperceptions and Misapplications of Research in Family Law Cases: Myths of "Parental Alienation Syndrome" and Implanted False Memories' (2019) 16(1) *Child Custody* 1–6, 3.

¹⁷²¹ Report of Single Joint Expert, Dr J (2 October 2019) [74], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J).

¹⁷²² Report of Single Joint Expert, Dr J (2 October 2019) [76], cited in *ibid* [46] (Altobelli J).

developed a false memory”.¹⁷²³ Applying this model, the expert found that “[t]his analysis casts doubt on X’s evolving accounts of ‘recalled’ events”.¹⁷²⁴

The Final Report of the Royal Commission, published two years before *Ainsley & Ainsley* was heard, established that false reports of child sexual abuse are exceedingly rare.¹⁷²⁵ Notably, false negatives—or a failure to disclose—are far more likely to occur than false positives, or false disclosures.¹⁷²⁶ The Commissioners stated:¹⁷²⁷

Rather than making a false allegation, a child who has experienced sexual abuse is more likely to deliberately choose to not disclose the abuse or, alternatively, to not disclose it because they have blocked it from memory.

The Royal Commission facilitated research into memory, which found that:¹⁷²⁸

In the past decade, a number of studies have confirmed what are called “developmental reversal effects”, showing that older adolescents and adults are more susceptible to erroneous or false memories than children ... Compared to adolescents and young adults, young children have been found to produce fewer false memory reports, particularly for negative events. As a consequence, the view that children are more suggestible than adults is regarded by many contemporary memory researchers as “outdated”.

In the 2019 judgement of *Ainsley & Ainsley*, the passages that Altobelli J quoted from the Single Joint Expert Report made no attempt to explain why Dr J had relied on the article by O’Donohue et al., instead of the extensively researched and widely recognised work of the

¹⁷²³ William O’Donohue, Lorraine T Benuto and Olga Cirlugea, ‘Analyzing Child Sexual Abuse Allegations’ (2013) 13(4) *Forensic Psychology Practice* 296–314, 299–300.

¹⁷²⁴ Report of Single Joint Expert, Dr J (2 October 2019) [77], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J).

¹⁷²⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136.

¹⁷²⁶ David M Fergusson, L John Horwood and LJ Woodward, ‘The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults’ (2000) 30(3) *Psychological Medicine* 529–544, 535–536.

¹⁷²⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 137.

¹⁷²⁸ Jane Goodman-Delahunty, Mark A Nolan and Evianne L van Gijn-Grosvenor, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017) 59, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 239.

Royal Commission. His Honour accepted the expert’s evidence without question, stating that her “written report and her cross-examination demonstrated a level of objectivity which, of course, is consistent with a professional Single Joint Expert”.¹⁷²⁹

The use of pseudoscientific theories continued in the final trial which, in determining the risks faced by the children, centred around the issues of whether the allegations against the father of child sexual abuse of the older child and the physical abuse of the younger child could be verified, and whether the mother had ‘coached’ the children to make their disclosures.¹⁷³⁰ Ultimately, Rees J determined that the mother had, in fact, “coached the children” to make false allegations.¹⁷³¹ Concluding, therefore, that the mother’s parenting was harmful to the children’s psychological wellbeing,¹⁷³² Her Honour’s final orders permitted the children supervised time with their mother on three occasions per year, while the father was ordered unsupervised time with the children.¹⁷³³

6.5.2 *Hammond & Hammond*

Hammond & Hammond was similarly mired in pseudoscience as the father commenced proceedings claiming that the mother was “emotionally manipulating” the children, had “coached the older child to make false allegations against him”¹⁷³⁴ and had “alienated” him from his children.¹⁷³⁵ Notwithstanding the older child Z’s history of disclosing sexual abuse by the father¹⁷³⁶ to numerous parties, including a psychotherapist,¹⁷³⁷ a psychologist¹⁷³⁸ and police,¹⁷³⁹ and despite the *substantiation* by the then-named Department of Family and Community Services of both the sexual harm of Z and a significant risk of sexual harm to Y by the father,¹⁷⁴⁰ Hannam J evaluated whether ‘coaching’¹⁷⁴¹ and ‘false memories’¹⁷⁴² might

¹⁷²⁹ *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [61]–[63] (Altobelli J).

¹⁷³⁰ *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [32]–[35] (Rees J).

¹⁷³¹ *Ibid* [148] (Rees J).

¹⁷³² *Ibid* [290] (Rees J).

¹⁷³³ *Ibid* ords 4–5 (Rees J).

¹⁷³⁴ *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [26] (Hannam J).

¹⁷³⁵ *Ibid* [171] (Hannam J).

¹⁷³⁶ *Ibid* [3] (Hannam J).

¹⁷³⁷ *Ibid* [100] (Hannam J).

¹⁷³⁸ *Ibid* [161]–[164] (Hannam J).

¹⁷³⁹ *Ibid* [119]–[131] (Hannam J).

¹⁷⁴⁰ *Ibid* [155] (Hannam J).

¹⁷⁴¹ *Ibid* [41] (Hannam J).

¹⁷⁴² *Ibid* [289] (Hannam J).

account for Z's disclosures of sexual abuse.¹⁷⁴³ Stating that the possibility of a false memory was as likely as not,¹⁷⁴⁴ Her Honour stated that she could not dismiss the possibility that the mother may have "coached" the older child, "in the way that this expression is used by the expert".¹⁷⁴⁵

Rather than acknowledging the highly speculative evidentiary basis for such theories, the court's consideration of the risk of sexual abuse to the children largely hinged on the testimony of a single expert forensic and clinical psychologist, who was requested by the court to evaluate Z's forensic interviews in order to report on "whether they complied with best practise [sic] in relation to the forensic interviewing of children".¹⁷⁴⁶ As reported by Hannam J, the expert concluded that, although Z "provided police investigators a broad narrative of her experience of abuse and her certainty that she and the younger child were both sexually abused by the father, little meaningful specific information was gained during those interviews".¹⁷⁴⁷ Justice Hannam also relayed the expert's opinion that Z may have been "coached by the psychotherapist [the child's treating mental health professional] prior to the forensic interviews",¹⁷⁴⁸ or that the mother may have inadvertently implanted a "false memory" of sexual abuse in Z via her "genuine belief" that such abuse had occurred.¹⁷⁴⁹ Justice Hannam also noted approaching Z's disclosures "with caution",¹⁷⁵⁰ stating "there is no evidence that the older child had made any disclosure of sexual abuse prior to her parents' separation".¹⁷⁵¹

Concluding that there was insufficient evidence to deem the father an unacceptable risk of sexual harm to his daughters,¹⁷⁵² Her Honour allowed the children to continue living with their mother, while ordering that they spend time with their father, transitioning to unsupervised time after four months.¹⁷⁵³

¹⁷⁴³ Ibid [41], [203], [212], [218], [287] (Hannam J).

¹⁷⁴⁴ Ibid [311]–[312] (Hannam J).

¹⁷⁴⁵ Ibid [290] (Hannam J).

¹⁷⁴⁶ Ibid [40] (Hannam J).

¹⁷⁴⁷ Ibid [41] (Hannam J).

¹⁷⁴⁸ Ibid [41] (Hannam J).

¹⁷⁴⁹ Ibid [289] (Hannam J).

¹⁷⁵⁰ Ibid [251] (Hannam J).

¹⁷⁵¹ Ibid [252] (Hannam J).

¹⁷⁵² Ibid [365] (Hannam J).

¹⁷⁵³ Ibid ord 14 (Hannam J).

6.5.3 *Zaida & Badouri*

In *Zaida & Badouri*, Forrest J concluded—albeit vaguely—that the paternal grandmother, “and probably the father as well”, were responsible for the disclosures of sexual abuse that the subject child X had made against the mother’s new partner during her interviews with the police and the then-named Department of Child Safety, Youth and Women.¹⁷⁵⁴ His Honour stated that the father and paternal grandmother “were involved in conversations with the child in which inappropriate things were put into the child’s mind, one way or another, for her to repeat to police and Departmental officers with the ultimate goal of securing her principal care”.¹⁷⁵⁵ In this way, His Honour discounted the child’s disclosures.

6.6 ‘Parental Alienation Syndrome’: Allegations as a Form of Psychological Abuse

‘Parental Alienation Syndrome’ represents the apex of erroneous, often gendered, beliefs translated into pseudoscientific theories. Deriving from the largely self-published and profoundly contested work of Gardner,¹⁷⁵⁶ ‘parental alienation’ theories construe children’s resistance to contact and allegations of sexual abuse against a parent as evidence that the other parent has undermined the child’s relationship with the alleged perpetrator.¹⁷⁵⁷ ‘Parental alienation’ theories have been soundly discredited by the literature.¹⁷⁵⁸ The most recent significant inquiry into Australia’s family law system stated: “[t]he committee acknowledges that parental alienation syndrome is not a recognised psychiatric disorder within the scientific community”.¹⁷⁵⁹ Despite this, the concept continues to be entertained—and is sometimes even

¹⁷⁵⁴ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [39], [46] (Forrest J).

¹⁷⁵⁵ *Ibid* [46] (Forrest J).

¹⁷⁵⁶ Nola Webb et al., ‘Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019’ (2021) 56(3) *Australian Journal of Social Issues* 1–22, 12, 20.

¹⁷⁵⁷ *Ibid* 12.

¹⁷⁵⁸ Joan S Meier and Sean Dickson, ‘Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation’ (2017) 32(2) *Law and Inequality* 311–334, 317; Miguel Clemente and Dolores Padilla-Racero, ‘When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged “Parental Alienation Syndrome”’ (2016) 13(2–3) *Child Custody* 126–133, 130; H Smith, ‘Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases’ (2016) 11(1) *University of Massachusetts Law Review* 64–99, 64; Joan S Meier, ‘A Historical Perspective on Parental Alienation Syndrome and Parental Alienation’ (2009) 6(3–4) *Child Custody* 232–257, 236–238; Elspeth McInnes, ‘Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law’ (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), 3–4; Claire Ferguson et al., ‘Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia’ (2018) 15(2) *Child Custody* 93–115, 110.

¹⁷⁵⁹ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 97.

determinative—when evaluating the best interests of children and the risks of sexual abuse they face—within family courts in Australia and internationally.¹⁷⁶⁰

Webb et al. evaluated cases of alleged child sexual abuse heard by the Family Court of Australia from just prior to the commencement of the Royal Commission until two years after it concluded.¹⁷⁶¹ The authors determined that in just under one-quarter of fully contested cases, the court made a formal finding that the allegation was *deliberately misleading*, as opposed to mistaken, an interpretation that accords with ‘parental alienation’ theories.¹⁷⁶² Lending further support to the strength of ‘parental alienation’ discourse within family law, judicial officers issued restraining orders or warnings against alleging parents in one-quarter of these fully contested cases.¹⁷⁶³ The present case studies reflect the use of the restraining orders and warnings identified by Webb et al., such as prohibiting the alleging parent from taking a child to sexual abuse counselling, allowing counselling only with the permission of the alleged perpetrator, or prohibiting any further allegations of sexual abuse being made except to officers of the family courts.¹⁷⁶⁴ The use of warnings in the case studies also correlated with Webb et al.’s findings that some alleging parents were warned that further allegations would result in the removal of the children.¹⁷⁶⁵

¹⁷⁶⁰ Madelyn Simring Milchman, 'Oversimplified Beliefs About Child Abuse Allegations in Custody Cases with Alienation Rebuttals: Review of Empirical Data' (2024) 21(2) *Journal of Family Trauma, Child Custody & Child Development* 165–192, 167; Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; Joan S Meier and Sean Dickson, 'Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation' (2017) 32(2) *Law and Inequality* 311–334, 316–317; Miguel Clemente and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133, 127.

¹⁷⁶¹ The authors examined 521 judgements published from 2012–2019: Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 1.

¹⁷⁶² N=76, 23%): *ibid* 10 (table 3), 16.

¹⁷⁶³ N=93 (25%): *ibid* 12 (table 8).

¹⁷⁶⁴ *Ibid* 14.

¹⁷⁶⁵ *Ibid* 14.

Similarly, Ferguson et al.'s study of child sexual abuse cases heard by the Family Court of Australia during the early years of the Royal Commission,¹⁷⁶⁶ found that allegations of child sexual abuse were *unsubstantiated* by judges in just under three-quarters of cases.¹⁷⁶⁷ In almost one-quarter of these unsubstantiated cases, judges professed a belief that the case contained elements of 'parental alienation'.¹⁷⁶⁸ Even in cases in which no judicial determination was made regarding the child sexual abuse allegations, judges considered 'parental alienation' as a relevant factor.¹⁷⁶⁹ These findings are reflected in the present analysis, raising questions as to how the findings of the family courts can diverge so strikingly from the findings of the Royal Commission, and the evidence-based literature about the rarity of false allegations of child sexual abuse.¹⁷⁷⁰

Perhaps because 'Parental Alienation Syndrome' has been so contested, present iterations of the theory have shifted slightly.¹⁷⁷¹ In contemporary parlance, 'Parental Alienation Syndrome' is commonly referred to as 'Parental Alienation' or, simply, 'PA'.¹⁷⁷² While earlier incarnations of 'Parental Alienation Syndrome' portrayed alleging parents as deliberately malicious, contemporary applications of the 'syndrome' in the Australian family courts tend to depict

¹⁷⁶⁶ The authors examined 156 judgements published from 2013–2015: Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 93.

¹⁷⁶⁷ Ibid 104 (table 2).

¹⁷⁶⁸ 23.9%: ibid 106.

¹⁷⁶⁹ 20%: ibid 106.

¹⁷⁷⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016), 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

¹⁷⁷¹ Simon Lapierre et al., 'The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec' (2020) 42(1) *Social Welfare and Family Law* 30–44, 30.

¹⁷⁷² Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 2.

alleging parents as mentally ill,¹⁷⁷³ or mistaken and overprotective.¹⁷⁷⁴ In some cases, a parent's steadfast belief that a child had been sexually abused was construed as evidence of psychological abuse of the child,¹⁷⁷⁵ or cited by judicial officers as a reason to transfer residence of the child to the allegedly abusive parent,¹⁷⁷⁶ if the allegedly abusive parent was deemed better able to support the child's relationship with both parents.¹⁷⁷⁷ In detailing the tension in family law between the need for children to maintain a 'meaningful relationship' with both parents and the need to keep children safe—referred to as the “twin pillars” of family law¹⁷⁷⁸—Rathus notes:¹⁷⁷⁹

[O]ngoing problems for a mother who makes allegations of violence and abuse, and is not believed, or whose allegations are seen as exaggerated. This mother exists at the very epicentre of the tension between the twin pillars. She may not be permitted to negotiate or litigate as a protective parent within the narrative of child safety. Her efforts to protect are interpreted as obstructive – colliding with the narrative of shared parenting. Her children are not considered unsafe, or are considered safe enough. As a consequence, the father becomes a victim and the mother an abuser, denying her children their rightful relationship with their father.

Webb et al. similarly found that when judicial officers provided a reason for changing a child's residence to live with an alleged perpetrator of child sexual abuse, they cited the “alleging parent's ‘unshakeable’ or ‘entrenched’ belief” in the allegation in 42% of cases, and the alleging parent's inability or unwillingness to support the child's relationship with the alleged perpetrator in 18% of cases.¹⁷⁸⁰ In some cases in the present analysis, rather than attending to

¹⁷⁷³ Ibid 169.

¹⁷⁷⁴ Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 246.

¹⁷⁷⁵ V Papaleo, 'When Children Refuse Contact with a Parent: The Language of Conflict and the Reciprocal Relationship between the Court and the Social Sciences' (Conference Paper, World Congress on Family Law and Children's Rights, 17–20 March 2013) 3.

¹⁷⁷⁶ Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 14.

¹⁷⁷⁷ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 7.

¹⁷⁷⁸ *Mazorski v Albright* [2007] (2007) FamCA 520 [3] (Brown J), cited in Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6.

¹⁷⁷⁹ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 6–7.

¹⁷⁸⁰ The number of cases was not provided: Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 14.

the risk of sexual abuse a child might face in the care of an alleged perpetrator, tenuous psychosocial theories supported judicial analyses that focused on mothers' *beliefs* as both the source of children's disclosures of sexual abuse, and as a significant source of risk to those children.

6.6.1 *Tabano & Yabon*

In the final judgement of *Tabano & Yabon*, Forrest J explicitly expressed support for the concept of 'parental alienation' in his findings regarding the child X, stating:¹⁷⁸¹

I am satisfied that both the father and his current wife, Ms Yabon, have consciously and deliberately sought to "alienate" X from her mother by their words and their actions over the last four years, as well as unconsciously and less deliberately doing so at the same time, but to the same effect.

6.6.2 *Ainsley & Ainsley*

Throughout the 2019 judgement of *Ainsley & Ainsley*, the mother was construed as mentally unbalanced, based on her anxiety and depression, her prescribed use of antidepressant medication, her adult victimisation in an assault by a stranger 12 years previously and her own history of childhood trauma.¹⁷⁸² However, the primary 'evidence' of the mother's mental illness under consideration throughout the judgement, was the children's ongoing disclosures of sexual abuse by their father. This was construed as a source of risk to the children themselves.¹⁷⁸³

In considering the risks posed to the children by the mother, Altobelli J concluded that:¹⁷⁸⁴

The main risk is psychological, and that is that the children are exposed to what would be their *mother's trenchant belief* that the Father has perpetrated child sexual abuse, and *her inability to contain her fears and protect her own children from her fears* ... the Mother's inability to contain her own concerns has the potential not only to seriously undermine the children's relationship with the Father in future, but their development both in the short term and long term. The Mother's lack of

¹⁷⁸¹ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [50] (Forrest J).

¹⁷⁸² Report of Single Joint Expert, Dr (2 October 2019) [22], [80], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [35] (Altobelli J).

¹⁷⁸³ *Ibid* [69]–[72] (Altobelli J).

¹⁷⁸⁴ *Ibid* [69]–[72] (Altobelli J) (emphasis added).

insight about this problem is significant ... the Mother manifests no understanding of her own potential role in what these children are experiencing, and sees no need to do anything about it. Regrettably, and despite the enormous impact that this will have on the children's lives, they need to be removed from her care, at least for the time being.

There was no evidence before the court that the mother had engaged in violence or abuse of any kind. Yet, when evaluating how the mother might react, should the children be ordered to live permanently with the paternal grandmother, Altobelli J referred to the cross-examination of the Single Joint Expert, Dr J, in which she considered "the risk of self-harm and filicide", concluding that the risk was "probably not great, but could not be excluded".¹⁷⁸⁵

The three- and four-year-old children were ordered to immediately begin living with their paternal grandmother.¹⁷⁸⁶ They were permitted two hours per week with their mother and four hours per week with their father, with their time with both parents to be professionally supervised.¹⁷⁸⁷ The mother was also ordered to attend upon a mental health professional, to engage in therapy to assist her to "support the children's transition into the Paternal Grandmother's care".¹⁷⁸⁸

6.6.3 *Bentleigh & Bentleigh*

Bentleigh & Bentleigh provides another key example of allegations of child sexual abuse being framed within the family courts as a form of psychological abuse. In the 2017 hearing, Rees J cited the Single Joint Expert Report of child and family psychiatrist, Dr G, who compared the impact on the children of witnessing family violence with that of their mother alleging that they had been sexually abused by their father as follows:¹⁷⁸⁹

Whereas the domestic assaults on their mother were isolated incidents, the allegations of child sexual abuse have gone on and on. There will be long term effects on these girls because of it, even though abuse may not have occurred. The girls need a weight of majority time with the father so they can see the reality of

¹⁷⁸⁵ Ibid [60] (Altobelli J).

¹⁷⁸⁶ Ibid ord 1, Annexure A(1) (Altobelli J).

¹⁷⁸⁷ Ibid ord 1, Annexure A(2), Annexure A(4) (Altobelli J).

¹⁷⁸⁸ Ibid ord 1, Annexure A(3) (Altobelli J).

¹⁷⁸⁹ Report of Single Joint Expert, Dr G (2016), cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [180] (Rees J).

their father, not the scary representation probably concocted, or at least not discouraged, by the mother and maternal grandmother.

In both reported hearings in 2017 and 2018, judicial officers considered the children's numerous and continued disclosures of sexual abuse by their father purely in terms of their mother's beliefs,¹⁷⁹⁰ and the father's assertion that the children had been 'coached' to make these disclosures.¹⁷⁹¹ No other explanation for the children's ongoing disclosures was attempted by either the father, the Independent Children's Lawyer, or Her Honour.

In the 2018 judgement, Hannam J characterised the risks posed by the mother as "[t]he concern that *the children may be psychologically abused by the mother's behaviour in responding to and encouraging disclosures* from the children that the father has sexually abused them".¹⁷⁹² In weighing the parties' parenting capacities, Her Honour again returned to the question of the mother's beliefs, stating:¹⁷⁹³

The more concerning limitation on the mother's parenting capacity that seems to have become evident since May 2017 is *her inability to analyse critically disclosures made to her by the children about abuse by the father* and her refusal to accept findings of experts and the court that the father has not abused the children and that he does not pose an unacceptable risk of harm to them. *On the basis of her beliefs the mother has subjected the children to numerous visits to health professionals and has engaged the children in sexual assault counselling leading to them potentially being as [sic] risk of psychological harm.*

6.6.4 Welby & Raine

In *Welby & Raine*, Cleary J concluded that the mother "is so fiercely protective that she has become overprotective"¹⁷⁹⁴ in believing that the younger child, X, was at risk of harm in the father's care, and that this would cause psychological harm to X by not promoting a meaningful

¹⁷⁹⁰ Ibid [48] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [17], [51] (Hannam J).

¹⁷⁹¹ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [21]–[23] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [15] (Hannam J).

¹⁷⁹² *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [84] (Hannam J) (emphasis added).

¹⁷⁹³ Ibid [133] (Hannam J) (emphasis added).

¹⁷⁹⁴ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [42] (Cleary J).

relationship with his father.¹⁷⁹⁵ Consequently, X was ordered to live with his father, who was awarded sole parental responsibility for him.¹⁷⁹⁶ The child was permitted only limited supervised contact with the mother, after a six month moratorium on all contact.¹⁷⁹⁷

6.7 Psychometric Testing

Some cases utilised psychometric testing to evaluate the risks children faced. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2)¹⁷⁹⁸ is a psychometric instrument designed to assess various psychological conditions and personality structures, and is commonly used in family law evaluations,¹⁷⁹⁹ and in assessing parental capacity following allegations of child abuse.¹⁸⁰⁰ The literature establishes numerous limitations in the utility of the tool, due to an identified high frequency of underreporting and the test's propensity to disproportionately pathologise some cultural and racial groups.¹⁸⁰¹ Of significance in parenting evaluations is research indicating the MMPI-2's inability to differentiate—to any significant degree—between women at risk from challenges, including domestic violence, and those who abuse their children.¹⁸⁰² Similarly, research using the MMPI and MMPI-2 has consistently failed to identify a profile for parents who engage in any form of child abuse,¹⁸⁰³ including child sexual abuse.¹⁸⁰⁴

¹⁷⁹⁵ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [175] (Cleary J).

¹⁷⁹⁶ *Ibid* ords 2–3 (Cleary J).

¹⁷⁹⁷ *Ibid* ords 7–8 (Cleary J).

¹⁷⁹⁸ JN Butcher et al., *Minnesota Multiphasic Personality Inventory–2 (MMPI-2): Manual for Administration, Scoring, and Interpretation* (University of Minnesota Press, rev ed, 2001).

¹⁷⁹⁹ Ramón Arce et al., 'Assessing Impression Management with the MMPI-2 in Child Custody Litigation' (2015) 22(6) *Assessment* 769–777, 769.

¹⁸⁰⁰ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 9.

¹⁸⁰¹ *Ibid* 96, 98.

¹⁸⁰² Tamara Halperin, 'MMPI-2 Personality Characteristics of Parents in Child Custody Litigation with Intimate Partner Violence Allegations' (PhD Thesis, Alliant International University, 2017) iv; Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 36; B Egeland et al., 'MMPI-2 Profiles of Women at Risk for Child Abuse' (1991) 57 *Personality Assessment* 254–263, 256.

¹⁸⁰³ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 44; B Egeland et al., 'MMPI-2 Profiles of Women at Risk for Child Abuse' (1991) 57 *Personality Assessment* 254–263, 256.

¹⁸⁰⁴ Karen M Davis and Robert P Archer, 'A Critical Review of Objective Personality Inventories with Sex Offenders' (2010) 66(12) *Clinical Psychology* 1254–1280, 1276–1277. See also N Heersink and DS Strassberg, 'A Normative and Descriptive Study of the MMPI with Acknowledged Child Molesters' (1995) 17(4) *Psychopathology and Behavioral Assessment* 377–391, 385; EH Yanagida and JJ Ching, 'MMPI Profiles of Child Abusers' (1993) 49(4) *Clinical Psychology* 569–576, 575.

The largest study of the efficacy of psychometric tests in assessing parenting capabilities applied the MMPI-2 to 298 parental capacity evaluations following substantiated allegations of child abuse.¹⁸⁰⁵ The prevalence of normal-range profiles and underreporting in this sample group suggests the limited utility of the MMPI-2 in a parental capacity assessment context.¹⁸⁰⁶ These results accorded with previous research into known parental perpetrators of child abuse or neglect, finding that 38% of active perpetrators, and 88% of people who were aware of the abuse but failed to intervene, produced profiles that were within normal limits on the clinical scales¹⁸⁰⁷ intended to identify various types of psychopathology.¹⁸⁰⁸ In fact, 40% of the sample did not result in elevations on *any* of the clinical scales.¹⁸⁰⁹ Despite this, the MMPI-2 and other psychometric tools are commonly employed in family law¹⁸¹⁰ and in parenting capacity assessments following allegations of abuse,¹⁸¹¹ with some researchers recommending their use in identifying parents engaged in ‘alienation’.¹⁸¹²

6.7.1 *Palmer & Kagan*

In *Palmer & Kagan*, Altobelli J relied heavily on a report by the court-appointed Single Joint Expert, Dr J, which extrapolated conclusions from an assessment of both parents that he performed using the MMPI-2.¹⁸¹³ In this case, Dr J’s interpretation of the MMPI-2 results discredited the mother’s allegations that the father posed a risk of sexual abuse to X, presenting

¹⁸⁰⁵ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 44.

¹⁸⁰⁶ *Ibid* vii.

¹⁸⁰⁷ EH Yanagida and JJ Ching, 'MMPI Profiles of Child Abusers' (1993) 49(4) *Clinical Psychology* 569–576, 575, cited in Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 82.

¹⁸⁰⁸ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 15.

¹⁸⁰⁹ *Ibid* 82.

¹⁸¹⁰ Nancy S Erickson, 'Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?' (2005) 39 *Family Law Quarterly* 87–107, 87.

¹⁸¹¹ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 93.

¹⁸¹² See for example Madelyn Simring Milchman, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139, 130; RM Gordon, R Stoffey and J Bottinelli, 'MMPI-2 Findings of Primitive Defenses in Alienating Parents' (2008) 36(3) *American Journal of Family Therapy* 211–228, 211.

¹⁸¹³ Report of Single Joint Expert, Dr J (24 April 2018) 39–42, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [124]–[127] (Altobelli J).

her as a person incapable of supporting X's relationship with the father, while determining that the father posed no such risk to the child.¹⁸¹⁴

Justice Altobelli quoted extensively from Dr J's report, which stated:¹⁸¹⁵

The results of the MMPI-2 provide a better explanation of why Ms Kagan might make the allegations against Mr Palmeter that have been proffered. To quote the MMPI-2 summary: "The MMPI-2 'code-type' for Ms Kagan is 3-4. The 3-4 code type is relatively common and describes a person with chronic, intense anger. They tend to be demanding of attention and approval from others, are sensitive to rejection, and are hostile when criticised. Such persons tend to have poor insight into their own behaviour, and if their 3-point code type is 3-4-6 (as is the case with Ms Kagan), their lack of insight is more pronounced. Females with this code type are more likely than males to have vague physical complaints. There is a tendency to be free of anxiety (as suggested by the PAI result) and relationships are superficial, characterised by naïve expectations and a perfectionistic view of the world. The most frequent diagnoses of 3-4 code types is [sic] passive aggressive interactional style, histrionic or borderline personalities, and adjustment disorder with depressed mood.

Dr J's analysis attributed to the mother a code type that neatly fit the gendered stereotype of an angry and vindictive woman. The sections of Dr J's report quoted in the judgement did not provide the scores that the doctor calculated for either of the parents when taking the MMPI-2. The judgement also did not detail the qualifications of Dr J, although presumably these were included in his report. The use of the MMPI-2, without reference to specifics such as the scores or score ranges achieved by each of the parents, and without refining the interpretation of clinical scales, arguably undermines the clinical significance of the results.¹⁸¹⁶ The sections of the report cited in the judgement also made no mention of the widespread critique of psychometric testing in evaluating parenting risks and capacities.¹⁸¹⁷

¹⁸¹⁴ Report of Single Joint Expert, Dr J (24 April 2018) 39–42, cited in *ibid* [124]–[127] (Altobelli J).

¹⁸¹⁵ Report of Single Joint Expert, Dr J (24 April 2018) 42, cited in *ibid* [127] (Altobelli J).

¹⁸¹⁶ Rebecca Jean Fisher, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019) 11–21.

¹⁸¹⁷ See for example *ibid* 36, 44, 96, 98; Tamara Halperin, 'MMPI-2 Personality Characteristics of Parents in Child Custody Litigation with Intimate Partner Violence Allegations' (PhD Thesis, Alliant International University, 2017) iv; B Egeland et al., 'MMPI-2 Profiles of Women at Risk for Child Abuse' (1991) 57 *Personality Assessment* 254–263, 256; Karen M Davis and Robert P Archer, 'A Critical Review of Objective Personality Inventories with Sex Offenders' (2010) 66(12) *Clinical Psychology* 1254–1280, 1276–1277; N Heersink and DS Strassberg, 'A Normative and Descriptive Study of the MMPI with Acknowledged Child Molesters' (1995) 17(4)

Nevertheless, Dr J reported that the psychometric testing identified the mother as a “personality type” that has “problems with authority”, due to her elevated scores on the “Hysteria” and “Psychopathic Deviate” scales.¹⁸¹⁸ Dr J stated:¹⁸¹⁹

Elevations on Hysteria are often associated with extraverted, dramatic and attention seeking behaviours and a strong need for approval, support and affections. Often there is a “conversion” of psychological difficulties into physical complaints and communications with others is [sic] more focussed on creating an impact than upon conveying a message.

Neither Altobelli J nor Dr J cited any evidence from any of the mother’s health practitioners to support the proposition that her health conditions were not real, or were the product of mental illness. However, in this way, the mother’s physical health complaints were transformed into evidence of mental instability. Dr J continued:¹⁸²⁰

Elevations on Psychopathic Deviate represent a rebellious, non-conforming, impulsive and angry individual who is irritable, dissatisfied, angry and underachievers. Such individuals also tend to experience problems with authority and have frequent relationship and work difficulties. Relationships tend to be shallow and characterised by recurrent turmoil.

Thus, the history of family violence perpetrated by the father was relegated to a propensity, on the part of the mother, towards relationships characterised by turmoil. His Honour appeared to accept this view, evidenced by his statement when assessing the mother’s allegations of family violence, that the relationship between the parents was “short and tumultuous” but “historical, and situational in nature”.¹⁸²¹ Ultimately, the effect of Dr J’s assessment of the mother as an unnaturally aggressive, rebellious and demanding woman, was to discredit her concerns about the risks posed to X by the father. The expert report continued:¹⁸²²

Psychopathology and Behavioral Assessment 377–391, 385; EH Yanagida and JJ Ching, 'MMPI Profiles of Child Abusers' (1993) 49(4) *Clinical Psychology* 569–576, 575.

¹⁸¹⁸ Report of Single Joint Expert, Dr J (24 April 2018) 37–38, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [139] (Altobelli J).

¹⁸¹⁹ Report of Single Joint Expert, Dr J (24 April 2018) 37–38, cited in *ibid* [139] (Altobelli J).

¹⁸²⁰ Report of Single Joint Expert, Dr J (24 April 2018) 37–38, cited in *ibid* [139] (Altobelli J).

¹⁸²¹ *Ibid* [47] (Altobelli J).

¹⁸²² Report of Single Joint Expert, Dr J (24 April 2018) 41–42, cited in *ibid* [127] (Altobelli J).

The results suggest that it is in Ms Kagan's personality style to somatise her psychological discomfort, to exaggerate her conflicts, and to be angry and demanding. Combined with her previously diagnosed OCD [or Obsessive Compulsive Disorder], supported in the present assessment, a perfectionistic attitude would render even the slightest of mistakes a major failure of capacity, such as Mr Palmeter giving X lollies at contact and this being evidence of his poor parental capacity. Ms Kagan likely provides little room for error in her relationships, and thus Mr Palmeter's familiar relationships with A and R would then be seen as a sinister engagement.

Even the mother's disappointment at the lack of protection afforded to X by the broader family law system was interpreted by Dr J as indicative of a personality that would oppose X's contact with her father. Dr J stated:¹⁸²³

Ms Kagan's criticism and externalisation of blame extended beyond Mr Palmeter. Ms Kagan alleged that difficulties in contacts were the fault of the Independent Children's Lawyer and her previous solicitor. She further complained about Catholic Care, saying that they "are ramming down X's throat that she should call Mr Palmeter 'Daddy'". Ms Kagan also criticised [the supervised contact service] when they were managing contacts, and expressed a lack of confidence in [the Department of Family and Community Services], criticising how they undertook interviews of other children. These behaviours are consistent with the author's assessment of Ms Kagan's personality and further explain her ardent opposition to Mr Palmeter playing a role in X's life.

In this light, the mother's allegations—based on her experience of family violence at the hands of the father, and on the father's behaviour that she and her elder son, Mr E, witnessed—were transformed into the 'beliefs' of a deviant woman.

While psychometric instruments such as the STATIC-2002¹⁸²⁴ are specifically designed to assess the risk of sexual offending,¹⁸²⁵ self-report tests generally—and the MMPI-2 specifically—have been critiqued for their inability to distinguish the traits of sex offenders

¹⁸²³ Report of Single Joint Expert, Dr J (24 April 2018) 41–42, cited in *ibid* [127] (Altobelli J).

¹⁸²⁴ RK Hanson and D Thornton, *Notes on the Development of Static-2002 (User Report 2003-01)* (Department of the Solicitor General of Canada, 2003).

¹⁸²⁵ Karen M Davis and Robert P Archer, 'A Critical Review of Objective Personality Inventories with Sex Offenders' (2010) 66(12) *Clinical Psychology* 1254–1280, 1277.

from other deviant indicators.¹⁸²⁶ Yet, Dr J relied on the results of the father’s assessment via the MMPI-2 as “evidence against the allegation” that the father posed a risk of sexual abuse to X. He stated:¹⁸²⁷

[T]he psychometric test results on the MMPI-2 are inconsistent with those expected of a sex offender. The research indicates that scale 4 particularly, and code type 4-8 generally, are demonstrated by sex offenders. Mr Palmeter did not return a profile indicative of either scale 4 elevations or 4-8 code types even with the K correction. This constitutes a fourth piece of evidence against the allegation.

Despite the tenuous nature of the psychometric tests administered by Dr J, *Palmeter & Kagan* became subsumed by gendered discourse about “the Mother’s distorted sense of reality”.¹⁸²⁸ Justice Altobelli relied on Dr J’s work in weighing X’s best interests, equating the risk of sexual abuse posed by the father to X, with the risk of psychological abuse posed by the mother’s lack of support for X’s relationship with her father.¹⁸²⁹ Concluding that the mother was “incapable of supporting X’s relationship with her father”,¹⁸³⁰ His Honour determined that the case necessitated assessment of “where there is least risk for X”.¹⁸³¹

6.8 Identifying Perpetrators of Child Sexual Abuse

There are a range of myths about child sexual abuse which can prevent children and their families from being alert to the possibility of abuse, or can prevent its detection or disclosure. These myths include that all perpetrators are strangers to their victims, and that victims have brought the abuse upon themselves.

A common view is that sex offenders are “monsters” who are different from other criminals and the rest of society. Demonising perpetrators has helped to reinforce this stereotype and mask the behaviour of those who do not appear to fit this category.¹⁸³²

¹⁸²⁶ Ibid 1277.

¹⁸²⁷ Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J).

¹⁸²⁸ Ibid [223] (Altobelli J).

¹⁸²⁹ Ibid [144] (Altobelli J).

¹⁸³⁰ Ibid [144] (Altobelli J).

¹⁸³¹ Ibid [1] (Altobelli J).

¹⁸³² *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 46.

A pivotal aspect of the Royal Commission's work was its research and recommendations concerning perpetrators of child sexual abuse. The Royal Commission highlighted research findings determining that there is no typical profile of perpetrators of child sexual abuse,¹⁸³³ apart from the fact that perpetrators are overwhelmingly male.¹⁸³⁴ Despite this, many of the judgements analysed reveal numerous assumptions among judges, experts, independent children's lawyers and other professionals involved in the family law system regarding the profile of a 'typical' perpetrator.¹⁸³⁵ These professionals similarly evinced erroneous assumptions regarding the likely future behaviour of parties accused of child sexual abuse.¹⁸³⁶

There were numerous examples in our case studies and private sessions where victims told us they had disclosed abuse and had not been believed because the perpetrator appeared to be a "normal" or "trusted" adult who did not fit the stereotype of an abuser.¹⁸³⁷

The issue of 'good character' is commonly raised in criminal justice proceedings by defendants as a rebuttal to allegations of child sexual abuse and by offenders as a mitigating factor in sentencing.¹⁸³⁸ Cherry et al. note the challenging nature of admitting such evidence in sentencing for sexual offences against children, as it can act to embed "status-based discrimination" in sentencing outcomes through the unconscious biases of judicial officers.¹⁸³⁹ 'Good character' evidence is contentious, and some states have legislated against its use in mitigating sentencing for sexual abuses against children in certain circumstances.¹⁸⁴⁰ The

¹⁸³³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 29, 34.

¹⁸³⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 46.

¹⁸³⁵ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [7] (Carew J); *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [55], [117], [131] (Altobelli J); Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J); *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [36], [44], [47] [55]–[57], [67] (Forrest J).

¹⁸³⁶ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [67] (Carew J); *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [60] (Altobelli J).

¹⁸³⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 45.

¹⁸³⁸ Nicole Stevens and Sarah Wendt, 'The "Good" Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing' (2014) 24(2) *Judicial Administration* 95–107, 95;

¹⁸³⁹ Yasmin Cherry et al., *Sexual Offences against Children: An Analysis of Sentencing Purposes and Procedures* (Report, Macquarie University and HAQ Centre for Child Rights, November 2016) 72.

¹⁸⁴⁰ For example, the *Crimes (Sentencing Procedure) Act 1999* (NSW) states, "[i]n determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be

Commissioners also raised the problematic function of depictions of ‘good character’, which can act to conceal child sexual abuse, writing that:¹⁸⁴¹

In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator’s good character and reputation facilitated the offending. In some cases, it *enabled* them to continue to offend despite complaints or allegations being made.

Equally, in some cases studied, erroneous assumptions about the ‘good character’ of parents alleged to have perpetrated child sexual abuse skewed the evaluation of the allegations made against them.

6.8.1 *Belton & Braim*

The dangers of family courts making decisions based on erroneous assumptions about perpetrator behaviour are illustrated in *Belton & Braim*. In this case, allegations of child sexual abuse against Z, a child from the mother’s previous relationship, had been *substantiated* against the father by the then-named Department of Child Safety, Youth and Women.¹⁸⁴² Despite the substantiation, Carew J referred to the father’s past substantiated child sexual abuse as “historic allegations”.¹⁸⁴³ Her Honour relied on “the father having no criminal history and not being prosecuted for any offence arising out of the allegations”¹⁸⁴⁴ to determine the potential for future child abuse,¹⁸⁴⁵ demonstrating a profound disregard for the Royal Commission’s findings about the challenges inherent in prosecuting offenders for sexual crimes against children.¹⁸⁴⁶ As the Commissioners wrote:¹⁸⁴⁷

[C]hild sexual abuse offences are generally committed in private, with no eyewitnesses and no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has retained recorded images of the abuse, or unless the

taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.

¹⁸⁴¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 98 (emphasis added).

¹⁸⁴² *Belton & Braim* (No 2) [2019] FamCA 840 (15 November 2019) [63] (Carew J).

¹⁸⁴³ *Ibid* [7] (Carew J).

¹⁸⁴⁴ *Ibid* [67] (Carew J).

¹⁸⁴⁵ *Ibid* [67] (Carew J).

¹⁸⁴⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 9, 4.

¹⁸⁴⁷ *Ibid* 317.

perpetrator admits the abuse, typically the only direct evidence of the abuse is the evidence the complainant gives about what occurred.

As a result, most cases of child sexual abuse reported to police are not prosecuted, with Australian and international estimates of successful prosecutions and convictions ranging between 8% and 15%.¹⁸⁴⁸ Additionally, the standard of proof in criminal cases—beyond a reasonable doubt¹⁸⁴⁹—is much higher than that required in civil proceedings. It is entirely possible that a case of child sexual abuse could meet the criteria for substantiation by a state child protection body, but not offer enough evidence to satisfy the criminal standard of proof, thereby remaining unprosecuted. However, Carew J deemed the evidence insufficient to prove that the father posed an ongoing risk to his daughter, X.¹⁸⁵⁰ The child was ordered to spend regular, initially supervised, time with her father, with a plan in place for a shift to unsupervised time after nine months.¹⁸⁵¹ Her Honour noted that the supervision was intended “to alleviate any remaining concerns of the mother”.¹⁸⁵²

Another area in which the family courts failed to adhere to the findings and recommendations of the Royal Commission in the identification of perpetrators of child sexual abuse, was in cases involving allegations of grooming.

Grooming is often difficult to identify and define. This is because the behaviours involved are not necessarily explicitly sexual, directly abusive or criminal in themselves. They may only be recognised with hindsight.¹⁸⁵³

¹⁸⁴⁸ Judy Cashmore et al., *The Impact of Delayed Reporting on Prosecution and Outcomes of Child Sexual Abuse Cases* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 34, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 393.

¹⁸⁴⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 11.

¹⁸⁵⁰ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [85] (Carew J).

¹⁸⁵¹ *Ibid* ords 4–5 (Carew J).

¹⁸⁵² *Ibid* [3] (Carew J).

¹⁸⁵³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 40.

In its Final Report, the Commission defined grooming as “actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child’s inhibitions in preparation for sexual activity with the child”.¹⁸⁵⁴ The Commissioners noted that many of the public hearings included testimony about institutional staff who failed to recognise grooming and abuse, leading to serious consequences for the child abused and, often, for future victims.¹⁸⁵⁵

Critically, the literature on child sexual abuse describes offenders both grooming their victims and the adults around them.¹⁸⁵⁶ This is reflected in the Final Report of the Royal Commission, which stated:¹⁸⁵⁷

Perpetrators can use grooming and other tactics to enable and facilitate the sexual abuse of children. They may groom to gain access to a victim, initiate and maintain sexual abuse of that victim, and conceal the sexual abuse from others who may identify it. These types of behaviours and tactics are often complex and incremental. They help to establish an emotional connection and build trust. They can involve a range of subtle, drawn out, calculated, controlling and premeditated behaviours.

6.8.2 *Palmer & Kagan*

A central consideration in *Palmer & Kagan* was whether the father posed a risk of sexual harm to the child X, based on his previous behaviour towards two other girls, as described by X’s mother, Ms Kagan, and adult brother, Mr E. The girls in question were A, the daughter of the mother’s friend, and R, the mother’s niece.¹⁸⁵⁸ Justice Altobelli termed this a question of “the Father’s inappropriate conduct with teenage girls”,¹⁸⁵⁹ repeatedly referring to the girls as

¹⁸⁵⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry* (Final Report, 15 December 2017) vol 1, 19.

¹⁸⁵⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 17.

¹⁸⁵⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 43.

¹⁸⁵⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 12.

¹⁸⁵⁸ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [50]–[51], [113] (Altobelli J).

¹⁸⁵⁹ *Ibid* [76] (Altobelli J).

‘teenagers’, when it is clear from the passages His Honour quoted from the mother’s affidavit that A was just 11 years old at the time of the events described.¹⁸⁶⁰

Allegations of grooming were starkly evident in *Palmer & Kagan*. In Mr E’s trial affidavit, he stated “there was a clear pattern of behaviour by Mr Palmer towards A and R and it is referred to as grooming”.¹⁸⁶¹ Mr E gave numerous examples of witnessing the father’s conduct towards A in his trial affidavit. This included witnessing the father lying with A on the couch, having her sit on his lap, leaving the home with her for hours at a time¹⁸⁶² and giving her gifts.¹⁸⁶³ The mother’s affidavit echoed Mr E’s concerns about the father’s conduct with “an 11 year old girl that lived two doors up”—likely a reference to A—describing the father spending time alone with the girl, lying with her under a blanket on the couch and floor and buying her an expensive gift.¹⁸⁶⁴ The mother also deposed to the father supplying alcohol and marijuana to R and consuming it with her,¹⁸⁶⁵ and Mr E described the father providing R with “pornographic DVDs”.¹⁸⁶⁶ It is important to view the grooming allegations in the context of other, more direct actions alleged, such as the father holding X’s genitals in the shower and referring to X’s vagina as a “pussy”.¹⁸⁶⁷

The substance and credibility of the allegations of grooming behaviours were extensively discussed by Altobelli J throughout the case, yet the Royal Commission’s detailed findings regarding the grooming process were wholly absent from the judgement. The Commissioners stated:¹⁸⁶⁸

Perpetrators may use tactics such as giving children gifts and privileges, which may cause the child to feel responsible for the abuse, or as though they “owe” the perpetrators something. Many survivors described how perpetrators gave them gifts or privileges before, during and after the sexual abuse ... Some perpetrators offer a child alcohol or drugs, while others show the victim pornography or use sexually explicit language with them. Research suggests these tactics are often used to make

¹⁸⁶⁰ Affidavit of Ms Kagan (12 July 2019) [81], cited in *ibid* [114] (Altobelli J).

¹⁸⁶¹ Affidavit of Mr E (12 July 2019) [3], cited in *ibid* [50] (Altobelli J).

¹⁸⁶² Affidavit of Mr E (12 July 2019) [7], cited in *ibid* [56] (Altobelli J).

¹⁸⁶³ Affidavit of Mr E (12 July 2019) [12], [15], cited in *ibid* [58] (Altobelli J).

¹⁸⁶⁴ Affidavit of Ms Kagan (12 July 2019) [30], cited in *ibid* [113] (Altobelli J).

¹⁸⁶⁵ Affidavit of Ms Kagan (12 July 2019) [71], cited in *ibid* [113] (Altobelli J).

¹⁸⁶⁶ Affidavit of Mr E (12 July 2019) [46]–[48], cited in *ibid* [79]–[81] (Altobelli J).

¹⁸⁶⁷ Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J).

¹⁸⁶⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 131–132.

the child feel special or privileged. At the same time, the child knows he or she is engaging in activities that contravene rules, making them complicit in maintaining secrecy around the activities ... this can create an effective barrier to disclosure.

While the Royal Commission was clear in its recognition that grooming is at once a form of child sexual abuse and a gateway to physical forms of sexual harm,¹⁸⁶⁹ Altobelli J dismissed the extensive testimony of both Mr E and the mother on this point. His Honour described the mother's case as "based on rumour, innuendo, and unreliable and inconsistent evidence by Mr E," stating rather scathingly that:¹⁸⁷⁰

The Mother's belief in the veracity of these claims seems to have grown as this litigation approached a Final Hearing. Her confidence in these claims grew in inverse proportion to the cogency of the evidence on which her confidence was based.

Mr E's affidavit referred to an incident in which he "saw Mr Palmeter expose his penis in front of A in fact he was completely naked after intentionally dropping the towel he was wearing when he hung from the landing where the stairs are at home right in front of her".¹⁸⁷¹ Justice Altobelli termed this behaviour in front of the 11-year-old child "skylarking or tomfoolery".¹⁸⁷² His Honour also drew a distinction between the father's alleged behaviour towards A, which he stated occurred prior to six-year-old X's birth, and his conduct towards R, which occurred afterwards.¹⁸⁷³ In doing so, His Honour implied that the father's conduct towards the 11-year-old child was irrelevant in weighing any risks he posed to X, as it had occurred in the past. This approach mirrors Altobelli J's interpretation of the father's violent behaviour and heavy use of alcohol as "historical".¹⁸⁷⁴

¹⁸⁶⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 30.

¹⁸⁷⁰ *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [131] (Altobelli J).

¹⁸⁷¹ Affidavit of Mr E (12 July 2019) [6], cited in *ibid* [52] (Altobelli J).

¹⁸⁷² *Ibid* [55] (Altobelli J).

¹⁸⁷³ *Ibid* [60] (Altobelli J).

¹⁸⁷⁴ *Ibid* [45], [47] (Altobelli J).

Single Joint Expert Dr J adopted a unique approach to the allegations that the father had groomed or sexually abused 11-year-old A and 15-year-old R, stating that this would not pose a significant risk to the subject child, X, as she was only six years old. Dr J noted:¹⁸⁷⁵

[I]nterest in prepubescent children is correctly referred to as paedophilia and paedophiles generally prefer a “type” of victim. According to Ms Kagan’s allegations, Mr Palmeter’s allegedly preferred victims are pubescent (Hebephilia). An interest in X at this age, while not impossible, is less likely.

Dr J’s conclusion appears highly disingenuous as, in the absence of any subsequent rehearing of the matter, any final orders mandating X’s unsupervised contact with the father would continue once X reached the ages of A and R at the time of their alleged abuse. Equally, the Royal Commission’s work identifying types of perpetrators of child sexual abuse made it clear that not all perpetrators ‘prefer a type of victim’. While not addressing the appropriateness of Dr J’s approach, the court was convinced by Dr J’s expert opinion regarding this matter.¹⁸⁷⁶ Justice Altobelli ordered X to live with her father¹⁸⁷⁷ and undergo a moratorium on all contact with her mother for approximately two months.¹⁸⁷⁸

In contrast to the expert’s approach in *Palmeter & Kagan*, the mother drew parallels between her own vulnerable situation when she had met Mr Palmeter and that of his new partner, Ms H, expressing concern for Ms H’s children. The mother stated in an affidavit:¹⁸⁷⁹

... There’s no doubt the applicant has a close relationship with his partner’s 2 daughters and this is a big part of the problem as they are similar in age to R and A. It has been disclosed that he has been grooming them in the exact same way he did with R and A and he also began grooming their mother in the same way as he did me by way of a dating app and connecting with a woman who was sick or had been suffering terrible illness.

The similarities in his behaviour and in the way he chose to connect with us by targeting our vulnerabilities and those of the girls all without a father around is that of a clear predator and is disturbing.

¹⁸⁷⁵ Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *ibid* [125] (Altobelli J).

¹⁸⁷⁶ *Ibid* [131] (Altobelli J).

¹⁸⁷⁷ *Ibid* ords 1, 3 (Altobelli J).

¹⁸⁷⁸ *Ibid* ords 3–4 (Altobelli J).

¹⁸⁷⁹ Affidavit of Ms Kagan (25 March 2019) [97]–[98], cited in *ibid* [116] (Altobelli J).

While the mother’s highlighting of the propensity of perpetrators of child sexual abuse to target vulnerable children and families *is* backed by the findings of the Royal Commission,¹⁸⁸⁰ the existence of the father’s new partner and her two children was termed by Altobelli J as “probably a stabilising influence”,¹⁸⁸¹ and interpreted as evidence against the question of whether the father presented an ongoing risk to X.¹⁸⁸² Instead, Altobelli J interpreted the mother’s words as revelatory of an “escalation” in the mother’s beliefs, stating:¹⁸⁸³

It is disconcerting to observe the obvious escalation in the Mother’s concerns about the Father’s behaviour. Based on the evidence she has given so far on this issue the Father was not only “grooming” R and A, but is grooming his present partners’ [sic] two children, and was a predator.

The findings of the Royal Commission emphasised the heightened vulnerability of children to sexual abuse when they are disadvantaged in other ways. The Commissioners stated that, “[w]hile all children are inherently vulnerable to child sexual abuse, perpetrators may target children whom they perceive to be more vulnerable than others”.¹⁸⁸⁴ In this case, both A and R were described by the mother as vulnerable and suffering significant emotional difficulties.¹⁸⁸⁵ Despite the mother’s and Mr E’s attempts to draw the court’s attention to their concerns about the father’s behaviours—on grounds reflective of evidence-based knowledge on grooming—the judicial officer and court-ordered expert relied on erroneous assumptions and myths in dismissing their allegations.

Erroneous assumptions about perpetrators of child sexual abuse were also evident in *Palmer & Kagan* in the court’s interpretation of the support of the father’s new partner, Ms H, the mother of two girls.¹⁸⁸⁶ The Single Joint Expert in the case, Dr J, concluded that the support of

¹⁸⁸⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 146.

¹⁸⁸¹ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [271] (Altobelli J).

¹⁸⁸² Report of Single Joint Expert, Dr J (24 April 2018) 39, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J).

¹⁸⁸³ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [117] (Altobelli J).

¹⁸⁸⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 146.

¹⁸⁸⁵ Affidavit of Ms Kagan (12 July 2019) [30], [71], cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [113] (Altobelli J).

¹⁸⁸⁶ *Ibid* [3] (Altobelli J).

Ms H and the absence of any disclosure of sexual abuse from the two stepchildren indicated that X was not at risk of sexual abuse from her father.¹⁸⁸⁷ In his Single Joint Expert Report, Dr J stated:¹⁸⁸⁸

[N]either Ms H nor her two daughters expressed any concerns or fears in regards to Mr Palmeter with respect to sexual behaviour. Mr Palmeter and Ms H have been in a relationship for 3 ½ years, during which time Ms H's daughters have traversed the age ranges of both A and R [two girls that the mother, Ms Kagan, alleged had been groomed and possibly sexually abused by Mr Palmeter]. For 3 years of this period, Mr Palmeter has cohabitated with Ms H and her daughters. *It is unlikely that an offender would maintain self-control*, given the deviancy associated with child sexual abusers, for such a period. Further, while the argument might be made that Ms H and her daughters were too fearful to disclose abuse, the author notes that had abuse occurred, the literature would suggest that *changes in the girls [sic] behaviours would have come to the attention of others, in particular their teachers*. The author adds to this that in his experience working with child protection services and as a therapist, *non-verbal behaviours related to non-disclosure* were not evident. This constitutes a second piece of evidence against the allegation.

The statement above challenges evidence-based responses to child sexual abuse. Dr J's assumptions that, had the father sexually abused the children of his new partner, the abuse would have been disclosed, the children would have displayed non-verbal indicators of abuse, and their teachers and others would have noticed these behaviours and then reported them are all sharply contradicted by the findings of the Royal Commission.

The Commissioners made it clear that delayed disclosure of child sexual abuse is common, with some victims never disclosing during their lifetimes.¹⁸⁸⁹ Of the close to 7,000 survivors who attended private sessions of the Royal Commission, the Commissioners stated that “survivors took on average 23.9 years to disclose child sexual abuse”.¹⁸⁹⁰ The Commissioners continued:¹⁸⁹¹

¹⁸⁸⁷ Ibid [253] (Altobelli J).

¹⁸⁸⁸ Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J) (emphasis added).

¹⁸⁸⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 9, 42.

¹⁸⁹⁰ Ibid 16 (emphasis added).

¹⁸⁹¹ Ibid 16–17.

Parents, carers and adults who work with children should not assume that a child would disclose to them if they were sexually abused. Adults need to learn to recognise indicators that may point to child sexual abuse, and to unsafe environments. They also need to understand the different ways in which a child might disclose. Disclosures by children are often partial or unclear as a result of trauma ... As well as understanding how to recognise indicators that may point to child sexual abuse, adults need to create environments in which children feel safe to disclose.

On the subject of teachers and other adults noticing signs of abuse, The Commissioners stated:¹⁸⁹²

Institutions also need to recognise and address barriers to identifying child sexual abuse. Commissioners heard many examples in public hearings of staff in institutions who did not understand how to recognise grooming and abuse, or who did not notice, or overlooked, potential indicators of abuse. Often, this had serious consequences.

Finally, Dr J's professed belief that "[i]t is unlikely that an offender would maintain self-control"¹⁸⁹³ similarly refutes established research in assuming that an offender will abuse any child that they can. Highlighting the "diversity of people who sexually abuse children",¹⁸⁹⁴ the Commissioners defined three broad types of child sex offenders—"fixated, persistent", "opportunistic" and "situational".¹⁸⁹⁵ They delineated the ways in which each core group identifies, grooms and abuses their victims, noted that individual perpetrators may be "representative of more than one type, or may exhibit elements of different typologies at different points in time" and warned against relying on these typologies as a diagnostic tool.¹⁸⁹⁶ The Final Report also identified basic risk factors associated with adult perpetrators, however it stated that these factors "do not predict causality".¹⁸⁹⁷ Although Dr J's report and Altobelli J's judgement were delivered after the conclusion of the Royal Commission, the Commission's

¹⁸⁹² Ibid 17.

¹⁸⁹³ Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J).

¹⁸⁹⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 20.

¹⁸⁹⁵ Ibid 127–129.

¹⁸⁹⁶ Ibid 127.

¹⁸⁹⁷ Ibid 132.

extensive findings and recommendations regarding the identification of perpetrators of child sexual abuse were wholly absent from the judgement.

6.8.3 *Zaida & Badouri*

Zaida & Badouri demonstrates the potential impact of cultural differences on the family courts' identification of perpetrators of child sexual abuse. In this case, the mother deposed that the parents' marriage was characterised by the father's sexualised behaviour towards X¹⁸⁹⁸ and by sexual and economic coercion and control of herself, and that the father's attempts to control her and the child had extended post-separation.¹⁸⁹⁹

Based on the disclosures of sexual and physical abuse by the mother's new partner and his family that X repeatedly made to the father, the police and the Department of Child Safety, Seniors and Disability Services,¹⁹⁰⁰ the father claimed that X was at risk in the care of the mother, although he ultimately did not press the issue.¹⁹⁰¹ The case is particularly notable for the way in which these allegations and the prospect of future risk to the child—from both the father, the mother's new partner and his family—were evaluated through a cultural lens.

Throughout the judgement, Forrest J portrayed the father as a devoutly religious person, with repeated mentions of his Islamic faith.¹⁹⁰² His Honour described the mother as a woman who “had chosen to partner with a non-Muslim and turn away, to a significant degree at least, from the Islamic faith”.¹⁹⁰³ The mother's ex-partner, against whom the child had made repeated disclosures of sexual abuse, featured in the judgement as a “non-Muslim, European Australian man”¹⁹⁰⁴ and “an apparently decent man”.¹⁹⁰⁵ Throughout the judgement, Forrest J seemed at pains not to name the mother's ex-partner, even though Australian family law judgements are routinely de-identified before publication.¹⁹⁰⁶ Instead, His Honour repeatedly—and highly

¹⁸⁹⁸ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [30]–[31] (Forrest J).

¹⁸⁹⁹ *Ibid* [19]–[20], [22], [29] (Forrest J).

¹⁹⁰⁰ *Ibid* [36]–[37] (Forrest J).

¹⁹⁰¹ *Ibid* [44] (Forrest J).

¹⁹⁰² *Ibid* [47] [55]–[57], [67] (Forrest J).

¹⁹⁰³ *Ibid* [56] (Forrest J).

¹⁹⁰⁴ *Ibid* [36] (Forrest J).

¹⁹⁰⁵ *Ibid* [42] (Forrest J).

¹⁹⁰⁶ Lyn Newlands, 'Publishing Family Court Judgments: Problems and Solutions' (2016) 24(2) *Law, Information and Science* 81–89, 82.

unusually—termed the ex-partner merely “the man”.¹⁹⁰⁷ This contrasted with Forrest J’s portrayal of a woman with whom the father was romantically involved, of whom he stated, “the father met a woman through the congregation at the mosque he was attending in Brisbane ... [who] is also a devotee of the Islamic faith”.¹⁹⁰⁸

The mother’s argument that the father posed a risk of emotional harm to X was significantly influenced by cultural factors. As reported by Forrest J, the mother’s counsel argued that “the father’s attitude to the Court and its authority vis his devotion to the Islamic faith” would negatively impact X’s relationship with her mother.¹⁹⁰⁹ On this, His Honour stated:¹⁹¹⁰

I do not consider it necessary to go into all of the evidence about that, save to say that I am satisfied that the father was trying hard to persuade the mother in the lead up to the trial to participate in “faith based” dispute resolution processes in respect of this parenting dispute, comfortable in the expectation that “faith based” dispute resolution processes would favour him as the child’s “guardian”, particularly as the mother had chosen to partner with a non-Muslim and turn away, to a significant degree at least, from the Islamic faith.

In fact, the *Family Law Act* requires parties to attempt dispute resolution prior to commencing child-related proceedings in the family courts.¹⁹¹¹ Many ‘faith based’ dispute resolution services are registered in Australia.¹⁹¹² The use of these predominantly Christian organisations remains largely uncontested by judges of the family courts, and rarely leads to concerns that a party would not accept the courts’ authority. His Honour continued:¹⁹¹³

After some consideration, I did not form the impression that the father would not ultimately respect the authority of this Court or the law of this country. *He assured me that his faith teaches him to respect the authority of the secular government of Australia*, of which this Court is an important part, and that he would respect and abide by whatever this Court’s decision is ...

¹⁹⁰⁷ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [42], [154] (Forrest J).

¹⁹⁰⁸ *Ibid* [47] (Forrest J).

¹⁹⁰⁹ *Ibid* [55] (Forrest J).

¹⁹¹⁰ *Ibid* [56] (Forrest J).

¹⁹¹¹ *Family Law Act* 1975 (Cth) s 60I. This requirement may be waived when there is a risk of family violence or other forms of child abuse.

¹⁹¹² 'Find an Accredited Family Dispute Resolution Practitioner', *Family Dispute Resolution Register* (Web Page, 2024) <<https://fdrr.ag.gov.au/>>

¹⁹¹³ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [57] Forrest J (emphasis added).

In sharp contrast to many cases before the family courts involving allegations of family violence, Forrest J recognised a “distinct power imbalance” between X’s mother and father, based on photographic and video evidence of their sexual activities adduced into evidence by the mother,¹⁹¹⁴ and on the father’s own statements about the mother.¹⁹¹⁵ Making a finding that “the father’s sexual conduct towards the mother was plainly abusive”,¹⁹¹⁶ His Honour drew on section 61DA(2) of the *Family Law Act* to award sole parental responsibility for X to the mother.¹⁹¹⁷

The decision in *Zaida & Badouri* clashes starkly with similar cases analysed herein, in which non-Muslim parties alleged to have perpetrated family violence or child sexual abuse were awarded joint or even sole parental responsibility for children.¹⁹¹⁸ Noting that shared parental responsibility was not in X’s best interests, Forrest J stated:¹⁹¹⁹

I am quite satisfied that the father’s continued devotion to the Islamic faith and its teachings and traditions around male “guardianship” of females, be they children or adult, the mother’s self-declared reduction in her level of commitment to the same faith, and their difficulties with mutually acceptable communication historically since separation will create insurmountable difficulties for this former couple and their child if parental responsibility is shared.

The level of scrutiny afforded to the father was not applied to the mother’s partner—the subject of X’s repeated disclosures of sexual abuse. By the time of the trial, the mother deposed that she was no longer in a relationship with this man, although she indicated they would like to resume their relationship if they could be sure the father would cease making allegations against him and his family.¹⁹²⁰ Ordering that X should continue to live with her mother and spend substantial, unsupervised overnight time with her father,¹⁹²¹ Forrest J determined that X

¹⁹¹⁴ Ibid [29], [31] (Forrest J).

¹⁹¹⁵ Ibid [35] (Forrest J).

¹⁹¹⁶ Ibid [64] (Forrest J).

¹⁹¹⁷ *Family Law Act 1975* (Cth) (comp 17 January 2012) s 61DA(2). The *Family Law Act* at the time stated that the presumption of equal shared parental responsibility enshrined in ss 61B, 61C of the *Act* did not apply in cases of child abuse or family violence. The presumption of equal shared parental responsibility was removed from the *Family Law Act* by the *Family Law Amendment Act (No 87) 2023* (Cth) sch 1, pt 2.

¹⁹¹⁸ See for example *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020); *Welby & Raine* [2020] FamCA 189 (7 April 2020).

¹⁹¹⁹ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [67] (Forrest J).

¹⁹²⁰ Ibid [41]–[43] (Forrest J).

¹⁹²¹ Ibid ords 2–4 (Forrest J).

did not face an unacceptable risk of harm in the mother’s care.¹⁹²² His Honour made no orders restricting the mother’s former partner’s contact with X, despite his assessment that “the prospect of the child coming into contact with, and spending time in the company of, this man, his children and his mother in the future is very high”.¹⁹²³

Further emphasising the cultural basis of the evaluation of X’s best interests, His Honour issued several culturally-specific orders. Among these was a directive restraining the father from having the child wear a hijab or any other religious attire without the mother’s consent.¹⁹²⁴ Notably, His Honour seems to have made these orders independently, without any request from either parent or the Independent Children’s Lawyer. On this point, Forrest J stated:¹⁹²⁵

My Orders will restrain the father from insisting that the child wear *the hijab or similar Islamic religious garb* before she reaches adulthood, such that any decision to do so will be hers, and hers alone but only when she reaches adulthood, unless her parents agree. Otherwise, if such restraint is not in place, I expect the father might insist on her wearing it when she is in his care, after she has reached puberty. The mother has clearly said that she will not do so. Accordingly, I do not consider it will be in the child’s best interests to be subjected to different regimes in respect of the religious clothing she must wear in the different homes she will be living in.

The *Family Law Act* at that time noted that a factor to be considered in determining a child’s best interests is that “children have a right to enjoy their culture”.¹⁹²⁶ However, His Honour did not address the cultural impact on X of preventing the father from having X wear a hijab. This raises obvious questions about how the injunction aligns with the *Act*’s cultural considerations, especially given the father’s devotion to Islam and the mother’s withdrawal from it.

While making detailed orders stipulating the time X would spend with each party on celebratory days including Mother’s Day, Father’s Day and each party’s birthday, and governing the school holiday periods encompassing Christmas and Easter,¹⁹²⁷ His Honour

¹⁹²² Ibid [44] (Forrest J).

¹⁹²³ Ibid [44] (Forrest J).

¹⁹²⁴ Ibid ord 8 (Forrest J).

¹⁹²⁵ Ibid [80] (Forrest J) (emphasis added).

¹⁹²⁶ *Family Law Act 1975* (Cth) (comp 9 December 2017) s 60B(2)(e). The current version of the *Act* now requires general consideration of the “cultural needs of the child”: *Family Law Act 1975* (Cth) (comp 12 June 2024) s 60CC(2)(c).

¹⁹²⁷ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) ords 4(d)–(o), (Forrest J).

declined to make orders requiring X to spend time with her father for any Muslim festival, stating “[t]hat will be a matter for the mother to decide upon if the father asks for such time”.¹⁹²⁸

6.9 Normalising and Excusing Child Sexual Abuse

The impacts of child sexual abuse were described in the Royal Commission’s Final Report as a “cascade of effects over a lifetime”, potentially including addiction, criminal behaviour and suicide¹⁹²⁹ and causing “ripple effects” that impact the victim’s family, community and even future generations.¹⁹³⁰ Given the grave and long-lasting effects of such abuse,¹⁹³¹ evidence-based responses to suspected or confirmed cases of child sexual abuse are of critical importance, yet the cases analysed herein do not reflect an evidence-based approach.

It is notable that in many of these cases, the judges and other family law professionals did note the significant impacts of child sexual abuse, yet this acknowledgement was often subsumed by findings based on legal technicalities and discursive processes which normalised such abuse and minimised the harm it can cause. In several of the cases examined, the importance of maintaining the parental relationship was weighed against the risk of sexual abuse.¹⁹³² In other instances, a perceived risk of ‘psychological harm’ posed by the alleging parent’s belief in a continued threat of sexual abuse was viewed as potentially damaging as the abuse itself.¹⁹³³ In other cases, sexual abuse was normalised or excused, to the extent that children were ordered to spend unsupervised time with a parent, despite the child having made numerous disclosures

¹⁹²⁸ Ibid [77] (Forrest J).

¹⁹²⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 11.

¹⁹³⁰ Ibid 12.

¹⁹³¹ Ibid 23.

¹⁹³² See for example *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [146]–[149], [233], [255], [280]–[281] (Altobelli J); *Yabon & Tabano* [2020] FamCAFC 22 (31 January 2020) [6] (Kent J).

¹⁹³³ See for example *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [148], [290] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [59], [78] (Hannam J).

¹⁹³³ See for example *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [62]–[63], [69]–[70] (Altobelli J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [68]–[71], [86]–[87] (Hannam J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [124], [175], [188] (Cleary J).

of abuse¹⁹³⁴ or even, in two cases, despite *substantiated* sexual abuse of another child by that parent.¹⁹³⁵

6.9.1 *Hammond & Hammond*

The most striking example of normalising child sexual abuse arose in *Hammond & Hammond*, in which the then-named Department of Family and Community Services had substantiated both the sexual harm of the older child, Z, and a significant risk of sexual harm to the younger child, Y, by the father.¹⁹³⁶ In this case, the court-appointed expert, Ms C—a forensic and clinical psychologist—recommended that the children should have “an opportunity to spend supervised time with the father”, even if the court determined that he had sexually abused one or both children.¹⁹³⁷

The Independent Children’s Lawyer, Mr Roberts, proposed that if the father was found to pose an unacceptable risk of sexual harm, the children should remain living with their mother and “spend time with the father in accordance with their wishes”.¹⁹³⁸ Expecting 10- and six-year-old children to evaluate the risks and psychological impact of spending time with a parent who has sexually abused them in the past, clearly contradicts best-practice responses to child sexual abuse. Nevertheless, despite the departmental substantiation, Hannam J concluded that there was insufficient evidence that the father posed an unacceptable risk of sexual harm to his daughters,¹⁹³⁹ and ordered the children to spend unsupervised time with him.¹⁹⁴⁰ Addressing the requirement of the *Family Law Act* when determining a child’s best interests to “protect the child from physical or psychological harm, from being subjected to or exposed to abuse, neglect or family violence”,¹⁹⁴¹ Hannam J neatly discounted any need to protect Z from

¹⁹³⁴ See for example *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [7] [22], [28] (Baumann J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [102], [104], [110]–[111] (Cleary J).

¹⁹³⁵ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [63] (Carew J); *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [155], [158] (Hannam J). The substantiation of child sexual abuse was later called into question in the Magellan Report (29 March 2019), cited in *ibid* [160] (Hannam J).

¹⁹³⁶ *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [155] (Hannam J).

¹⁹³⁷ *Ibid* [37] (Hannam J).

¹⁹³⁸ *Ibid* [5] (Hannam J).

¹⁹³⁹ *Ibid* [365] (Hannam J).

¹⁹⁴⁰ *Ibid* ord 14 (Hannam J).

¹⁹⁴¹ *Family Law Act 1975* (Cth) (comp 27 November 2020) s 60CC(2)(b), cited in *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [352] (Hannam J). The current *Family Law Act* requires courts to consider “what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of: (i) the child; and (ii) each person who has care of the child (whether or not a person has parental responsibility for the child)”: *Family Law Act 1975* (Cth) (comp 12 June 2024) s 60CC(2)(a).

psychological harm arising from mandated contact with her father, given “her belief that the father had sexually abused her in the past”, stating that this was unnecessary as the harm potentially caused “is not harm arising from abuse, neglect or family violence”.¹⁹⁴²

Several other examples from the case studies highlight the role of the family courts in normalising and excusing child sexual abuse. In *Fletcher & Littlemore*, Baumann J accepted the claim that the father had tickled the child, possibly including her genitalia, yet its effect on the child was largely overlooked by His Honour,¹⁹⁴³ who dismissed the father’s behaviour on the grounds that these acts did not give him sexual gratification.¹⁹⁴⁴ Similarly, in *Belton & Braim*, the court dismissed three incidents reported by the mother’s older child, Z, in which she alleged the father had touched her inappropriately on two occasions, and entered the bathroom while she was naked on a third occasion.¹⁹⁴⁵ Although sexual abuse of Z by the father had been substantiated by the then-named Department of Child Safety, Youth and Women in 2015,¹⁹⁴⁶ Carew J termed the incidents “historic *allegations*”,¹⁹⁴⁷ determining that the subject child, X, was not at an unacceptable risk of harm in the father’s care.¹⁹⁴⁸

6.10 Assigning Responsibility for Child Sexual Abuse

The Royal Commission made it clear that responsibility for child sexual abuse rests first with the perpetrator, and second with the institution that enables the abuse to occur and continue.¹⁹⁴⁹ In contrast, some of the cases studied evinced judicial officers of the family courts casting responsibility for child sexual abuse—and for the prevention of future abuse—onto the alleging parents and even the child victims themselves. In the cases analysed, the failure of the family courts to protect children from sexual abuse—and, in many cases, the courts’ use of orders restricting adults’ ability to even *report* further concerns—as discussed later in this chapter—placed the onus on children to protect themselves. This expectation is starkly unrealistic given

¹⁹⁴² *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [365] (Hannam J) (emphasis added).

¹⁹⁴³ *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [32(c)] (Baumann J).

¹⁹⁴⁴ *Ibid* [32(d)] (Baumann J).

¹⁹⁴⁵ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [32] (Carew J).

¹⁹⁴⁶ *Ibid* [63] (Carew J).

¹⁹⁴⁷ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [7(1)] (Carew J) (emphasis added).

¹⁹⁴⁸ *Ibid* [130] (Carew J).

¹⁹⁴⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 204.

the lengthy delays common with disclosure of child sexual abuse and children's comparatively limited power and resources.¹⁹⁵⁰ As stated by the Royal Commissioners:

Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of adults.¹⁹⁵¹

6.10.1 *Palmer & Kagan*

In *Palmer & Kagan*, Mr E described the father smoking marijuana alone with both R and Mr E at different times,¹⁹⁵² and detailed another occasion when R and Mr E were both 15 years old, in which the father pressured them to drink large amounts of alcohol with him.¹⁹⁵³ Mr E deposed that the next morning R “said she woke up on the lounge with Mr Palmer but didn’t remember much”.¹⁹⁵⁴ Justice Altobelli responded to Mr E’s statement about this incident by simultaneously casting doubt that it had occurred and implying that R, who was below the age of consent, was complicit in any sexual activity that had occurred. Of Mr E’s account of events, His Honour noted, “[t]he reference is presumably to what R told him, and it is more likely than not that the inference sought to be drawn was that *something inappropriate* took place *between R and the Father*”.¹⁹⁵⁵

In his affidavit, Mr E detailed being informed by a community member that the father was “having sex with an underage Indigenous girl”, stating that he believed the girl referred to was R.¹⁹⁵⁶ Justice Altobelli dismissed this when weighing the risks the father posed to X, suggesting

¹⁹⁵⁰ The average time taken to disclose childhood sexual abuse by the 6,875 survivors who personally engaged with the Royal Commission was 23.9 years: *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 16. The Commissioners also cited research stating that up to two-thirds of survivors did not disclose their experience of child sexual abuse *at all* during their childhood: K London et al., ‘Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?’ (2005) 11(1) *Psychology, Public Policy and Law* 194–226, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 33.

¹⁹⁵¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 133.

¹⁹⁵² Affidavit of Mr E (12 July 2019) [25]–[26], cited in *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [64] (Altobelli J).

¹⁹⁵³ Affidavit of Mr E (12 July 2019) [18]–[23], [33], cited in *ibid* [61], [66] (Altobelli J).

¹⁹⁵⁴ Affidavit of Mr E (12 July 2019) [24], cited in *ibid* [62] (Altobelli J).

¹⁹⁵⁵ *Ibid* [63] (Altobelli J) (emphasis added).

¹⁹⁵⁶ Affidavit of Mr E (12 July 2019) [49]–[50], cited in *ibid* [82] (Altobelli J).

that Mr E was jumping to conclusions in assuming the child was R,¹⁹⁵⁷ and stating that “the weight that can be given to his evidence is dubious”.¹⁹⁵⁸ His Honour’s Reasons for Judgement made no reference to consideration of whether the prospect of the father “having sex with” any other child was relevant to X’s safety in his care.

The most serious incident that Mr E deposed to, concerned a night of heavy drinking involving the father and R when she and Mr E were 15 or 16 years of age. This, Altobelli J described as “the zenith of the Mother’s case about the risk of harm that the Father presents to X”.¹⁹⁵⁹ In an affidavit, Mr E described R consuming a large amount of alcohol with the father, being showered and put to bed by Mr E and his mother, and being discovered in the morning in a state of undress.¹⁹⁶⁰ His Honour again subscribed complicity to teenage R in what Mr E alleged was a sexual assault, stating of Mr E’s evidence that “the inference, or perhaps more correctly innuendo, sought to be drawn was that *the Father and R had engaged in some sort of sexual activity* that night”.¹⁹⁶¹ Justice Altobelli then considered Mr E’s actions on the night in question, stating:¹⁹⁶²

Mr E appears to have been present for a major part of the events he deposes to, though this would include, by logical implication from his own evidence, the undressing of R, her showering, and subsequent dressing. And yet, this seems to the Court to be both inappropriate, and improbable ...

Mr E deposes; “Together we managed to get her into the shower” ...

At one point he was obviously alone in the bathroom with R, before the Mother returned and ... “took over in the bathroom and R was dried off, dressed and helped back into Mum’s bed”.

Although Altobelli J in the preceding passage stated that Mr E’s self-described behaviour was “inappropriate, and improbable”,¹⁹⁶³ His Honour continued, “I want to make it very clear that I am in no way suggesting that Mr E behaved inappropriately, but I am casting doubts on the

¹⁹⁵⁷ Ibid [82]–[100] (Altobelli J).

¹⁹⁵⁸ Ibid [85] (Altobelli J).

¹⁹⁵⁹ Ibid [76] (Altobelli J).

¹⁹⁶⁰ Affidavit of Mr E (12 July 2019) [33]–[39], cited in *ibid* [66]–[76] (Altobelli J).

¹⁹⁶¹ Ibid [76] (Altobelli J).

¹⁹⁶² Ibid [68]–[72] (Altobelli J).

¹⁹⁶³ Ibid [68] (Altobelli J).

plausibility of his recollection of these events”.¹⁹⁶⁴ Mr E’s trial affidavit stated that, on the night in question, he and the mother remained with R until she fell asleep in the mother’s bed. Upon leaving the room, Mr E encountered the father standing outside his mother’s room, who stated that he was going to sleep in his van.¹⁹⁶⁵ Mr E stated:¹⁹⁶⁶

The next morning, on my way back from the bathroom I saw Mum’s door open. I saw R first with Mr Palmeter close behind her. Shocked, I said, “I thought you were sleeping in the van?” Neither of them said anything and R looked instantly embarrassed, her face went red and she put her head down. There was an awkward silence and they both went downstairs saying nothing further to me.

Mr E stated that despite his mother having dressed R in her “bike tights” before putting her to bed, in the morning she was wearing a singlet and her underwear, while the father wore only underwear without a shirt.¹⁹⁶⁷ His Honour dismissed the allegation that the father had, at the very least, behaved inappropriately towards R, while simultaneously casting blame on teenage Mr E for taking no action to protect R from the father on the night in question, stating, “despite Mr E’s obvious concern arising from his belief that the Father was in the same bedroom as R, he did nothing”.¹⁹⁶⁸ In light of the absence of affidavit evidence from R or her family members, Altobelli J dismissed the entirety of Mr E’s and the mother’s eyewitness evidence about the father’s conduct towards R, stating “[t]he weight to be given to this evidence is minimal”.¹⁹⁶⁹

6.10.2 *Hammond & Hammond*

In *Hammond & Hammond*, Hannam J drew on the child, Z’s, numerous disclosures of sexual abuse,¹⁹⁷⁰ and the subsequent departmental substantiation of both the sexual harm of Z and a significant risk of sexual harm to her sister, Y, by their father,¹⁹⁷¹ as *factors militating against*

¹⁹⁶⁴ Ibid [71] (Altobelli J).

¹⁹⁶⁵ Ibid [72] (Altobelli J).

¹⁹⁶⁶ Affidavit of Mr E (12 July 2019) [38], cited in ibid [73] (Altobelli J).

¹⁹⁶⁷ Affidavit of Mr E (12 July 2019) [39], cited in ibid [75] (Altobelli J).

¹⁹⁶⁸ Ibid [97] (Altobelli J).

¹⁹⁶⁹ Ibid [78] (Altobelli J).

¹⁹⁷⁰ Z disclosed sexual abuse by her father to a psychotherapist, a psychologist, the police and the then-named Department of Family and Community Services: *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [3], [100], [119]–[131], [153], [161]–[164] (Hannam J).

¹⁹⁷¹ Ibid [155] (Hannam J).

the risk of future sexual abuse of the 10-year-old child and her six-year-old sister. Her Honour stated.¹⁹⁷²

[T]here is evidence to the effect that the older child herself has been provided with extensive therapy to assist her in relation to her experience and has received education concerning protective behaviours. Although it is of course not incumbent upon a child of such a young age to effectively protect herself against the prospect of sexual abuse there is some weight that must be given to the child's observation that she feels safer as the father "knows that [I] know". In other words the child is asserting that the father knows that she is aware that the conduct (that she believes he engaged in) is abusive.

Clearly, this understanding of prevention subverts the evidence-based recommendations of the Royal Commission. As noted in the Final Report:¹⁹⁷³

It is not sufficient to educate children to recognise behaviours that constitute sexual abuse, and instruct them to tell someone if they are abused. Instead, adults need to be attuned to signs of harm in children and equipped to identify signs of possible sexual abuse ... institutions need to create environments and structures in which children feel safe to disclose.

The Commissioners also noted that a negative response to a victim's initial disclosure of sexual abuse—such as not being believed or protected—significantly reduces the likelihood that the child will relay their experiences to others:¹⁹⁷⁴

A negative response to disclosure can affect a victim's willingness to disclose again, exacerbate the impacts of the abuse, and allow it to continue. Failing to act on a disclosure may also put other children at risk of abuse.

¹⁹⁷² Ibid [341] (Hannam J).

¹⁹⁷³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 154.

¹⁹⁷⁴ Ibid 17.

6.10.3 *Belton & Braim*

Again, in *Belton & Braim*, Carew J cast some of the responsibility of protecting eight-year-old X from sexual abuse onto the child herself, quoting an assertion by the Family Consultant, Ms J, that:¹⁹⁷⁵

[T]he father is aware of Z’s allegations and [the mother’s] vigilance in relation to [X’s] safety ... this must be considered a protective factor. Further, X has also been made aware of the importance of protective behaviours and has [the mother] and other supports, such as her school teacher, to talk to should she have any concerns.

In X’s case, this is a particularly disingenuous assertion given that the mother’s oldest daughter from a previous relationship, Z, had already made numerous disclosures of sexual abuse by the father, which had been substantiated by the then-named Department of Child Safety, Youth and Women¹⁹⁷⁶ before being dismissed by the family courts.¹⁹⁷⁷ In rejecting this substantiated abuse, Carew J noted that Z had incorrectly stated the date of an incident of sexual abuse by the father, a mistake which Her Honour believed, “go[es] to the weight of the evidence and, in turn, the magnitude of the risk to X if she spends unsupervised time with her father”.¹⁹⁷⁸ With these ‘safeguards’ in place, X was ordered to spend supervised time with her father, progressing to significant unsupervised time after nine months.¹⁹⁷⁹

6.11 Punitive Responses to Reports of Child Sexual Abuse

[T]hey were silenced or disbelieved when they disclosed the sexual abuse, exacerbating their feelings of helplessness, anger and shame. Many who tried to disclose the abuse when they were children were told that they were liars, and some were punished as a result.¹⁹⁸⁰

¹⁹⁷⁵ Report of Family Consultant, Ms J (2019), cited in *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [84] (Carew J).

¹⁹⁷⁶ Ibid [63] (Carew J).

¹⁹⁷⁷ Ibid [78], [85] (Carew J).

¹⁹⁷⁸ Ibid [77]–[78] (Carew J).

¹⁹⁷⁹ Ibid ord 4 (Carew J).

¹⁹⁸⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 174.

Perhaps the most concerning aspect of the family courts' approach to suspected and identified child sexual abuse in the cases analysed, was the use of punitive measures and threats in response to reports of such abuse occurring. The refusal to believe victims in many cases heard by the Royal Commission, and even the punitive measures taken in response to survivors' disclosures,¹⁹⁸¹ were reflected in many of the post-Commission family law cases studied herein. In some cases, measures adopted by the family courts appeared intended to prevent future disclosures and reporting of sexual abuse.¹⁹⁸² In others, children who continued to disclose sexual abuse were even portrayed as presenting a risk to their siblings.¹⁹⁸³

In several of the cases analysed, judicial officers and court-appointed experts employed threats to ensure parents' and children's compliance with court orders for contact between children and alleged perpetrators of abuse. Parents expressing safety concerns for a child who had disclosed sexual abuse were construed as vindictive or mentally ill. In some of these cases, the courts responded to parents' allegations with explicit threats that continued allegations of child sexual abuse could result in a change of residence for the child.

The cases analysed reflect the findings of other academic research into the family courts' responses to allegations of child sexual abuse. Webb et al.'s study of contested cases of child sexual abuse heard by the Family Court of Australia from 2012 to 2019,¹⁹⁸⁴ found that judges issued restraining orders or warnings against alleging parents in one-quarter of all fully contested cases.¹⁹⁸⁵ Prohibitions on taking children to sexual abuse counselling were the most prevalent restraints used, and some injunctions allowed such counselling only with the written permission of the alleged perpetrator.¹⁹⁸⁶ Also common were prohibitions on making further

¹⁹⁸¹ Ibid 174, 189.

¹⁹⁸² *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) ords 10, 22–23 (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) ords 1–2, [59], [135] (Hannam J); *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [299]–[300] (Rees J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) ord 21(a) (Carew J); *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [34] (Forrest J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [28] (Forrest J).

¹⁹⁸³ *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [34] (Forrest J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [32], [128] (Forrest J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [39] (Cleary J); Magellan Report (25 May 2019) [243]–[244], cited in *ibid* [33] (Cleary J).

¹⁹⁸⁴ The authors examined 521 judgements published from 2012–2019: Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 1.

¹⁹⁸⁵ N=93 (25%); *ibid* 12 (table 8).

¹⁹⁸⁶ *Ibid* 14.

allegations of child sexual abuse to anyone but an independent children’s lawyer or the Family Court itself.¹⁹⁸⁷ Such orders were sometimes accompanied by the threat that further allegations of child sexual abuse would result in the child being ordered to live with the alleged perpetrator.¹⁹⁸⁸

6.11.1 *Ainsley & Ainsley*

In the 2019 judgement of *Ainsley & Ainsley*, Altobelli J not only quoted extensively from the recommendations of the Single Joint Expert, Dr J, His Honour also accepted those recommendations.¹⁹⁸⁹ Discussing the mother, the expert stated:¹⁹⁹⁰

Under calmer conditions of reduced (perceived) threat she may be better able to manage her anxiety and respond adaptively to certain inescapable, unwelcome realities which she must now face. If she proves too emotionally disturbed to make a positive re-adjustment to her changed life circumstances, she may persevere unhelpfully with unfounded opposition to Orders for contact which the Court deems to be safe. In my experience both outcomes are possible. Only time can tell. For example, I have known cases where mothers persisted in raising implausible CSA [or child sexual abuse] allegations in the teeth of the evidence and were never able to rationally evaluate the father’s positive contribution and/or his risk potential. In such cases children must be removed lest they be recruited to a worldview based on delusional beliefs. In other cases, reason has prevailed after some arrangement is reached which addresses everyone’s main concerns sufficiently to reduce fear and resentment to tolerable levels.

The passage above is striking for neatly delivering a threat that if the mother persists in “unfounded opposition to Orders for contact”, the family will fall into the basket of cases in which “children must be removed lest they be recruited to a worldview based on delusional beliefs”.¹⁹⁹¹ The expert continued:¹⁹⁹²

If Ms Ainsley shows herself resolutely unwilling to honour all the children’s family ties between now and Final Hearing, then the Court may need re-consider the children’s principal residence. This would be necessary, for example, if Interim Orders were made to safely progress the father’s time with the children, but Ms

¹⁹⁸⁷ Ibid 14.

¹⁹⁸⁸ Ibid 14.

¹⁹⁸⁹ *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [63] (Altobelli J).

¹⁹⁹⁰ Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *ibid* [46] (Altobelli J).

¹⁹⁹¹ Report of Single Joint Expert, Dr J (2 October 2019) [82], cited in *ibid* [46] (Altobelli J).

¹⁹⁹² Report of Single Joint Expert, Dr J (2 October 2019) [85], cited in *ibid* [46] (Altobelli J) (emphasis added).

Ainsley obstructed the smooth implementation of those Orders in the absence of any objectively-verified basis for child safety concerns. The Court should also consider that if, under safe conditions of contact, X were to continue to raise allegations of CSA [or child sexual abuse] which were not only unsubstantiated but also inherently implausible, this could imply a deliberate campaign of alienation by the mother, perhaps based on her delusional beliefs about the father's dangerousness which the child had come to share. Such problems can develop in cases in which a child is over-aligned with a mother who projects her own childhood abuse onto her child's situation. Unfortunately, childhood sexual abuse in the context of early attachment relationships can cause serious, lasting emotional disturbance.

Ironically, in this passage, the expert acknowledged some of the long-term and significant impacts of child sexual abuse, yet these impacts were considered only in light of the *mother's capacity* to parent the children.¹⁹⁹³ No consideration was made of the potential impacts of child sexual abuse on the subject children, X and Y, or of the effects of court-ordered contact between the children and their father despite X's repeated disclosures of sexual abuse.

6.11.2 Zaida & Badouri

In *Zaida & Badouri*, Forrest J devoted consideration to the mother's allegation that the father would not accept the court's orders due to his Muslim faith.¹⁹⁹⁴ Expressing sceptical acceptance that the father would heed the court's authority,¹⁹⁹⁵ His Honour issued a threat about the consequences for the child, should her father not comply with his orders:¹⁹⁹⁶

Of course, whilst the Court is comforted by this assurance, the reality is that the Court's orders are enforceable and compliance with them is enforceable by way of properly invoked due process. If the father was not true to his assurance, not only would the wellbeing of the parties' little girl be negatively impacted but *the orders made by the Court could again come under very close scrutiny to see whether or not the child's wellbeing required them to be re-considered.*

¹⁹⁹³ Report of Single Joint Expert, Dr J (2 October 2019) [53], [85], cited in *ibid* [46] (Altobelli J).

¹⁹⁹⁴ *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [55] (Forrest J).

¹⁹⁹⁵ *Ibid* [57] Forrest J.

¹⁹⁹⁶ *Ibid* [57] (Forrest J) (emphasis added).

6.11.3 *Tabano & Yabon*

In the 2019 judgement of *Tabano & Yabon*, Forrest J temporarily set aside an existing order that prevented any communication between X and her father, urging the father to encourage X to voluntarily return to her mother's care "before police are authorised to go and collect her and return her".¹⁹⁹⁷ His Honour indicated that the outcome of the final hearing would partly depend on the father's willingness to cooperate in this respect, stating:¹⁹⁹⁸

I will give him the opportunity to communicate with his daughter by telephone and to encourage her to return to her mother's care before 5.00 pm today. If she is not back at her mother's home by then, the police will be authorised to find her and take her back to her mother's home. It is hoped and expected that the father is able to convince her that is the best course for her to take, particularly in the light of the fact that *I have determined to list the final hearing as soon as I possibly can. As I informed him during the hearing, success or failure in this respect will be significantly demonstrative of his parenting capacities in respect of this thirteen year old girl.*

This passage clearly demonstrates Foucault's description of both the coercive power of law¹⁹⁹⁹ and of the limited "network of contingencies" available to parties within a discourse,²⁰⁰⁰ as both the alleging parent's attempts to protect his child and the judge's response to the father and child's ongoing allegations of child sexual abuse, were prescribed by the discourse of family law.

6.12 Retraction of Allegations

In some of the cases examined, implicit or explicit threats that children could be ordered to live with alleged perpetrators of child sexual abuse led alleging parents to cease requesting protective orders, or to retract their allegations of child sexual abuse entirely.

¹⁹⁹⁷ *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [23].

¹⁹⁹⁸ *Ibid* [21] (Forrest J) (emphasis added).

¹⁹⁹⁹ Douglas Eliot Litowitz, 'Postmodern Philosophy and Legal Thought' (PhD Thesis, Loyola University, 1997), 129.

²⁰⁰⁰ Michel Foucault and Lawrence D Kritzman, *Politics, Philosophy, Culture: Interviews and Other Writings 1977–1984* (Routledge, 1988) 37.

6.12.1 *Bentleigh & Bentleigh*

In *Bentleigh & Bentleigh*, the mother withdrew her allegations of sexual abuse during the 2017 hearing, stating:²⁰⁰¹

I have carefully considered the report [of Dr [G]], the report of Dr [H], my affidavit evidence and the affidavit evidence of the father and have come to the conclusion that the children are not at risk whilst in the father's care and that is the reason why I have amended my response.

The mother's retraction reflects an internationally documented trend, in which alleging litigants withdraw or cease making allegations of harm. Canadian scholars Nonomura et al. note the ways in which allegations of 'parental alienation' may intimidate applicants for restraining orders, "especially if they already fear not being believed".²⁰⁰² This phenomenon has also been documented in Australian family law cases. Douglas highlights the ways in which legal systems present opportunities to "exercise coercive control over a former intimate partner",²⁰⁰³ while Laing has documented parents downplaying—or simply not reporting—family violence due to a "climate of disbelief" in the family law system.²⁰⁰⁴ Kaspiew et al.'s evaluation of cases occurring after the 2012 'family violence amendments' to the *Family Law Act* echoes these concerns, stating "substantial minorities" of parties reported failing to disclose physical or emotional abuse to the family courts.²⁰⁰⁵ Rathus notes the impact of 'alienation' theories on parents who hold concerns for their children due to family violence or child sexual abuse,

²⁰⁰¹ Affidavit of Ms Bentleigh (27 January 2018), cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [18] (Hannam J).

²⁰⁰² Robert Nonomura et al., *When the Family Court Becomes the Continuation of Family Violence after Separation: Understanding Litigation Abuse* (Family Violence & Family Law Brief No 15, Alliance of Canadian Research Centres on Gender-Based Violence, July 2022) 7.

²⁰⁰³ Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84–99, 84.

²⁰⁰⁴ Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 93.

²⁰⁰⁵ Rae Kaspiew et al., *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015) 174.

noting the silencing power of the fear of being perceived as unwilling to support the other party's parental relationship, and thus losing residence of their children.²⁰⁰⁶

After the 2017 hearing in *Bentleigh & Bentleigh*, the subject children continued to disclose sexual abuse, and the mother reported these new disclosures to health professionals and the then-named New South Wales Department of Family and Community Services.²⁰⁰⁷ During the 2018 hearing, Hannam J considered these continued reports of abuse, stating that the 2017 orders enabling the children to continue living with their mother “were predicated on the mother’s acceptance of the expert evidence that the father had not sexually abused the children”.²⁰⁰⁸ Her Honour emphasised that “[t]his acceptance was central to the findings and orders of the trial judge”.²⁰⁰⁹ Accordingly, in the 2018 hearing, the mother sought only orders that maintained the children’s primary residence with her and continued their substantial unsupervised time with their father.²⁰¹⁰ However, the mother’s change of position failed to convince the court. Justice Hannam stated:²⁰¹¹

The concern that *the children may be psychologically abused by the mother’s behaviour in responding to and encouraging disclosures* from the children that the father has sexually abused them was clearly contemplated in the May 2017 Judgement. I accept that the mother’s concerning behaviour has continued after the May 2017 Judgement was delivered and that this behaviour indicates that she does not accept, as she previously stated she did, that the father has not sexually abused the children.

The Independent Children’s Lawyer echoed this sentiment, supporting the father’s application for residence of the children, a moratorium on time with their mother and supervised contact with her thereafter.²⁰¹² As summarised by Hannam J, the Independent Children’s Lawyer’s position was that “despite what the mother says she clearly does believe that the children have been sexually abused by the father”.²⁰¹³ As a result, Hannam J’s 2018 judgement concentrated

²⁰⁰⁶ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 8.

²⁰⁰⁷ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [20]–[25] (Hannam J).

²⁰⁰⁸ *Ibid* [51] (Hannam J).

²⁰⁰⁹ *Ibid* [59] (Hannam J).

²⁰¹⁰ *Ibid* [89] (Hannam J).

²⁰¹¹ *Ibid* [84] (Hannam J).

²⁰¹² *Ibid* [39], [41] (Hannam J).

²⁰¹³ *Ibid* [71] (Hannam J).

on weighing the ‘risk’ that the children would continue to make disclosures of sexual abuse by their father if they were permitted to remain in their mother’s care.²⁰¹⁴

Ultimately, the orders for residence of the children were unchanged from those made in 2017.²⁰¹⁵ The children were permitted to continue living with their mother,²⁰¹⁶ while continuing unsupervised contact with their father.²⁰¹⁷ Justice Hannam heavily restricted the children’s access to counselling,²⁰¹⁸ and thus their ability to disclose sexual abuse to anyone besides their mother.

6.12.2 *Welby & Raine*

In *Welby & Raine*, the mother initially sought sole parental responsibility and the primary residence of the children, X and Y, requesting that they have no communication with their father.²⁰¹⁹ As is common, she revised her stance over the course of the trial, eventually proposing that the younger child, X, spend unsupervised time with the father.²⁰²⁰ Nevertheless, Cleary J determined that the mother would cause psychological harm to X by failing to promote a meaningful relationship between the child and his father.²⁰²¹ X was ordered to immediately begin living with his father, who was granted sole parental responsibility for him.²⁰²² Her Honour ordered that X have no contact with his mother for six months, followed by two hours per month in a supervised contact centre for a further six months.²⁰²³ Any time between the mother and X after this time was left to the father’s discretion.²⁰²⁴

²⁰¹⁴ Ibid [86], [88], [121] (Hannam J).

²⁰¹⁵ Ibid ord 4 (Hannam J).

²⁰¹⁶ Ibid [149] (Hannam J).

²⁰¹⁷ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) ords 3, 5–8 (Rees J), cited in *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [52] (Hannam J).

²⁰¹⁸ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) ord 1 (Hannam J).

²⁰¹⁹ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [27] (Cleary J).

²⁰²⁰ Ibid [29] (Cleary J).

²⁰²¹ Ibid [175], [188] (Cleary J).

²⁰²² Ibid ords 2–3 (Cleary J).

²⁰²³ Ibid ords 7–8 (Cleary J).

²⁰²⁴ Ibid ord 10 (Cleary J).

6.12.3 *Martin & Payne*

In *Martin & Payne*, the mother initially alleged a long history of coercive, controlling, physically intimidating, verbally and financially abusive behaviour perpetrated by the father against her and the children during the parents' relationship,²⁰²⁵ as well as sexualised behaviours by the children, physical signs of sexual abuse and the children's disclosures of physical and sexual abuse emerging after separation, which were witnessed by the mother, her friends, the maternal grandmother and the director of their childcare centre.²⁰²⁶ In the final judgement, Tree J determined that the mother's allegations made to the police and state child protection body contained "malice", were "strategic and disingenuous"²⁰²⁷ and constituted "abuse and family violence",²⁰²⁸ however the children were permitted to remain living with their mother, who not only ceased pressing her allegations but apologised to the court. As Tree J stated:²⁰²⁹

Under cross examination, the mother *apologised for being so sensitive* and for not looking at things as part of a bigger picture. She accepted she quite possibly has misinterpreted the children's behaviour in relation to alleged sexual abuse.

In evaluating the "future risk" that the mother would not support the children's relationship with the father, Tree J listed the following points:²⁰³⁰

The mother has now not generated any new allegations since about mid 2014 ...

The evidence from the mother's psychologist, Mr G, indicated the mother is making efforts to change how she thinks about the father's actions, and that she is moving ahead.

Under cross examination, and in the mother's trial affidavit, the mother was apologetic towards the father, and sought a fresh start in parenting the children.

The mother has complied with orders, and has facilitated a relationship between the children and the father, since 2015.

²⁰²⁵ *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [99]–[106] (Tree J).

²⁰²⁶ *Ibid* [21], [80] (Tree J).

²⁰²⁷ *Ibid* [90] (Tree J).

²⁰²⁸ *Ibid* [92] (Tree J).

²⁰²⁹ *Ibid* [79] (Tree J) (emphasis added).

²⁰³⁰ *Ibid* [95] (Tree J).

Accordingly, the children were ordered to remain living with their mother,²⁰³¹ while spending substantial unsupervised time with their father.²⁰³²

6.13 Preventing Further Disclosures and Reporting

An overwhelming aim of the Royal Commission was to foster institutional cultures that identify child sexual abuse and prevent further abuse occurring²⁰³³ by *encouraging* disclosure and believing children who disclose.²⁰³⁴ However, the family law cases analysed revealed attempts to *inhibit* further disclosure and reporting of child sexual abuse. While evidence-based research demonstrates that child sexual abuse is common²⁰³⁵ and false allegations of such abuse are rare,²⁰³⁶ many judgements demonstrated hostile disbelief on the part of family law professionals when alleging parents reported children's disclosures to the courts and other authorities. In some cases, judicial officers explicitly made orders that were intended to prevent further disclosures of abuse by the subject child, or dissuade the alleging parent from making further reports.²⁰³⁷

²⁰³¹ Ibid ord 4 (Tree J).

²⁰³² Ibid ord 5 (Tree J).

²⁰³³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 9.

²⁰³⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 14.

²⁰³⁵ The Australian Child Maltreatment Study found the prevalence of child sexual abuse reported by adult survivors was 28.5%: Ben Mathews et al., 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(6) *Medical Journal of Australia* S13–S18, S13.

²⁰³⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

²⁰³⁷ See for example Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [86], [88], [121] (Hannam J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [95] (Tree J).

The Final Report of the Royal Commission specified some conditions that empower sexually abused children to disclose their abuse. These factors include, the availability of trustworthy adults, access to information and programs designed to prevent child sexual abuse, and the presence of opportunities to raise and discuss their concerns.²⁰³⁸ The cases in the following section demonstrate the removal of these factors by the family courts.

A common theme in the cases analysed was judicial officers and court-appointed experts expressing concern over alleging parents and therapists discussing children's disclosures of sexual abuse with them, and this was frequently perceived as indicative of 'coaching' or 'psychological abuse'.²⁰³⁹ The Royal Commission made it clear that questioning children about their wellbeing and providing them with opportunities to raise concerns is critical in aiding children to disclose when they are being abused.²⁰⁴⁰ However, in some cases analysed, children's disclosures led to court orders restricting their contact with the adults to whom they had disclosed. In other cases, court orders prevented children from continuing to be treated by mental health professionals who had reported the children's disclosures of sexual abuse, replacing these professionals with named counsellors approved by the court. Other children were only permitted to attend counselling with the alleged perpetrator's consent. In some cases, judicial officers took steps to inform professionals who may become involved in a child's life in the future, that past allegations of child sexual abuse had been dismissed by the family courts. Effectively, this discredited any future allegations before they were made.

6.13.1 *Welby & Raine*

In *Welby & Raine*, the father, Mr Raine, was the subject of allegations that he had sexually abused the mother's daughter from a previous relationship, Ms P, had sexually abused the 14-year-old subject child, Y, and had verbally and physically abused the 10-year-old subject child, X, and some or all of the children of his first wife, Ms C.²⁰⁴¹ Ms C, Ms P and Ms C's older

²⁰³⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 157.

²⁰³⁹ See for example *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [251], [289] (Hannam J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [124], [149] (Cleary J).

²⁰⁴⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 161.

²⁰⁴¹ *Welby & Raine* [2020] FamCA 189 (7 April 2020) [58]–[63] (Cleary J).

children all supported the mother, Ms Welby, in her allegations,²⁰⁴² and an Apprehended Domestic Violence Order was made after separation to protect Ms Welby, X and Y from Mr Raine.²⁰⁴³

The strength of X and Y's relationships with their mother featured throughout the judgement, both as evidence of psychological abuse,²⁰⁴⁴ and as an explanation for the children's expressions of fear of the father.²⁰⁴⁵ Despite stating that "X has his closest, most dependent, relationship with his mother and a loving protective relationship with his sister, Y [and] X and Y express anxious fears about the father",²⁰⁴⁶ Cleary J determined that the mother was unlikely to promote a meaningful relationship between X, his father and extended paternal family.²⁰⁴⁷

The Magellan Report stated:²⁰⁴⁸

Y has been successfully completely aligned with her mother meaning that it would be near impossible to manage compliance with any orders for her to live with her father.

X presents as being on the way to being aligned with his mother but is not yet completely aligned with her.

X had lived his entire life with his mother, and the parents lived 500 kilometres apart,²⁰⁴⁹ yet Cleary J determined:²⁰⁵⁰

I have concluded that despite having always lived with his mother, the distance involved, the change of school, separation from his mother and sister, and the child's own stated views, X should move to live with his father.

²⁰⁴² Ibid [69] (Cleary J).

²⁰⁴³ Ibid [64] (Cleary J).

²⁰⁴⁴ Magellan Report (25 May 2019) [243]–[244], cited in ibid [33] (Cleary J);

²⁰⁴⁵ Magellan Report (26 February) 8, 10, cited in ibid [105], [189] (Cleary J); ibid [195]–[202] (Cleary J).

²⁰⁴⁶ Ibid [203]–[204] (Cleary J).

²⁰⁴⁷ Ibid [174]–[175] (Cleary J).

²⁰⁴⁸ Magellan Report (25 May 2019) [243]–[244], cited in ibid [33] (Cleary J).

²⁰⁴⁹ Ibid [219] (Cleary J).

²⁰⁵⁰ Ibid [36] (Cleary J).

Her Honour continued:²⁰⁵¹

In effect the orders provide for a period of *respite* (six months) for the child to deal with the internal conflict he must feel resulting from the parental conflict he has been exposed to for so long. Thereafter a period of supervised time with his mother, supervised to ensure that no unsettling comments are made to X about the father to the child, or anxious statements by the mother about his own welfare. Thereafter the father would have the discretion to facilitate time if he considered there would be a benefit to the child.

The orders may cause a disorienting shock to the child from being disrupted in this way. That harm is balanced against a life growing up in a state of fear and protective anger about the conduct of his father towards himself and his sisters based entirely on the unsubstantiated opinions of his mother.

It will be important for X to maintain contact with his sister Y but that too will be at the discretion of the father and the willingness of the mother.

Under the final orders, the 10-year-old child was required to live with his father, commencing immediately.²⁰⁵² X was permitted no contact with his mother for six months, followed by monthly contact in a supervised contact centre for a further six months.²⁰⁵³ Any time between the mother and X after this time was only to occur “at the discretion of the father”.²⁰⁵⁴ The sibling relationship between X and his 14-year-old sister, Y—who had made disclosures against the father—was also severed, as there was no order made for any contact between the siblings.²⁰⁵⁵

²⁰⁵¹ Ibid [37]–[39] (Cleary J) (emphasis added).

²⁰⁵² Ibid ords 2–3 (Cleary J).

²⁰⁵³ Ibid ords 7–8 (Cleary J).

²⁰⁵⁴ Ibid ord 10 (Cleary J).

²⁰⁵⁵ Ibid [39] (Cleary J).

6.13.2 *Palmer & Kagan*

Palmer & Kagan also led to a change of residence of six-year-old X, when the child was sent away from her mother, with whom she had always lived,²⁰⁵⁶ and into the care of her father.²⁰⁵⁷ Justice Altobelli reasoned that this order was necessary due to the mother's continued belief that X was at risk in the father's care, stating:²⁰⁵⁸

The Mother's entrenched belief that the Father is a paedophile and presents a risk of sexual harm to X, is itself a form of psychological harm to X who, the Court fears, will grow up eventually assimilating her mother's distorted views about her father.

His Honour ordered that X reside permanently with her father,²⁰⁵⁹ arranging for the immediate transfer to his care to occur without any notice to the child.²⁰⁶⁰ His Honour ordered that X spend alternate weekends and half of each school holiday with her mother, once a two-month moratorium on all contact between mother and daughter was complete.²⁰⁶¹

6.13.3 *Ainsley & Ainsley*

Under the 2023 orders of *Ainsley & Ainsley*, the children were ordered to live permanently with the paternal grandmother,²⁰⁶² spending unsupervised time with their father²⁰⁶³ and experiencing supervised time with their mother on only three occasions per year.²⁰⁶⁴ In making these orders, Rees J stated, "I am satisfied that, if the children were to live with the mother, there would be further allegations of abuse and further litigation".²⁰⁶⁵

²⁰⁵⁶ *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [4] (Altobelli J).

²⁰⁵⁷ Ibid ords 1, 3 (Altobelli J).

²⁰⁵⁸ Ibid [256] (Altobelli J).

²⁰⁵⁹ Ibid ords 1, 3 (Altobelli J).

²⁰⁶⁰ Ibid ords 3, 24–25 (Altobelli J).

²⁰⁶¹ Ibid ords 3–4 (Altobelli J).

²⁰⁶² *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) ord 2 (Rees J).

²⁰⁶³ Ibid ords 3–5 (Rees J).

²⁰⁶⁴ Ibid ord 6 (Rees J).

²⁰⁶⁵ Ibid [299]–[300] (Rees J).

6.13.4 *Bentleigh & Bentleigh*

The 2017 orders under consideration in the 2018 judgement of *Bentleigh & Bentleigh* restrained “each parent” from “presenting the children to a medical or health practitioner for the purposes of the children making a disclosure about the father”,²⁰⁶⁶ stating that any further disclosures of sexual abuse must be reported to a therapist chosen by the Independent Children’s Lawyer,²⁰⁶⁷ or to the then-named Department of Family and Community Services, if no therapist had been appointed, “before taking any other step”.²⁰⁶⁸ In her 2018 judgement, Hannam J stated that the 2017 restrictions on reporting further disclosures had been ordered “to mitigate the risk that further allegations of sexual abuse would be made”.²⁰⁶⁹

After the 2017 orders were made, the mother reported further disclosures made by the older child to the New South Wales Department of Family and Community Services, presented the older child to a medical centre and a hospital where she made further disclosures to medical professionals,²⁰⁷⁰ and enrolled the children in counselling facilitated by Victims Services New South Wales.²⁰⁷¹ The core of the father’s case in 2018 was that in “giving weight to the children’s allegations that he has sexually abused them and presenting them to medical professionals for the purposes of making disclosures of abuse”, the mother posed an “unacceptable risk of emotional and psychological harm” to the children.²⁰⁷² As Hannam J stated, “[t]he father contends that *she cannot therefore be trusted* when she claims that she will not facilitate the children making further disclosures of abuse”.²⁰⁷³ The Independent Children’s Lawyer agreed, claiming that the “constant medical assessments and counselling in relation to sexual abuse allegations” were psychologically harmful to the children.²⁰⁷⁴

²⁰⁶⁶ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) ord 22 (Rees J).

²⁰⁶⁷ Ibid ord 10 (Rees J).

²⁰⁶⁸ Ibid ord 23 (Rees J).

²⁰⁶⁹ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [59] (Hannam J).

²⁰⁷⁰ Ibid [20]–[25] (Hannam J).

²⁰⁷¹ Ibid [57] (Hannam J).

²⁰⁷² Ibid [61] (Hannam J).

²⁰⁷³ Ibid [69] (Hannam J) (emphasis added).

²⁰⁷⁴ Ibid [71] (Hannam J).

Even a *referral made by a hospital* of the older child to a sexual assault service,²⁰⁷⁵ and that child's disclosures of sexual abuse by her father in counselling sessions facilitated by Victims Services New South Wales,²⁰⁷⁶ were considered by Hannam J as evidence of *the risk posed by the mother* to the children.²⁰⁷⁷ Although the 2017 orders mandated the children's attendance upon a therapist nominated by the Independent Children's Lawyer,²⁰⁷⁸ Hannam J expressed concern that the mother had enabled them to attend counselling at an alternative agency upon a referral by Victims Services, as this implied that the children were victims of sexual abuse.²⁰⁷⁹ Her Honour stated:²⁰⁸⁰

Documents produced on subpoena by that counselling service indicate that a number of the older child's counselling sessions have been focused on allegations that the father sexually abused her and the psychologist's notes indicate that the child has made disclosures of abuse in the course of those sessions ...

Notes from counselling sessions between the counsellor and the older child indicate that sexual abuse is a significant matter consistently raised during the sessions and the therapist is at least exploring the possibility that the allegations are true.

The 2018 orders affirmed the 2017 restrictions and extended them by restraining the parents from recording any conversation with the children, and preventing the mother from engaging the children in "any form of counselling or therapy ... without the consent of the father".²⁰⁸¹ Ultimately, Hannam J did not vary the orders allowing the children to continue living with their mother, while spending significant unsupervised time with their father. In detailing this decision, Her Honour stated:²⁰⁸²

The mother has informed the Court that she is willing to cease the children's counselling through Victims Services and recommence facilitating the children's time with the father. Orders have also been made restraining the parties from taking the children to any agency or service for the purposes of making complaints about the other parent's care of the children.

²⁰⁷⁵ Ibid [74] (Hannam J).

²⁰⁷⁶ Ibid [73] (Hannam J).

²⁰⁷⁷ Ibid [77]–[78] (Hannam J).

²⁰⁷⁸ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [10] (Rees J).

²⁰⁷⁹ *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [77] (Hannam J).

²⁰⁸⁰ Ibid [73], [77] (Hannam J).

²⁰⁸¹ Ibid ords 1–2 (Hannam J).

²⁰⁸² Ibid [135] (Hannam J).

It is notable that these orders were made by consent.²⁰⁸³ Laing notes the pressure experienced by parties who have experienced family violence—defined in the *Family Law Act* as including sexual abuse²⁰⁸⁴—to “consent to arrangements that they did not consider the best option for ensuring the safety of themselves and their children”, including pressure from their own legal representatives.²⁰⁸⁵ Discussing the unique challenges faced by self-represented parties to family law proceedings, Kaye et al. similarly highlight the experience of compulsion to agree to consent orders when there has been a history of family violence. The pressures identified by the authors derived from judicial officers and lawyers, and were often based in fear of a former partner, or the emotional and financial costs of continuing legal proceedings.²⁰⁸⁶ While the consent orders in *Bentleigh & Bentleigh* took considerable care to prevent further disclosure and reporting of child sexual abuse, no orders were made to mitigate the risk of the children being sexually abused by the father.

In *Belton & Braim*, it was determined that the father did not pose an unacceptable risk of sexual abuse to the child X, despite the then-named Department of Child Safety, Youth and Women substantiating his sexual abuse of X’s stepsibling, Z.²⁰⁸⁷ Justice Carew ordered that X spend time with her father that was initially supervised, leading to substantial unsupervised time after nine months.²⁰⁸⁸ The Undertaking that the court required the supervisor to sign, notified the supervisor that previous allegations of child sexual abuse had been dismissed by the family courts. It stated, “[t]he reason for supervision is to allay any residual concerns the mother may have about the child being at risk of sexual abuse from the father, despite the Court finding that there is no unacceptable risk of harm to the child”.²⁰⁸⁹

²⁰⁸³ Ibid ords 1–3 (Hannam J).

²⁰⁸⁴ *Family Law Act 1975* (Cth) ss 4AB(1)–(2).

²⁰⁸⁵ Lesley Laing, *No Way to Live: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 63.

²⁰⁸⁶ Miranda Kaye, Tracey Booth and Jane Wangmann, ‘Compromised ‘Consent’ in Australian Family Law Proceedings’ (2021) 35(1) *International Journal of Law, Policy and the Family* 1–25, 25.

²⁰⁸⁷ *Belton & Braim* (No 2) [2019] FamCA 840 (15 November 2019) [68]–[77] (Carew J).

²⁰⁸⁸ Ibid ord 4 (Carew J).

²⁰⁸⁹ Ibid ord 21(a) (Carew J).

6.13.5 *Tabano & Yabon*

In *Tabano & Yabon*, the teenage child, X, began to actively resist orders for contact with her mother and stepfather as her father's attempts to protect her through the family courts failed.²⁰⁹⁰ The child made numerous disclosures of neglect and abuse, including sexual abuse, occurring in her mother's household²⁰⁹¹ and stated that her mother and siblings were also subject to abuse.²⁰⁹² She threatened self-harm and even suicide²⁰⁹³ if she was forced to reside with her mother and stepfather and fled their home on numerous occasions, only to be returned repeatedly under family law recovery orders.²⁰⁹⁴ The response of the family courts to X's efforts was starkly reminiscent of the older cases heard by the Royal Commission in which police were deployed to return children to abusive institutions without genuine consideration of their disclosures.²⁰⁹⁵

During 2020, X—then 13 years old—had again left her mother's care and, this time, had moved in with her father's sister-in-law.²⁰⁹⁶ The younger children remained in their mother's care, and all three siblings were forbidden contact with their father.²⁰⁹⁷ The father requested a number of orders, including that the mother permit X to speak to her siblings by phone,²⁰⁹⁸ detailing numerous attempts by X to contact her siblings via her mother without success.²⁰⁹⁹ Justice Forrest, having found that X could not be controlled by court orders, inserted the 13-year-old into the narrative of psychological harm, stating:²¹⁰⁰

During her submissions to the Court, the mother's solicitor told the Court that the mother was reluctant to agree to permit telephone communication between X and her siblings as such. Having regard to all of the evidence that I heard in the trial over nineteen days, I have some understanding of why it might concern the mother. I would be troubled that X might broach some inappropriate topics in conversation

²⁰⁹⁰ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [47] (Forrest J).

²⁰⁹¹ *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [12] (Forrest J).

²⁰⁹² *Ibid* [16]–[17] (Forrest J).

²⁰⁹³ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [47] (Forrest J). See *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 62.

²⁰⁹⁴ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [18]–[21], [25] (Forrest J).

²⁰⁹⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 5.

²⁰⁹⁶ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [27] (Forrest J).

²⁰⁹⁷ *Ibid* [28] (Forrest J).

²⁰⁹⁸ *Tabano & Yabon* [2020] FamCA 643 (5 August 2020).

²⁰⁹⁹ *Ibid* [16]–[20], [29]–[33] (Forrest J).

²¹⁰⁰ *Ibid* [34] (Forrest J) (emphasis added).

with her siblings either as agent for her father or one of the other adults close to him or of her own volition.

While X's case ultimately resulted in orders allowing her to return to her father's care,²¹⁰¹ the younger children were not subject to the change of residence and continued to be bound by orders that they reside with their mother and stepfather.²¹⁰² Despite the mother's refusal to allow X to speak to her siblings since she had run away, Forrest J made no orders for the siblings to communicate, effectively severing their relationship.²¹⁰³ Justice Forrest stated:²¹⁰⁴

I am satisfied that if I make orders that provided for the youngest two children to spend time with their father or even separately with their sister, that further proceedings in relation to the children would be just a matter of a short time away in the form of contravention proceedings, recovery proceedings or even applications to change the living arrangements again.

In making these orders, His Honour referred to the requirement of the *Family Law Act* at that time, that judicial officers determining a child's best interests consider "whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child".²¹⁰⁵ However, the orders also effectively curtailed the opportunities of these children to raise concerns or disclose any abuse in the future.

6.14 Summary of Case Studies

This analysis highlights a critical disjunction between the handling of child sexual abuse allegations in the family courts and the best-practice recommendations of the Royal Commission. The family courts' reliance on gendered myths, outdated psychosocial theories and pseudoscientific concepts, such as 'parental alienation' and 'false memories', significantly undermined the reliability and validity of judicial narratives in the cases studied. Further, the

²¹⁰¹ *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [118] (Forrest J).

²¹⁰² Ibid ords 5–6 (Forrest J).

²¹⁰³ Ibid ord 7, [128] (Forrest J).

²¹⁰⁴ Ibid [128] (Forrest J).

²¹⁰⁵ *Family Law Act 1975* (Cth) s 60CC(3)(I). This provision was repealed by the *Family Law Amendment Act (No 87) 2023* (Cth).

misapplication of psychometric testing and the use of contested concepts, such as ‘good character’ to mitigate child sexual abuse allegations, exacerbated the issues identified.

The case studies revealed that the family courts often dismissed children’s disclosures of sexual abuse, construing alleging parents—predominantly mothers—as mentally unstable or strategic, and understanding children who disclosed sexual abuse as lying or easily fooled. For example, in several of the cases analysed, the value of the parental relationship was weighed against the risk of sexual abuse.²¹⁰⁶ In others, discourse centred around a perceived risk of ‘psychological harm’ posed by an alleging parent’s belief in an ongoing risk of sexual abuse, which was considered as potentially harmful as child sexual abuse itself.²¹⁰⁷ Further, in some cases, child sexual abuse was normalised or excused to the extent that subject children were ordered to spend unsupervised time with a parent *despite* the child’s numerous disclosures of sexual abuse²¹⁰⁸—or, in two cases, despite *substantiated* sexual abuse of another child—by that parent.²¹⁰⁹

Such judicial discourse demonstrates a clear departure from findings of the Royal Commission and the principles it established as a best-practice approach to identifying and responding to child sexual abuse. Accordingly, the case studies demonstrate a resounding failure by the family courts to protect the best interests of the child when child sexual abuse has been alleged.

²¹⁰⁶ See for example *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [146]–[149], [233], [255], [280]–[281] (Altobelli J); *Yabon & Tabano* [2020] FamCAFC 22 (31 January 2020) [6] (Kent J).

²¹⁰⁷ See for example *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [148], [290] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [59], [78] (Hannam J).

²¹⁰⁷ See for example *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [62]–[63], [69]–[70] (Altobelli J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [68]–[71], [86]–[87] (Hannam J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [124], [175], [188] (Cleary J).

²¹⁰⁸ See for example *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [7] [22], [28] (Baumann J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [102], [104], [110]–[111] (Cleary J).

²¹⁰⁹ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [63] (Carew J); *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [155], [158] (Hannam J). The substantiation of child sexual abuse was later called into question in the Magellan Report (29 March 2019), cited in *ibid* [160] (Hannam J).

Chapter Seven – Conclusions

The sexual abuse of a child is intolerable in a civilised society. It is the responsibility of our entire community to acknowledge that children are vulnerable to abuse. We must each resolve that we will do what we can to protect them. The tragic impact of abuse for individuals and through them our entire society demands nothing less.²¹¹⁰

An overriding aim of the Royal Commission was to foster institutional cultures that identify and prevent child sexual abuse,²¹¹¹ by encouraging disclosure and believing children when they disclose.²¹¹² However, the family law judgements analysed overwhelmingly reveal a culture of disbelief²¹¹³ which discredits children who disclose sexual abuse, applies coercion and threats to parents who report their children's disclosures to the courts, and privileges myths and pseudoscience over the evidence-based knowledge gained from the Royal Commission.

The Royal Commission established evidence-based approaches to identifying and responding to child sexual abuse. It remains the most extensive royal commission in Australian history and ranks among the largest public investigations into institutional child sexual abuse worldwide.²¹¹⁴ Further, its findings have influenced legislation and the approach of government and non-government institutions at state and federal levels throughout Australia.²¹¹⁵ Yet, the Commission appears to have made little impact on the operation of Australia's family courts.

²¹¹⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 4.

²¹¹¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 9.

²¹¹² *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 14.

²¹¹³ Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 81; Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 291; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 93; R Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776, 766.

²¹¹⁴ Katie Wright, Shurlee Swain and Kathleen McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1–9, 1.

²¹¹⁵ See the annual progress reports detailing the implementation of the Royal Commission's recommendations by commonwealth, state and territory governments, and some non-government entities, for five years following the Commission: 'Annual Progress Reports', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/royal-commission/annual-progress-reports>>.

In their Final Report, the Commissioners noted that child sexual abuse is neither purely historical nor limited to institutions.²¹¹⁶ The Final Report noted the importance of ongoing reform at government, institutional and community levels to minimise future harm, both from perpetrators themselves and from dismissive or harmful institutional responses to reports of child sexual abuse.²¹¹⁷ The Commissioners emphasised that “[t]he Royal Commission’s impact will depend primarily on the implementation of the recommendations made in this Final Report as well as those made in our earlier reports”.²¹¹⁸ Despite this, the cases analysed demonstrate that the post–Royal Commission family courts remain largely impervious to the Commission’s findings and recommendations. Family law discourse continues to be subsumed by erroneous beliefs—many of them gendered—which coexist with poorly understood psychosocial models and thoroughly debunked theories such as ‘parental alienation’, ‘coaching’, and the implantation of ‘false memories’.

7.1 Disparities between Evidence and Family Law Practices

Institutions may increase the risk of child sexual abuse through cultures that:

- lack understanding or awareness of child sexual abuse
- fail to listen to children
- fail to educate children about healthy and appropriate sexual development
- prioritise the reputation of the institution over children
- cultivate secrecy and isolation
- fail to see prevention of child sexual abuse as a shared responsibility
- fail to address racism and prejudice
- normalise harmful practices.²¹¹⁹

²¹¹⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 3–4.

²¹¹⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 61–62.

²¹¹⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Beyond the Royal Commission* (Final Report, 15 December 2017) vol 17, 10.

²¹¹⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 159.

Webb et al. argued that decisions of the family courts must be weighed “against the extent to which they are broadly commensurate with research-based findings about the frequency of occurrence of child sexual abuse as well as the statistical likelihood that allegations are both genuine and correct”.²¹²⁰ The *Australian Child Maltreatment Study* established a prevalence of child sexual abuse in Australia of roughly 28%.²¹²¹ The Royal Commission made it clear that false allegations of child sexual abuse are rare,²¹²² and that underreporting is a far greater problem.²¹²³ False allegations arising from children are estimated to comprise just 2.5% to 5% of all children’s allegations of sexual abuse²¹²⁴ and, in children under six years of age, this falls to just 2%.²¹²⁵ Research also establishes that the rate of false allegations of child sexual abuse made by adults within the family courts is similarly rare.²¹²⁶ False allegations of all forms of

²¹²⁰ Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 4.

²¹²¹ Published in 2023, the Australian Child Maltreatment Study featured interviews with 8,503 survey participants, of which around 28.5% reported having experienced sexual abuse as a child: Ben Mathews (coordinating author), 'The Australian Child Maltreatment Study: National Prevalence and Associated Health Outcomes of Child Abuse and Neglect' (2023) 218(S6) *Medical Journal of Australia* S1–S51, S13, S27.

²¹²² *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016), 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

²¹²³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 52.

²¹²⁴ William O'Donohue, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475, 471.

²¹²⁵ Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007), cited in Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 30; MD Everson and BW Boat, 'False Allegations of Sexual Abuse by Children and Adolescents' (1989) 28(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 230–235, 231.

²¹²⁶ Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1333.

child abuse have been identified as occurring at similar rates in family law proceedings as in other contexts,²¹²⁷ a rate of around 9%.²¹²⁸ Yet, research by Ferguson et al. and Webb et al. revealed a stark disparity between the established evidence base and the family courts' understanding of child sexual abuse allegations.

Ferguson et al. examined the outcomes of child sexual abuse cases before the Family Court of Australia during the early years of the Royal Commission.²¹²⁹ In these cases, judicial officers substantiated abuse in 10%²¹³⁰—and identified a risk of sexual harm to a child in only 12%—of contested cases.²¹³¹ Of greatest concern, *even when the alleged perpetrator of child sexual abuse did not dispute the allegation*, judicial officers found a risk of sexual harm to the child in only 65% of cases.²¹³² Webb et al. evaluated contested cases of child sexual abuse heard by the Family Court of Australia, from just prior to the commencement of the Royal Commission, until two years after it concluded.²¹³³ The authors found that the Family Court *increased* the amount of time that children were mandated to spend with alleged perpetrators in just under two-thirds of cases,²¹³⁴ with changes of residence favouring the alleged abuser in 17% of these cases.²¹³⁵

The disparity between the prevalence of false allegations of child sexual abuse in Australia and the rate at which such allegations are dismissed by the family courts is clear. By this standard, the family courts are failing to effectively protect child survivors of sexual abuse as they

²¹²⁷ Nico Trocmé and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345, 1341; M Hume, 'The Relationship between Child Sexual Abuse, Domestic Violence and Separating Families' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), cited in Kathleen Faller, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959, 955; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9.

²¹²⁸ T Brown et al., 'Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes' (2000) 24(6) *Child Abuse and Neglect* 849–859, 852.

²¹²⁹ The authors examined 156 judgements published from 2013–2015: Claire Ferguson et al., 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115, 93.

²¹³⁰ N=16 (10.3%): *ibid* 102.

²¹³¹ N=47 (12%): Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 9 (table 3), 12.

²¹³² N=46 (65%): *ibid* 9 (table 3), 12.

²¹³³ The authors examined 521 judgements published from 2012–2019: *ibid* 1.

²¹³⁴ N=233 (63%): *ibid* 11 (table 6), 13.

²¹³⁵ N=63 (17%): *ibid* 11 (table 7), 13.

deprioritise research-based findings. The Royal Commission emphasised the “profound and lasting impacts” of child sexual abuse for many victims.²¹³⁶ The Commission found that the complex trauma caused by child sexual abuse can impact the “biological, social and psychological development of a child ... interrupting normal psychosocial development at every critical stage of a child’s formative years”.²¹³⁷ The thesis concludes that, given the extensive authority of the family courts over the children who are subject to their judgements and the consequences of child sexual abuse for the life trajectories of survivors, the family courts are not only failing countless children who fall within their jurisdiction, but also *exacerbate* the risks many face.

7.2 The Royal Commission’s Influence on Institutional Reforms and Child Protection

The most significant impact of the Royal Commission was envisaged to occur in the transformation of institutional policies and practices aimed at safeguarding children within the first five to 10 years after the Commission’s conclusion. The Commissioners recommended annual progress reporting by commonwealth, state and territory governments,²¹³⁸ as well as by major institutions that engage in child-related work, and their peak bodies,²¹³⁹ for five years following its conclusion. As well, the Commission recommended a review be undertaken 10 years after its conclusion to:²¹⁴⁰

- a) establish the extent to which the Royal Commission’s recommendations have been implemented 10 years after the tabling of the Final Report;
- b) examine the extent to which the measures taken in response to the Royal Commission have been effective in preventing child sexual abuse, improving the responses of institutions to child sexual abuse and ensuring that victims and survivors of child sexual abuse obtain justice, treatment and support;
- c) advise on what further steps should be taken by governments and institutions to ensure continuing improvement in policy and service delivery in relation to child sexual abuse in institutional contexts.

²¹³⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 23.

²¹³⁷ *Ibid* 11.

²¹³⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 15 December 2017) 61, rec 17.2.

²¹³⁹ *Ibid* 61, rec 17.3.

²¹⁴⁰ *Ibid* 62, rec 17.4.

The implementation of the Royal Commission's recommendations and Child Safe Standards were the intended bedrock on which child safety was to be embedded in institutional governance and culture, ensuring rigorous recruitment and training processes and establishing robust mechanisms for reporting and responding to child sexual abuse.²¹⁴¹ In the first years after the Commission, institutions across diverse sectors, including education, religion and out-of-home care, did undergo substantial reforms to comply with these standards.²¹⁴² The impacts of the Royal Commission have also been seen in increased community awareness and education about child sexual abuse, both during²¹⁴³ and after the Commission.²¹⁴⁴ This multifaceted approach was intended to not only help prevent abuse, but also create a culture of transparency and support for victims and survivors, thereby fostering a significant societal shift towards prioritising child safety.²¹⁴⁵

The annual progress reporting period, aimed at ensuring the Commission's recommendations were being implemented swiftly and effectively, and that institutional and cultural change was realised, is now complete.²¹⁴⁶ While the family courts were not included in the Royal Commission's Terms of Reference, and were subsequently exempt from these reporting requirements,²¹⁴⁷ judicial officers and professionals working in the family law system cannot have been oblivious to the cultural change sweeping across Australian institutions, government departments and the community at large in the wake of the Royal Commission. Arguably, any shift in family law discourse towards the evidence base established by the Royal Commission

²¹⁴¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 141.

²¹⁴² See the annual progress reports detailing the implementation of the Royal Commission's recommendations by commonwealth, state and territory governments and some non-government entities for five years following the Commission: 'Annual Progress Reports', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/royal-commission/annual-progress-reports>>.

²¹⁴³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Beyond the Royal Commission* (Final Report, 15 December 2017) vol 17, 40.

²¹⁴⁴ *National Centre for the Prevention of Child Sexual Abuse* (Stakeholder Consultation Report, Australian Government, August 2020) 50.

²¹⁴⁵ *Ibid* 49–50.

²¹⁴⁶ 'Annual Progress Reports', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/royal-commission/annual-progress-reports>>.

²¹⁴⁷ Federal Court of Australia, *Commonwealth Child Safe Framework* (Annual Statement of Compliance, 31 October 2023).

was most likely to be seen while the Commission sat, and within those first few post-Commission years. Nearly seven years on, little has been achieved.

7.3 Exploring the Reasons behind Family Law's Resistance to Evidence-based Practices

Many institutions we examined did not have a culture where the best interests of children were the priority. Some leaders did not take responsibility for their institution's failure to protect children. Some leaders felt their primary responsibility was to protect the institution's reputation, and the accused person. Many did not recognise the impact this had on children. Poor practices, inadequate governance structures, failures to record and report complaints, or understating the seriousness of complaints, have been frequent.²¹⁴⁸

While this thesis did not attempt to determine the causes underlying the disparity between research and practice in the family law system, some insight may be gained from the research of the Royal Commission itself, which relied heavily on organisational culture as an explanation for poor responses to child sexual abuse. The Commissioners stated:²¹⁴⁹

Institutional barriers can prevent both the identification and disclosure of child sexual abuse. These barriers do not exist independently. In many cases, a constellation of factors leads to institutional cultures where individuals can perpetrate sexual abuse that goes unnoticed and unreported and leaves children powerless to tell anyone what is happening.

Many of the inquiries conducted into the family law system criticise the nature of family litigation itself as leading to ineffectual and harmful responses to child sexual abuse and family violence.²¹⁵⁰ What is clear is that—in approaching child safety—academic analysis and government-commissioned inquiries, including the Royal Commission itself, form one discrete

²¹⁴⁸ Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017).

²¹⁴⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 12.

²¹⁵⁰ See for example Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.69]; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) [3.3]; *Australian Law Reform Commission, Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [1.53].

discourse, while family law comprises another. The two discourses rarely interact, and when they do, this can cause more harm than good. The family courts' absorption of 'parental alienation' theories, for example, has derived from the largely self-published²¹⁵¹ and overwhelmingly discredited work of Gardner.²¹⁵² Equally, the case studies provide numerous examples in which psychological theories have been poorly applied by 'experts' unqualified to do so. This echoes Rathus' finding that social science research has sometimes been deployed in the family courts to decontextualise or misconstrue the experiences of survivors of family violence.²¹⁵³

Another obvious aspect of the family courts' failure to respond to developments in the evidence base can be seen in the numerous recurring recommendations of government inquiries concerning the courts' responses to family violence and child sexual abuse. Appendix A details the pertinent findings and recommendations of these inquiries since the turn of the century, while Appendix B highlights the issues that have been *repeated* by numerous inquiries. The relevant recurring recommendations of these inquiries include:

1. Improving risk assessment and facilitating the disclosure of family violence and child sexual abuse.²¹⁵⁴

²¹⁵¹ Nola Webb et al., 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22, 12.

²¹⁵² Joan S Meier and Sean Dickson, 'Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation' (2017) 32(2) *Law and Inequality* 311–334, 317; Miguel Clemente and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133, 130; H Smith, 'Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases' (2016) 11(1) *University of Massachusetts Law Review* 64–99, 64; Joan S Meier, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257, 236–238; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3–4.

²¹⁵³ Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 5.

²¹⁵⁴ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 5, 11, rec 2.3; *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 997–1008, recs 21.1–21.3; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 215–218, rec 134; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 12–13, recs 2–5; Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 113–115, rec 6.1; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 150–151, recs 2–3; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 161–162, 292, recs 27, 61; Joint Select Committee

2. Protecting families with complex needs.²¹⁵⁵
3. Improving integration of the family law, family violence and child protection systems.²¹⁵⁶
4. Educating communities about healthy relationships.²¹⁵⁷
5. Educating judicial officers and allied family law professionals about family violence and child sexual abuse.²¹⁵⁸

on Australia's Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021) 7–9, rec 1.

²¹⁵⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 714–719, 869, recs 16.4, 24.1; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 157, rec 21; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 227–228, 255–258, 287–288, recs 22, 24–25, 30; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 16–17, 165–170, recs 5, 16–17.

²¹⁵⁶ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 61–62, rec 5; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 702–712, 1448–1449, 1455–1457, 1504–1505, recs 16.1–16.3, 30.16–30.18, 32.2; Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) 869, rec 24.3; Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) 215–218, rec 129, 134; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 104–107, recs 5–6; Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 279–284, recs 96–99; Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 116–119, 123–124, recs 6.4, 6.5, 6.7; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 155–158, 224–225, recs 6, 10–11, 21; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 36–38, recs 1, 2–3; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 343, rec 82.

²¹⁵⁷ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26, rec 3; Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 27–31, 33–37, recs 1.1–1.3; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 243–245, recs 55, 57, 59.

²¹⁵⁸ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26–33, rec 4; Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 166–168, 172, recs 4.3, 4.4, 4.6; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 45–46, rec 2; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 1212–1214, 1465–1477, recs 26.3, 31.1–31.5; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 9–10, rec 2; Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) 9, rec 2; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 14–15, rec 11; Finance and Public Administration

6. Expanding non-adversarial and child-focused decision-making.²¹⁵⁹
7. Increasing transparency and accountability.²¹⁶⁰

Numerous attempts have been made through legislative reform and professional education to address these issues over the past decades; however, the lack of impact of these initiatives has made it clear that further legislative tinkering is not the answer to the gaping chasm between the evidence base and the approach of the family courts to allegations of child sexual abuse.

The gap between the written law and its implementation is particularly apparent in laws concerning violence against women and children.²¹⁶¹ The 2010 report of the Australian Law Reform Commission and the New South Wales Law Reform Commission, highlighted the “implementation gap” impacting Australian legal responses to sexual violence.²¹⁶² The authors noted:²¹⁶³

References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015) 128–129, rec 18; Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 288–292, recs 103–110; Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 37–38, rec 1.4; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 284–287, recs 27, 28; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 397–401, 405–414, 416–421, recs 51–54; Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 75, rec 15.

²¹⁵⁹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26–33, rec 4; Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) 104, rec 13; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 15, rec 13; Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 55–56, rec 10; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 395–397, rec 50.

²¹⁶⁰ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) 106, rec 19; Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 223–224, rec 20; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 388–395, rec 49.

²¹⁶¹ Jane Wangmann, ‘Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?’ (2012) 34(4) *Sydney Law Review* 695–719, 701.

²¹⁶² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) [24.96].

²¹⁶³ Australian Government, *Government Response to the Australian and NSW Law Reform Commissions’: Family Violence – a National Legal Response* (Government Response, June 2013) [24.96].

Despite extensive changes to law and procedure, research continues to highlight a gap between written law and its practice—referred to as an “implementation gap”. This gap highlights the resistance to change evident in the legal system through its legal players who may still hold views about sexual assault characterised by myths and misconceptions. Some commentators question the over-reliance on, or confidence in, legislative change alone to bring about substantive changes for women and children as complainants in sexual offences.

Kaspiew echoes this perspective on criminal justice responses to sexual assault, highlighting “mounting evidence that progressive change is frequently subverted by a persistently change-resistant, conservative system”.²¹⁶⁴ Similarly, Stubbs notes that legislative amendments have been “narrowly circumscribed, contested, ignored, diluted or perhaps even actively subverted” within the criminal courts of New South Wales.²¹⁶⁵ Taylor argues that judicial beliefs, such as the idea that women and girls lie about sexual assault, have become “immutable rhetoric in legal trials and immune to legal reform”.²¹⁶⁶ Importantly, Quilter highlights the continuing paucity of Australian criminal legal responses to sexual assault, “[d]espite more than three decades of progressive law reform”.²¹⁶⁷ Noting that early legal requirements, particularly those concerning the restraint and physical injury of the victim, persist in practice despite being removed from the legislation, Quilter argues that attempts to reform harmfully gendered legislation must go beyond the formal content of legislation to address “the knowledges and cultural lineages” that inform legal practice.²¹⁶⁸

Examining the efficacy of law reform initiatives on sexual assault and family law, Graycar emphasises the “power and persistence of myths and stereotypes, and reliance on anecdotal information, in place of evidence-based research and hard data” as contributing to “the limits” of legal reform.²¹⁶⁹ Hunter attributes the “implementation problem”, in part, to “a gap between

²¹⁶⁴ Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382, 351.

²¹⁶⁵ Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women against Violence* 14–26, 1, cited in 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in Rosemary Hunter and Mary Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 49–76, 55.

²¹⁶⁶ Caroline Shannon Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 5.

²¹⁶⁷ Julia Quilter, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law and History* 89–113, 89.

²¹⁶⁸ *Ibid* 89.

²¹⁶⁹ 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in Hunter and Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 49–76, 50.

the intent of the reform and the prevailing legal culture”.²¹⁷⁰ The author emphasises the hegemonic power of discourse, in arguing that feminist-inspired legislative reform is easily undermined when implemented by judicial officers and other legal professionals, whose understandings of interpersonal violence conflict with feminist accounts.²¹⁷¹ Similarly, Death et al. analysed the use of ‘parental alienation’ claims to rebut allegations of child sexual abuse within the Australian family law system.²¹⁷² The authors identified the use of “gendered discourses of hysterical, vindictive and manipulative women” within the Family Court of Australia, stating “[t]hese gendered discourses have been discredited elsewhere and should be similarly challenged in the [Family Court]”.²¹⁷³ As Hunter states, “[i]f there is a disjunction between the legal culture of (feminist) reformers and that of (non-feminist) enforcers, then dismal results are inevitable”.²¹⁷⁴

7.4 Consequences of Limited Oversight in Family Law Decisions

Where institutions are insular and closed off from the world, families, communities, governmental agencies and professional services are not able to play the crucial role of monitoring the safety and wellbeing of children, reporting allegations or scrutinising policies and practices.²¹⁷⁵

Another partial explanation for the gap between evidence and practice in family law is that the family courts operate largely without external oversight. There is no government-commissioned process established to determine how children and families progress in the months and years after final court orders are made. It is also an offence to publish any account of family law proceedings in a way that could identify any party.²¹⁷⁶ As seen in some of the cases analysed, judicial officers may include in their orders measures to prevent further reporting of abuse or injunctions against parties discussing the case, or the reasons for it, in any

²¹⁷⁰ Rosemary Hunter, *Domestic Violence Law Reform and Women’s Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 5–9.

²¹⁷¹ R Hunter, ‘Narratives of Domestic Violence’ (2006) 28(4) *Sydney Law Review* 733–776 733.

²¹⁷² Jodi Death, Claire Ferguson and Kylie Burgess, ‘Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia’ (2019) 94 *Child Abuse and Neglect* 2–10, 2.

²¹⁷³ *Ibid* 8–9.

²¹⁷⁴ R Hunter, ‘Narratives of Domestic Violence’ (2006) 28(4) *Sydney Law Review* 733–776, 734.

²¹⁷⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 163.

²¹⁷⁶ *Family Law Act 1975* (Cth) (comp 12 June 2024) ss 114(N)–114(T).

public sphere, or even with the children who are subject to the judgement.²¹⁷⁷ Such injunctions may be accompanied by judicial threats that, should a child continue to disclose abuse, or a parent continue to report their disclosures, they may be removed from the care of the alleging parent.²¹⁷⁸ In some cases studied, family law orders restricted a child's access to mental health services to which they had previously disclosed sexual abuse, or only permitted such care with the consent of the alleged perpetrator.²¹⁷⁹ These factors have combined to create a perfect storm of secrecy and unaccountability; *the exact cultural form that the Royal Commission warned creates the conditions for child sexual abuse to thrive*.²¹⁸⁰

An important aspect of the Royal Commission's work was the framing of 'criminogenic institutions', which the Commissioners defined as institutions "likely to cause or produce criminal behaviour, or ... contribute to offending indirectly".²¹⁸¹ The Final Report highlighted aspects of institutional culture that can exacerbate the risk of child sexual abuse occurring, including "failing to listen to or value children; encouraging secrecy and isolation; normalising harm; or being insular and cut-off from the outside world".²¹⁸²

7.5 Systemic Issues in Family Law and the Role of Discourse

The failure to protect children has not been limited to institutions providing services to children. Some of our most important state instrumentalities have failed. Police often refused to believe children. They refused to investigate their complaints of

²¹⁷⁷ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) ords 10, 22–23 (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) ords 1–2, [59], [135] (Hannam J); *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [299]–[300] (Rees J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) ord 21(a) (Carew J); *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [34] (Forrest J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [28] (Forrest J).

²¹⁷⁸ See for example Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [86], [88], [121] (Hannam J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [95] (Tree J).

²¹⁷⁹ *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) ords 10, 22, 23 (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [59] [73]–[74], [77]–[78] (Hannam J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) ord 21(a) (Carew J); *Tabano & Yabon* [2020] FamCA 643 (5 August 2020) [34], [128] (Forrest J).

²¹⁸⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 163.

²¹⁸¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Parts III–VI, August 2017) 250.

²¹⁸² *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 39.

abuse. Many children who had attempted to escape abuse were returned to unsafe institutions by police. Child protection agencies did not listen to children.²¹⁸³

The issues identified in the case studies appear to be systemic. Although some names of judicial officers come up repeatedly in this analysis, the widespread failings cannot be attributed to a few biased or poorly trained professionals. The issues recognised have been identified repeatedly, throughout decades of academic research and government inquiries into the family law system, as detailed in Chapter Four and Appendices A and B.

An understanding of discourse is particularly valuable when the approaches of judicial officers clearly contradict evidence-based best-practice. Legal professionals in the judgements featured frequently dismissed the voices of children²¹⁸⁴ and employed threats and coercion in their handling of parents who reported abuse.²¹⁸⁵ The judges and experts involved commonly denied allegations of child sexual abuse or minimised the harm caused, relying on pseudoscientific theories about the nature and causes of child sexual abuse that contrast sharply with the findings of the Royal Commission, the academic evidence base, and the findings of numerous inquiries into interpersonal violence and family law in Australia.²¹⁸⁶ Gross contradiction of established

²¹⁸³ Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017).

²¹⁸⁴ *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [141], [148] (Rees J); Report of Single Joint Expert, Dr J (2 October 2019) [77], [85] cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); Report of Single Joint Expert, Dr J (30 March 2020), cited in *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [12] (Rees J); Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [12]–[15] (Hannam J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [18]–[21], [25], [48] (Forrest J); *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [39], [46] (Forrest J); *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [20], [22(c)], [28(c)] (Baumann J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [87], [90]–[92] (Tree J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [36] (Cleary J); *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [3], [100], [119]–[131], [161]–[164], [251]–[251], [365] (Hannam J).

²¹⁸⁵ Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], [85], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [57] (Forrest J); *Tabano & Yabon* [2019] FamCA 952 (10 December 2019) [21] (Forrest J), *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [95] (Tree J).

²¹⁸⁶ *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [32] (Baumann J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [7], [32], [63], [67], [77]–[78] (Carew J); Report of Family Consultant, Ms J (2019), cited in *ibid* [84] (Carew J); *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [55], [60], [63], [85], [76], [117], [256] (Altobelli J); Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J); *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [5], [37], [341] (Hannam J); *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [32(d)] (Baumann J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [37]–[39] (Cleary J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [61], [71], [77] (Hannam J).

best-practice and academic consensus was seen repeatedly in judgements and expert reports discounting children’s disclosures of sexual abuse because—while they accorded with established literature on disclosure—they fell outside the judge’s or expert’s personal understanding of the way disclosure should occur.²¹⁸⁷ The discourse studied was infused with erroneous beliefs about child sexual abuse²¹⁸⁸ and the sanity and veracity of women and children,²¹⁸⁹ and the opinions of family law ‘experts’ were supported to a surprising extent by contested and wholly debunked pseudoscientific theories that have little evidentiary basis—yet, they were presented as fact.²¹⁹⁰

While, in some instances, judicial officers and court-ordered experts openly dismissed established best-practice or academic consensus, far more often, however, judicial officers’ reasoning was revealed throughout the judgements in subtle statements, in what was excluded as much as included, and in decisions as to which ‘facts’ were relevant and whose accounts were credible within the discourse.

²¹⁸⁷ See for example *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [141] (Rees J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [77] (Carew J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [48] (Forrest J); *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [22(c)], [28(c)] (Baumann J).

²¹⁸⁸ *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [32] (Baumann J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [7], [32], [63], [67], [77]–[78] (Carew J); Report of Family Consultant, Ms J (2019), cited in *ibid* [84] (Carew J); *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [55], [60], [63], [85], [76], [117], [256] (Altobelli J); Report of Single Joint Expert, Dr J (24 April 2018) 39–40, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [125] (Altobelli J); *Hammond & Hammond* [2021] FamCA 329 (24 May 2021) [5], [37], [341] (Hannam J); *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [32(d)] (Baumann J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [37]–[39] (Cleary J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [61], [71], [77] (Hannam J).

²¹⁸⁹ *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [77] (Carew J); *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [50]–[51], [84] (Forrest J); Report of Single Joint Expert, Dr J (24 April 2018) 37–38, 41–42, cited in *Palmeter & Kagan* [2019] FCCA 2298 (18 December 2019) [127], [139] (Altobelli J); *ibid* [45]–[49], [131], [149], [243], [253] (Altobelli J); Report of Single Joint Expert, Dr J (2 October 2019) [80]–[82], cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46] (Altobelli J); *ibid* [69]–[72] (Altobelli J); *Welby & Raine* [2020] FamCA 189 (7 April 2020) [42], [69], [81], [92]–[93], [99], [100], [123], [131], [134]–[136], [137], [178], [190], [238] (Cleary J); *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) 57–58, 63, 65–66 (Rees J); *Bentleigh & Bentleigh* [2018] FamCA 264 (27 April 2018) [61], [69] (Hannam J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [90], [114] (Tree J).

²¹⁹⁰ Report of Single Joint Expert, Dr G, cited in *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175], [178] (Rees J); *ibid* 71 (Rees J); Report of Single Joint Expert, Dr J (2 October 2019) [72], [74], [80]–[82], [85], [101] cited in *Ainsley & Ainsley & Anor* [2019] FCCA 3816 (16 December 2019) [46]–[47] (Altobelli J); Report of Single Joint Expert, Dr J (30 March 2020), cited in *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [12] (Rees J); Magellan Report of the Family Consultant, Ms D (21 May 2019), cited in *Welby & Raine* [2020] FamCA 189 (7 April 2020) [123]–[124] (Cleary J); *Martin & Payne* [2017] FamCA 1041 (18 December 2017) [88]–[89], [91] (Tree J).

7.6 The Construction of ‘Truth’: A Foucauldian Perspective on Power Dynamics and Judicial Reasoning

[W]e are also subject to the truth in the sense that truth lays down the law: it is the discourse of truth that decides, at least in part; it conveys and propels effects of power.²¹⁹¹

Foucault argued that what is accepted as truth is constructed through societal power dynamics, rather than through any objective reality.²¹⁹² This is evident in the family courts, as the power exercised by judicial officers and court-appointed experts demonstrably shapes the discourse surrounding child sexual abuse. As Milchman argues, even irrational beliefs can appear natural when they accord with discursive norms.²¹⁹³ McInnes maintains that erroneous beliefs within family law discourse can have the effect of a ‘self-fulfilling prophecy’, as “the system failure to protect children continually reinscribes the myth that child abuse allegations in the context of divorce are usually false”.²¹⁹⁴ Hunter echoes this assertion. The author’s analysis of Family Court of Australia cases involving allegations of family violence found that the use of ‘consent’ orders, which “clearly perpetuated rather than prevented the father’s future control and abuse of the mother”, has impacted family law discourse by perpetuating gendered beliefs that minimise and deny such violence.²¹⁹⁵

The reliance identified in judicial reasoning on widely discredited theories such as ‘parental alienation’ exemplifies how power structures within the legal system can perpetuate ‘truths’ that contradict empirical evidence and the lived experiences of victims. Feminist legal scholars have long questioned whether legislative amendment can effectively challenge not only the structural deficits inherent in law itself, but the injustice deriving from law’s normalising

²¹⁹¹ Michel Foucault, *Society Must Be Defended: Lectures at the College De France 1975–1976*, ed M Bertani and A Fontana, tr D Macey (Picador, 2003) 25.

²¹⁹² Colin Gordon, *Michel Foucault Power/Knowledge* (Harvester Press, 1980) 51–52.

²¹⁹³ Madelyn Simring Milchman, ‘Commentary: Implicit Cultural Arguments Affect the Science of Shared Parenting’ (2018) 15(3) *Child Custody* 218–227, 210.

²¹⁹⁴ Elspeth McInnes, ‘Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law’ (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003), 3.

²¹⁹⁵ R Hunter, ‘Narratives of Domestic Violence’ (2006) 28(4) *Sydney Law Review* 733–776, 773.

power.²¹⁹⁶ Consequently, the family courts' failure to adequately address child sexual abuse is not merely a legal shortcoming which can be resolved through legislative amendment, but a manifestation of Foucault's assertion that truth is a product of power relations. The effects of Foucault's 'disciplinary power' are starkly evident in the family law cases examined herein, as parties are surveilled and regulated, pathologised and ultimately made to adhere to the norms of the discourse;²¹⁹⁷ a process which Foucault describes as "the technicians of discipline ... elaborating procedures for the individual and collective coercion of bodies".²¹⁹⁸

7.7 Perpetuation of Erroneous Beliefs in Family Law Discourse

[M]yths and misconceptions have influenced the law ... The myths and misconceptions may lead to a complainant's behaviour being regarded as "counterintuitive" to the behaviour expected of a "real" victim of sexual abuse even though social science research establishes that the behaviour is common—and sometimes even typical—for victims of sexual abuse.²¹⁹⁹

Evidence-based responses to child sexual abuse in the family courts have the power to protect not only the direct victims and their families, but other children as well. Inversely, a failure to respond appropriately to reports of the sexual abuse of children places the broader community at risk. The Royal Commission stated that "[r]esearch suggests that victims' experiences of being believed may have changed over time; children are now more likely to be believed when disclosing, particularly by their parents".²²⁰⁰ Yet, in the cases analysed, the operation of erroneous beliefs was so entrenched in family law discourse that disclosure evidence was commonly interpreted within a paradigm in which child sexual abuse is rare and false

²¹⁹⁶ Nicola Lacey, 'Feminism and the Tenets of Conventional Legal Theory' (1995) 11 *Humboldt Forum Rechts* 1–7, 3–4.

²¹⁹⁷ Carol Smart, *Feminism and the Power of Law* (Taylor and Francis, 1989), 7.

²¹⁹⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Allen Lane, 1977) 169.

²¹⁹⁹ Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017).

²²⁰⁰ A Quadara, M Stathopoulos and R Carson, *Family Relationships and the Disclosure of Institutional Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse Australian Institute of Family Studies, July 2016) 45–46, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 174.

allegations are common. As the Royal Commission and decades of academic researchers have established, the opposite is in fact the case.²²⁰¹

Despite the Royal Commission's emphasis on disclosure as the best way to know child sexual abuse has happened or is at risk of happening,²²⁰² the significant influence of myths and pseudoscientific theories within family law discourse helps to explain why children's disclosures are often simply not believed. In the cases analysed, the demonstrably erroneous beliefs evinced by many judicial officers and experts in the judgements studied, resulted in a deep scepticism towards children's disclosures, and protective parents' reports, of child sexual abuse.²²⁰³

Judicial officers frequently failed to adhere to the overriding aim of the *Family Law Act*: to prioritise the best interests of the child,²²⁰⁴ a standard based on Article 3 of the *Convention on the Rights of the Child*,²²⁰⁵ which also underpins the Royal Commission's Child Safe Standards.²²⁰⁶ In the cases studied, children's best interests were routinely undermined by

²²⁰¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, 15 December 2017) vol 7, 136–137. See also David M Fergusson, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544, 535; Jodi Death, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10, 9; *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016), 201; Daryl J Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) 40; Elspeth McInnes, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003) 3; Lawrie Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007) 125; Thea Brown et al., 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124, 113.

²²⁰² *Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse* (Final Report, 15 December 2017) vol 4, 9.

²²⁰³ See for example *Tabano & Yabon (No 4)* [2020] FamCA 1001 (27 November 2020) [48] (Forrest J); Report of Single Joint Expert, Dr J (30 March 2020), cited in *Ainsley & Ainsley (No 3)* [2023] FedCFamC1F 211 (30 March 2023) [12] (Rees J); *Bentleigh & Bentleigh* [2017] FamCA 294 (11 May 2017) [175] (Rees J); *Belton & Braim (No 2)* [2019] FamCA 840 (15 November 2019) [77] (Carew J); *Zaida & Badouri* [2018] FamCA 645 (24 August 2018) [39] (Forrest J); *Fletcher & Littlemore* [2018] FamCA 1126 (20 December 2018) [22], [32] (Baumann J).

²²⁰⁴ *Family Law Act 1975* (Cth) s 60CA.

²²⁰⁵ Article 3 states, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration": *Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS (entered into force 2 September 1990)*.

²²⁰⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe* (Final Report, 15 December 2017) vol 6, 13.

judicial decisions that viewed maintaining relationships with alleged abusers as equally valuable as ensuring children's safety.²²⁰⁷ Previous research has consistently identified the response of the family courts to allegations of family violence, including child sexual abuse, as playing a significant role in survivors concealing abuse from the courts or downplaying its extent.²²⁰⁸ It is posited that warnings and restraints against disclosure and reporting occurring in both interim and final family law judgements may similarly lead to survivors withholding further reports of child sexual abuse during the years they are before the family courts, and may even prompt the retraction of prior allegations.

Many of the issues evidenced in the post-Royal Commission family law cases analysed, were identified by the Commissioners in the responses of police, law enforcement and government to reports of child sexual abuse over the past decades.²²⁰⁹ These issues included not believing victims, failing to respond to or investigate reports of child sexual abuse, and a lack of specialised training in child sexual abuse and child protection.²²¹⁰ In their work, the Commissioners highlighted many cases in which institutions failed to protect children *despite* being aware that sexual abuse was, or could be, occurring, stating “[n]ot only can these poor responses place a victim at risk of repeated and prolonged abuse, they continue to expose other children to an unsafe environment”.²²¹¹

²²⁰⁷ See for example *Palmer & Kagan* [2019] FCCA 2298 (18 December 2019) [146]–[149], [233], [255], [280]–[281] (Altobelli J); *Yabon & Tabano* [2020] FamCAFC 22 (31 January 2020) [6] (Kent J).

²²⁰⁸ See for example Elspeth McInnes, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91, 79, 81; Wendy Lee Foote, 'Child Sexual Abuse Allegations in the Family Court' (PhD Thesis, University of Sydney, 2006) 55; Zoe Rathus, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17, 11; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) 10, 55.

²²⁰⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause* (Final Report, 15 December 2017) vol 2, 116.

²²¹⁰ *Ibid* 116.

²²¹¹ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 178.

7.8 Final Reflections on the Need for Reform in Family Law Discourse

All children have a right to a safe and happy childhood. We all carry the responsibility to do what we can to provide it. We must not fail them.²²¹²

This study underscores a critical dissonance between the theoretical underpinnings of best-practice approaches to child protection and the practical application of family law in cases involving allegations of child sexual abuse. There is a clear need for reform in the family courts' approach, yet without deep cultural change, the impact of legislative amendment will remain limited. The theoretical and empirical evidence reviewed in this thesis demonstrates that, despite decades of inquiries, academic research and the Royal Commission's clear findings and recommendations, the Australian family courts continue to fail to protect many children from child sexual abuse. Due to the entrenched resistance of the family courts to evidence-based approaches to child safety and the unaccountability of its professionals for harm caused by 'expert' reports and court orders based on erroneous personal beliefs, a radical change is needed.

The Royal Commission emphasised the “*complicity* of some institutions in creating situations and settings where abuse can occur and in concealing abuse or failing to deal appropriately with disclosures”.²²¹³ Within the family courts, such failures expose children to the risk of ongoing harm from sexual abuse. In order to effectively protect children within the family law system, legal discourse must genuinely prioritise evidence-based approaches to child protection over the erroneous beliefs and debunked theories prevalent in the discourse. Without genuine investigation and radical reform of the family law system, these failures will continue.

Ultimately, the findings of this analysis call for a fundamental reassessment of the family courts' practices in handling allegations of child sexual abuse. There is a pressing need for the courts to align their approach to child safety with contemporary, evidence-based research and the Royal Commission's practical recommendations. Far more crucial, however, is the urgent

²²¹² *Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary* (Final Report, 15 December 2017) 100.

²²¹³ *Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts* (Final Report, 15 December 2017) vol 3, 42 (emphasis added).

need to reframe the *discourse* of family law to ensure that decisions are informed by a robust *understanding* of the complexities of child sexual abuse and the critical importance of protecting vulnerable children. This calls for a deep realignment of the *institutional culture* of family law, in order to bring the approach of the family courts up to date with the contemporary evidence base.

For decades prior to the Royal Commission, numerous government inquiries and legislative reforms have attempted and failed to align family law discourse with evidence-based approaches to the protection of children and their families from violence and abuse. Arguably, further reform of this nature is unlikely to bring about the significant change needed to make the family courts child safe, while the institutional culture and discourse remain steeped in erroneous beliefs. Radical cultural change, such as that wrought within many of Australia's institutions by the Royal Commission, is urgently needed. Failure to achieve such change is to allow the sexual abuse of children to continue within Australia's family law system.

Bibliography

A Articles/Books/Reports

Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010)

Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019)

Adams, Michelle A, 'Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights' (2006) 40(2) *Family Law Quarterly* 315–338 <<https://www.jstor.org/stable/25740570>>

Ailwood, Sarah, Patricia Easteal and Jessica Kennedy, 'Law's Indifference to Women's Experience of Violence: Colonial and Contemporary Australia' (2012) 35(2) *Women's Studies International Forum* 86–96 <<https://doi.org/10.1016/j.wsif.2012.02.010>>

Altobelli, T, 'When a Child Rejects a Parent: Why Children Resist Contact' (2011) 25(3) *Australian Journal of Family Law* 185–209 <<https://search.informit.org/doi/10.3316/agispt.20120001>>

Arce, Ramón, Francisca Fariña, Dolores Seijo and Mercedes Novo, 'Assessing Impression Management with the MMPI-2 in Child Custody Litigation' (2015) 22(6) *Assessment* 769–777 <<https://doi.org/10.1177/1073191114558111>>

Arnould, Andreas von and Stefan Martini, 'Unreliable Narration in Law Courts' in Vera Nünning (ed), *Unreliable Narration and Trustworthiness: Intermedial and Interdisciplinary Perspectives* (De Gruyter, 2015) 347–370

Attorney-General's Department, *High Level Financial Analysis of Court Reform Initiatives* (Final Report, February 2015) <<https://www.ag.gov.au/legal-system/publications/high-level-financial-analysis-court-reform-initiatives>>

Australian Bureau of Statistics, *Year Book Australia: History of Pensions and Other Benefits in Australia* (Report No 1301.0, January 1988) <<https://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/8e72c4526a94aaedca2569de00296978!opendocument>>

Australian Government, *Government Response to the Australian and NSW Law Reform Commissions': Family Violence – a National Legal Response* (Government Response, June 2013) <<https://www.ag.gov.au/families-and-marriage/publications/government-response-australian-and-nsw-law-reform-commissions-family-violence-national-legal-response>>

Australian Government, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2018) <<https://www.childsafety.gov.au/resources/australian-government-response>>

Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018) <<https://childsafef.humanrights.gov.au/national-principles/download-national-principles>>

Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018) <<https://www.aihw.gov.au/reports/family-domestic-and-sexual-violence/family-domestic-sexual-violence-in-australia-2018/summary>>

Australian National Audit Office, *Auditor-General Report 45 (2018-19): Coordination and Targeting of Domestic Violence Funding and Actions* (Report on the implementation of the National Plan to Reduce Violence Against Women and their Children 2010-2022, 13 June 2019) <<https://www.anao.gov.au/work/performance-audit/coordination-and-targeting-domestic-violence-funding-and-actions>>

Bagshaw, Dale, Thea Brown, Sarah Wendt, Alan Campbell, Elspeth McInnes, Beth Tinning, Becky Batagol, Adiva Sifris, Danielle Tyson, Joanne Baker and Paula Fernandez Arias, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49–61 <<https://search.informit.org/doi/epdf/10.3316/informit.702873923415841>>

Baker, Helen, 'Constructing Women Who Experience Male Violence: Criminal Legal Discourse and Individual Experiences' (2008) 29(2) *Liverpool Law Review* 123–142 <<https://doi.org/10.1007/s10991-008-9037-6>>

Ballinger, Anette, 'Masculinity in the Dock: Legal Responses to Male Violence and Female Retaliation in England and Wales, 1900–1965' (2007) 16(4) *Social and Legal Studies* 459–481 <<https://doi.org/10.1177/0964663907082731>>

Banyard, VL, LM Williams and JA Siegel, 'The Long-Term Mental Health Consequences of Child Sexual Abuse: An Exploratory Study of the Impact of Multiple Traumas in a Sample of Women' (2001) 14(4) *Traumatic Stress* 697–715 <<https://www.ncbi.nlm.nih.gov/pubmed/11776418>>

Barnett, Adrienne, 'A Genealogy of Hostility: Parental Alienation in England and Wales' (2020) 42(1) *Social Welfare and Family Law* 18–29 <<https://doi.org/10.1080/09649069.2019.1701921>>

Batty, Rosie and Bryce Corbett, *A Mother's Story* (Harper Collins, 2015)

Ben Mathews (coordinating author), 'The Australian Child Maltreatment Study: National Prevalence and Associated Health Outcomes of Child Abuse and Neglect' (2023) 218(S6) *Medical Journal of Australia* S1–S51 <https://www.mja.com.au/system/files/2023-03/MJA2_v218_is6_Iss2Press_Text.pdf>

Berger, LL, BJ Crawford and KM Stanchi, 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' (2018) 47 *University of Baltimore Law Review* 167–197 <<https://scholars.law.unlv.edu/facpub/1100>>

Berger, PL and T Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, 1966)

Berns, Sandra S, 'Judicial Decision Making and Moral Responsibility' (1991) 13(2) *Adelaide Law Review* 119–162 <<https://www6.austlii.edu.au/au/journals/AdelLawRw/1991/8.pdf>>

Blizard, Ruth and Morgan Shaw, 'Lost-in-the-Mall: False Memory or False Defense' (2019) 16(1) *Child Custody* 1–22 <<https://doi.org/10.1080/15379418.2019.1590285>>

Booth, Wayne C, *The Rhetoric of Fiction* (University of Chicago Press, 1961)

Boxall, Hayley, Adam M Tomison and Shann Hulme, *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, Australian Institute of Criminology, 2014) <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20>

[%20Historical%20review%20of%20sexual%20offence%20and%20child%20sexual%20abuse%20legislation%20in%20Australia%201788-2013%20-%20Government%20responses.pdf>](#)

Breckenridge, Jan, Joan Cunningham and Karen Jennings, *Cry for Help: Client and Worker Experiences of Disclosure and Help Seeking Regarding Child Sexual Abuse* (Report, Relationships Australia & University of New South Wales, 2008) <https://www.avertfamilyviolence.com.au/wp-content/uploads/2013/05/Cry_For_Help_Report_2008.pdf>

Bromfield, Leah, Craig Hirte, Olivia Octoman and Ian Katz, *Child Sexual Abuse in Australian Institutional Contexts 2008–13: Findings from Administrative Data* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, Australian Centre for Child Protection, 2017) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_child_sexual_abuse_in_australian_institutional_contexts_2008-13_findings_from_administrative_data_-_causes.pdf>

Broughton, Peta, 'Jurisprudence: Discourse Analysis of the Law' (1999) 3 *Southern Cross University Law Review* 136–152 <<https://classic.austlii.edu.au/au/journals/SCULawRw/1999/6.pdf>>

Brown, Helen, 'Mad, Bad or Unreasonable Women: Battered Women's Syndrome and It's Silencing of the Experience of Women: Two Alternative Approaches' (Conference Paper, Australian Law and Society Conference, 14 December 1994)

Brown, T and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (Allen & Unwin, 2007)

Brown, T, M Frederico, L Hewitt and R Sheehan, 'Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes' (2000) 24(6) *Child Abuse and Neglect* 849–859 <<https://www.ncbi.nlm.nih.gov/pubmed/10888023>>

Brown, T, D Tyson and P Fernandez Arias, 'Filicide and Parental Separation and Divorce' (2014) 23(2) *Child Abuse Review* 79–88 <<https://doi.org/10.1002/car.2327>>

Brown, Thea, Margarita Frederico, Lesley Hewitt and Rosemary Sheehan, 'The Child Abuse and Divorce Myth' (2001) 10(2) *Child Abuse Review* 113–124 <<https://doi.org/10.1002/car.671>>

Brownmiller, Susan, *Against Our Will; Men, Women and Rape* (Pelican Books, 1975)

Bruch, C, 'Parental Alienation Syndrome: Junk Science in Child Custody Determinations' (2001) 3(3) *European Journal of Law Reform* 383–404 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/ejlr3&div=33&id=&page=>>

Bruner, Jerome, 'The Narrative Construction of Reality' (1991) 18(1) *Critical Inquiry* 1–21 <<https://doi.org/10.1086/448619>>

Bunting, Annie, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30(3) *Alberta Law Review* 829–842 <<https://doi.org/10.29173/alr1509>>

Butcher, JN, JR Graham, YS Ben-Porath, A Tellegen, WG Dahlstrom and B Kaemmer, *Minnesota Multiphasic Personality Inventory–2 (MMPI-2): Manual for Administration, Scoring, and Interpretation* (University of Minnesota Press, rev ed, 2001)

Butler, Judith, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, 1997)

- Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 2006)
- Byrne, Kenneth, 'Brainwashing in Custody Cases: The Parental Alienation Syndrome' (1989) 4(3) *Australian Family Lawyer* 1–7 <https://canadiancrc.com/pdfs/Aust_Family_Law_K_Byrne_1989.pdf>
- Campbell, Jeremy, *The Liar's Tale: A History of Falsehood* (WW Norton & Co, 2001)
- Carpenter, Belinda, Sue Currie and Rachael Field, 'Domestic Violence: Views of Queensland Magistrates' (Conference Paper, Australian and New Zealand Society of Criminology Annual Conference, 21–23 February 2001)
- Cashmore, Judy, Alam Taylor, Rita Shackel and Patrick Parkinson, *The Impact of Delayed Reporting on Prosecution and Outcomes of Child Sexual Abuse Cases* (Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_the_impact_of_delayed_reporting_on_the_prosecution_and_outcomes_of_child_sexual_abuse_cases_and_appendices_-_government_responses.pdf>
- Chattopadhyay, Sreeparna, 'Gendering Legal Discourse: A Critical Feminist Analysis of Domestic Violence Adjudication in India' (2017) 20(2) *Law, Social Justice and Global Development* 1–16 <https://www.researchgate.net/publication/312494846_Gendering_Legal_Discourse_A_Critical_Feminist_Analysis_of_Domestic_Violence_Adjudication_in_India>
- Cheng, L and D Machin, 'The Law and Critical Discourse Studies' (2022) 20(3) *Critical Discourse Studies* 243–255 <<https://doi.org/10.1080/17405904.2022.2102520>>
- Cherry, Yasmin, Janson Lim, Jakeb Thornton and Jessica Vines, *Sexual Offences against Children: An Analysis of Sentencing Purposes and Procedures* (Report, Macquarie University and HAQ Centre for Child Rights, November 2016) <<https://haqcrc.org/wp-content/uploads/2017/10/sexual-offences-against-children-an-analysis-of-sentencing-purposes-and-procedures-november-2016.pdf>>
- Chisholm, Richard, *Family Courts Violence Review* (Report, 27 November 2009) <<https://www.ag.gov.au/sites/default/files/2020-03/Family%20Courts%20Violence%20Review.pdf>>
- Christie, Agatha, *The Murder of Roger Ackroyd* (William Collins, 1926)
- Clemente, Miguel and Dolores Padilla-Racero, 'When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged "Parental Alienation Syndrome"' (2016) 13(2–3) *Child Custody* 126–133 <<https://doi.org/10.1080/15379418.2016.1219245>>
- Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, *National Agreement on Closing the Gap* (Report, July 2020) <<https://www.closingthegap.gov.au/national-agreement>>
- Coker, Donna, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4(2) *Buffalo Criminal Law Review* 801–860 <<https://doi.org/10.1525/nclr.2001.4.2.801>>
- Collins, Patricia H, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2nd ed, 2000)
- Commonwealth of Australia, *Safe and Supported: National Framework for Protecting Australia's Children 2021–2031* (Report, 2021)

<https://www.dss.gov.au/sites/default/files/documents/12_2021/dess5016-national-framework-protecting-childrenaccessible.pdf>

Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) <<https://www.dss.gov.au/the-national-plan-to-end-violence-against-women-and-children/the-national-plan-to-end-violence-against-women-and-children-2022-2032>>

Commonwealth of Australia, *Aboriginal and Torres Strait Islander Action Plan 2023–2025 under the National Plan to End Violence against Women and Children 2022–2032* (Report, 2023) <<https://www.dss.gov.au/the-national-plan-to-end-violence-against-women-and-children/aboriginal-and-torres-strait-islander-action-plan-2023-2025>>

Commonwealth of Australia, *National Plan to End Violence against Women and Children 2022–2032* (First Action Plan 2023–2027, 2023) <<https://www.dss.gov.au/ending-violence#fap>>

Conaghan, Joanne, 'Reassessing the Feminist Theoretical Process in Law' (2000) 27(3) *Journal of Law and Society* 351–385 <<https://doi.org/10.1111/1467-6478.00159>>

Cook, Kay and Kristin Natalier, 'Gender and Evidence in Family Law Reform: A Case Study of Quantification and Anecdote in Framing and Legitimising the "Problems" with Child Support in Australia' (2016) 24(2) *Feminist Legal Studies* 147–167 <<https://doi.org/10.1007/s10691-016-9317-9>>

Cossins, Anne, 'Saints, Sluts and Sexual Assault: Rethinking the Relationship between Sex, Race and Gender' (2003) 12(1) *Social and Legal Studies* 77–104 <<https://journals.sagepub.com/doi/pdf/10.1177/096466390301200104>>

Council of Australian Governments, *National Framework for Protecting Australia's Children: Implementing the First Three-Year Action Plan 2009–2012* (Report, 2009)

Council of Australian Governments, *Protecting Children Is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (Report, 2009) <<https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>>

Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010) <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>

Council of Australian Governments, *Moving Ahead: National Plan to Reduce Violence against Women and Their Children 2010–2022* (Second Action Plan 2013–2016, 2013) <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children/the-second-action-plan>>

Council of Australian Governments, *Protecting Children Is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (Third Action Plan 2015–2018, 2015) <<https://www.dss.gov.au/families-and-children/programmes-services/children/protecting-children-is-everyones-business-national-framework-for-protecting-australias-children-2009-2020-third-action-plan-2015-2018>>

Council of Australian Governments, *The National Plan to Reduce Violence against Women and Their Children 2010–2022* (Third Action Plan 2016–2019, 2016) <<https://www.dss.gov.au/women/programs-services/reducing-violence/third-action-plan>>

Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Fourth Action Plan 2019–2022, 2019) <<https://www.dss.gov.au/women-publications-articles-reducing-violence/fourth-action-plan>>

Cover, Robert M, 'The Supreme Court, 1982 Term: Foreword' (1983) 97 *Harvard Law Review* 4–68 <<https://doi.org/10.2307/1340787>>

Cox, Peta, *Violence against Women: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS Horizons: Research Report No 1, Australia's National Research Organisation for Women's Safety, 2016, rev ed) <<https://www.anrows.org.au/publication/violence-against-women-in-australia-additional-analysis-of-the-australian-bureau-of-statistics-personal-safety-survey-2012/>>

Cutajar, Margaret C, Paul E Mullen, James RP Ogloff, Stuart D Thomas, David L Wells and Josie Spataro, 'Psychopathology in a Large Cohort of Sexually Abused Children Followed up to 43 Years' (2010) 34(11) *Child Abuse and Neglect* 813–822 <<https://www.ncbi.nlm.nih.gov/pubmed/20888636>>

Davies, Margaret, 'The De-Capitation of a Discipline, or How Legal Theory Lost Its Head' (2000) 4(1) *Flinders Journal of Law Reform* 127–142 <<https://www6.austlii.edu.au/au/journals/FlinJLawRfm/2000/8.pdf>>

Davies, Margaret, 'Derrida and Law: Legitimate Fictions' in T Cohen (ed), *Jacques Derrida and the Humanities* (Cambridge University Press, 2001) 213–235

Davies, Margaret, 'Exclusion and the Identity of Law' (2005) 5 *Macquarie Law Journal* 5–30 <<https://classic.austlii.edu.au/au/journals/MqLawJl/2005/2.html>>

Davis, Karen M and Robert P Archer, 'A Critical Review of Objective Personality Inventories with Sex Offenders' (2010) 66(12) *Clinical Psychology* 1254–1280 <<https://doi.org/10.1002/jclp.20722>>

Davis, Kingsley, 'The Sociology of Prostitution' (1937) 2(5) *American Sociological Review* 744–755 <<https://doi.org/10.2307/2083827>>

Death, Jodi, Claire Ferguson and Kylie Burgess, 'Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia' (2019) 94 *Child Abuse and Neglect* 2–10 <<https://doi.org/10.1016/j.chiabu.2019.104045>>

Del Gobbo, Daniel, 'Unreliable Narration in Law and Fiction' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 311–338 <<https://doi.org/10.1017/cjlj.2017.15>>

Department of Social Services, *National Centre for the Prevention of Child Sexual Abuse* (Stakeholder Consultation Report, Australian Government,, August 2020) <<https://www.dss.gov.au/families-and-children-programs-services/national-centre-for-the-prevention-of-child-sexual-abuse-stakeholder-consultation-report>>

Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) <<https://australianwomenshealth.org/resource/coag-advisory-panel-on-reducing-violence-against-women-and-their-children-final-report-2/>>

Department of the Prime Minister and Cabinet, *First Commonwealth Action Plan to Prevent and Respond to Child Sexual Abuse 2021–2024* (Report, 2021)

Department of the Prime Minister and Cabinet, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030*, 2021) <<https://www.childsafety.gov.au/resources/national-strategy-prevent-and-respond-child-sexual-abuse-2021-2030>>

Douglas, Heather 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84–99 <<https://doi.org/10.1177/1748895817728380>>

Edwards, Susan S, 'Neither Bad nor Mad: The Female Violent Offender Reassessed' (1986) 9(1) *Women's Studies International Forum* 79–87 <[https://doi.org/10.1016/0277-5395\(86\)90079-8](https://doi.org/10.1016/0277-5395(86)90079-8)>

Eekelaar, J, *Family Law and Personal Life* (Oxford University Press, 2006)

Egeland, B, MF Erickson, JN Butcher and YS Ben-Porath, 'MMPI-2 Profiles of Women at Risk for Child Abuse' (1991) 57 *Personality Assessment* 254–263 <https://doi.org/10.1207/s15327752jpa5702_5>

Epstein, Deborah and Lisa A Goodman, 'Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences' (2019) 167 *University of Pennsylvania Law Review* 399–461 <<https://scholarship.law.georgetown.edu/facpub/2037>>

Erickson, Nancy S, 'Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?' (2005) 39 *Family Law Quarterly* 87–107 <https://www.researchgate.net/publication/241661819_Use_of_the_MMPI2_in_Child_Custody_Evaluations_Involving_Battered_Women_What_Does_Psychological_Research_Tell_Us>

Esposito, Catherine, *Child Sexual Abuse and Disclosure: What Does the Research Tell Us?* (Literature Review, NSW Department of Family and Community Services, 2014) <<https://www.facs.nsw.gov.au/download?file=415448>>

Esposito, Catherine and Ellen Field, *Child Sexual Abuse: What Does the Research Tell Us?* (Literature Review, Office of the Senior Practitioner & NSW Department of Family and Community Services, December 2016) <<https://www.facs.nsw.gov.au/download?file=415446>>

Evans, Jonathan, 'Artful Dodgers: The Role of Unreliable Narrators in the Production of Authorized Histories and Assessments of Young People in Conflict with the Law' (2017) 38(9) *Deviant Behavior* 1042–1058 <<https://doi.org/10.1080/01639625.2016.1237835>>

Everson, MD and BW Boat, 'False Allegations of Sexual Abuse by Children and Adolescents' (1989) 28(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 230–235 <<https://www.ncbi.nlm.nih.gov/pubmed/2925577>>

Fairclough, Norman, *Language and Power* (Longman, 2nd ed, 2001)

Faller, Kathleen, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions' (2007) 31 *Child Abuse and Neglect* 947–959 <<https://www.clinicalkey.com.au/#!/content/journal/1-S2.0-S0145213407002086>>

Family Court of Australia, Family Court of Western Australia and Federal Circuit Court of Australia, *Guidelines for Independent Children's Lawyers* (Practice Guidelines, 29 May 2013)

Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (Practice Guidelines, 2023) <<https://www.fcfsa.gov.au/pubs/fl/fvbpp>>

Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Final Report to the Attorney-General, June 1998) <<https://www.ag.gov.au/families-and-marriage/publications/child-contact-orders>>

Family Law Council, *Penalties and Enforcement: Interim Report to the Attorney-General on the Enforcement of Family Court Orders and Injunctions and Penalties for Non-Compliance with Orders and Injunctions* (Interim Report, March 1998) <<https://www.ag.gov.au/families-and-marriage/publications/interim-report-penalties-and-enforcement>>

Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) <<https://www.ag.gov.au/families-and-marriage/publications/improving-responses-family-violence-family-law-system-advice-intersection-family-violence-and-family-law-issues>>

Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) <<https://www.ag.gov.au/families-and-marriage/publications/improving-family-law-system-aboriginal-and-torres-strait-islander-clients>>

Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) <<https://www.ag.gov.au/families-and-marriage/publications/improving-family-law-system-clients-culturally-and-linguistically-diverse-backgrounds>>

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) <<https://www.ag.gov.au/families-and-marriage/publications/interim-report-families-complex-needs-and-intersection-family-law-and-child-protection-systems-terms-1-2>>

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>>

Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) <<https://search.informit.org/doi/10.3316/agispt.20020038>>

Faulks, J, "'Condemn the Fault and Not the Actor?'" Family Violence: How the Family Court of Australia Can Deal with the Fault and the Perpetrators' (2010) 33(3) *University of New South Wales Law Journal* 818–835 <<https://www.austlii.edu.au/au/journals/UNSWLawJl/2010/35.pdf>>

Featherstone, Lisa, "'Children in a Terrible State': Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42 *Journal of Australian Studies* 164–176 <<https://doi.org/10.1080/14443058.2018.1455063>>

Federal Circuit Court and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Practice Guidelines, 2021) <<https://www.fcfcoa.gov.au/fl/pubs/icl-guidelines>>

Federal Court of Australia, *Commonwealth Child Safe Framework* (Annual Statement of Compliance, 31 October 2023) <<https://www.fedcourt.gov.au/about/corporate-information/child-safe-framework#:~:text=Whilst%20the%20Child%20Safe%20Framework,family%20law%20matter%20involving%20children>>

Fehlberg, Belinda, Rae Kaspiew, Jenni Millbank, Fiona Kelly and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015)

Ferguson, Claire, Sarah Wright, Jodi Death, Kylie Burgess and John Malouff, 'Allegations of Child Sexual Abuse in Parenting Disputes: An Examination of Judicial Determinations in the Family Court of Australia' (2018) 15(2) *Child Custody* 93–115 <<https://doi.org/10.1080/15379418.2017.1415776>>

Fergusson, David M, Joseph M Boden and L John Horwood, 'Exposure to Childhood Sexual and Physical Abuse and Adjustment in Early Adulthood' (2008) 32(6) *Child Abuse and Neglect* 607–619 <<https://www.ncbi.nlm.nih.gov/pubmed/18565580>>

Fergusson, David M, L John Horwood and LJ Woodward, 'The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behaviour of Young Adults' (2000) 30(3) *Psychological Medicine* 529–544 <<https://doi.org/10.1017/s0033291799002111>>

Field, R, S Jeffries, Z Rathus and A Lynch, 'Family Reports and Family Violence in Australian Family Law Proceedings: What Do We Know?' (2016) 25 *Judicial Administration* 212–236 <https://www.researchgate.net/profile/Samantha_Jeffries/publication/304520692_Family_reports_and_family_violence_in_Australian_family_law_proceedings_What_do_we_know/links/577216c308ae6219474a6537.pdf>

Fish, E, M McKenzie and H MacDonald, *"Bad Mothers and Invisible Fathers", Parenting in the Context of Domestic Violence* (Discussion Paper No 7, Domestic Violence Resource Centre Victoria, 2009) <<https://safeandequal.org.au/resource-library/>>

Fisher, Rebecca Jean, 'A Descriptive Analysis of MMPI-2 Profiles of Individuals Undergoing Parenting Capacity Evaluations' (PsyD Thesis, Chestnut Hill College, 2019)

Fitz-Gibbon, Kate Esther, *The Peter Mitchell Churchill Fellowship to Examine Innovative Legal Responses to Intimate Homicide in the UK, USA and Canada* (Final Report, Winston Churchill Memorial Trust, 2016) <<https://research.monash.edu/en/publications/2015-churchill-fellowship-report-the-peter-mitchell-churchill-fel>>

Flood, Michael, 'Backlash: Angry Men's Movements' in SE Rossi (ed), *The Battle and Backlash Rage On: Why Feminism Cannot Be Obsolete* (Xlibris, 2004) 261–278

Flood, Michael, '"Fathers' Rights" and the Defense of Paternal Authority in Australia' (2010) 16(3) *Violence Against Women* 328–347 <<https://doi.org/10.1177/1077801209360918>>

Flood, Michael, *Where Men Stand: Men's Roles in Ending Violence against Women* (Prevention Research Series No 2, White Ribbon, 2010) <<https://eprints.qut.edu.au/103417/>>

Flood, Michael, *False Allegations of Sexual Assault and Domestic Violence* (Report prepared for VicHealth, 25 June 2014) <<https://xyonline.net/content/false-allegations-sexual-assault-and-domestic-violence>>

Fogarty, John, 'Establishment of the Family Court of Australia and Its Early Years' (2001) 60 *Family Matters* 90–101 <<https://link.gale.com/apps/doc/A83034594/AONE?u=dixson&sid=AONE&xid=d882c457>>

Foote, Wendy Lee, 'Child Sexual Abuse Allegations in the Family Court' (PhD Thesis, University of Sydney, 2006)

- Foucault, Micheal, 'The History of Sexuality: Interview' (1980) 4(2) *Oxford Literary Review* 3–14 <<https://doi.org/10.3366/olr.1980.002>>
- Foucault, Michel, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Allen Lane, 1977)
- Foucault, Michel, *The History of Sexuality, Volume 1: The Will to Knowledge*, tr Robert Hurley (Pantheon Books, 1978)
- Foucault, Michel, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed C Gordon, tr C Gordon, Leo Marshall, John Mepham and Kate Sopers (Harvester Wheatsheaf, 1980)
- Foucault, Michel, *Society Must Be Defended: Lectures at the College De France 1975–1976*, ed M Bertani and A Fontana, tr D Macey (Picador, 2003)
- Foucault, Michel and Lawrence D Kritzman, *Politics, Philosophy, Culture: Interviews and Other Writings 1977–1984* (Routledge, 1988)
- Freud, Sigmund, *New Introductory Lectures on Psychoanalysis*, ed Angela Richards and James Strachey (Penguin, 1973)
- Friedman, Lawrence M, 'Legal Culture and Social Development' (1969) 4(1) *Law and Society Review* 29–44 <<https://doi.org/10.2307/3052760>>
- Garner, Helen, *This House of Grief* (Text Publishing, 2014)
- Gee, James Paul, *An Introduction to Discourse Analysis: Theory and Method* (Routledge, 3rd ed, 2011)
- Geis, Gilbert, 'Lord Hale, Witches, and Rape' (1978) 5(1) *British Journal of Law and Society* 26–44 <<https://doi.org/10.2307/1409846>>
- Geis, Gilbert, 'Revisiting Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10(5) *Criminal Law Journal* 319–329 <<https://search.informit.org/doi/abs/10.3316/agispt.19870866>>
- Gelles, Richard J, 'Power, Sex, and Violence: The Case of Marital Rape' (1977) 26(4) *Family Coordinator* 339–347 <<http://www.jstor.org/stable/581754>>
- GJ, Simpson and H Charlesworth, 'Objecting to Objectivity: The Radical Challenge to Legal Liberalism' in Hunter, Ingleby and Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995) 100–110
- Gleeson, Kate and Sinéad Ring, 'Confronting the Past and Changing the Future? Public Inquiries into Institutional Child Abuse, Ireland and Australia' (2020) 29(1) *Griffith Law Review* 109–133 <<https://doi.org/10.1080/10383441.2020.1855950>>
- Goodman-Delahunty, Jane, Mark A Nolan and Evianne L van Gijn-Grosvenor, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_empirical_guidance_on_the_effects_of_child_sexual_abuse_on_memory_and_complainants_evidence.pdf>
- Goodrich, Peter, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987)

- Gordon, Colin, *Michel Foucault Power/Knowledge* (Harvester Press, 1980)
- Gordon, RM, R Stoffey and J Bottinelli, 'MMPI-2 Findings of Primitive Defenses in Alienating Parents' (2008) 36(3) *American Journal of Family Therapy* 211–228 <<https://doi.org/10.1080/01926180701643313>>
- Graycar, Reg, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in Rosemary Hunter and Mary Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 49–76
- Hackett, Lisa J and Jo Coghlan, 'Conjuring up a King: The Use of Magic and Ritual in the Coronation of King Charles Iii' (2023) 26(5) *M/C Journal* <https://doi.org/10.5204/mcj.2986>>
- Hale, M, *Historia Placitorum Coronae* (Nutt and Gosling, 1734)
- Halperin, Tamara, 'MMPI-2 Personality Characteristics of Parents in Child Custody Litigation with Intimate Partner Violence Allegations' (PhD Thesis, Alliant International University, 2017)
- Hanson, RK and D Thornton, *Notes on the Development of Static-2002 (User Report 2003-01)* (Department of the Solicitor General of Canada, 2003)
- Harris, Anita, Nikki Honey, Kim Webster, Kristen Diemer and Violeta Politoff, *Young Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey for Respondents 16–24 Years* (Report, Victorian Health Promotion Foundation, 2015) <https://www.vichealth.vic.gov.au/sites/default/files/SurveyReport_YoungPeople-attitudes-violence-against-women.pdf>
- Hart, HLA, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593–629 <<https://doi.org/10.2307/1338225>>
- Hartsock, N, 'Foucault on Power: A Theory for Women?', *Feminism and Postmodernism* (Routledge, 1990)
- Haselschwerdt, ML, JL Hardesty and JD Hans, 'Custody Evaluators' Beliefs About IPV Allegations During Divorce: Feminist and Family Violence Perspectives' (2011) 26(8) *Interpersonal Violence* 1694–1719 <<https://doi.org/10.1177/0886260510370599>>
- Heersink, N and DS Strassberg, 'A Normative and Descriptive Study of the MMPI with Acknowledged Child Molesters' (1995) 17(4) *Psychopathology and Behavioral Assessment* 377–391 <<https://doi.org/10.1007/BF02229057>>
- Heurich, Angelika and Jo Coghlan, 'The Canberra Bubble: A Toxic Gender Culture' (2021) 24(1) *M/C Journal* <https://doi.org/10.5204/mcj.2749>>
- Hickey, Jennifer and Stephen Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Report, Judicial Commission of New South Wales, 1999) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/apprehended-violence-orders-survey-magistrates>>
- Higgins, Daryl J, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (Report prepared for the Family Court of Australia, Australian Institute of Family Studies, 2007) <<https://apo.org.au/node/8337>>
- Higgins, Daryl J, Ben Mathews, Rosana Pacella, James G Scott, David Finkelhor, Franziska Meinck, Holly E Erskine, Hannah J Thomas, David M Lawrence, Divna M Haslam, Eva Malacova and Michael

- P Dunne, 'The Prevalence and Nature of Multi-Type Child Maltreatment in Australia' (2023) 218(6) *Medical Journal of Australia* S19–S25 <<https://doi.org/10.5694/mja2.51868>>
- Hindman, MH, 'Family Violence: An Overview' (1979) 4(1) *Alcohol Health and Research World* 2–11 <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/family-violence-2>>
- Holdsworth, WS, 'Sir Matthew Hale' (1923) 39 *Law Quarterly Review* 402–426 <
- Hollander, Jocelyn, 'Challenging Despair: Teaching About Women's Resistance to Violence' (2005) 11(6) *Violence Against Women* 776–791 <<https://doi.org/10.1177/1077801205274808>>
- Holzscheiter, Anna, 'Between Communicative Interaction and Structures of Signification: Discourse Theory and Analysis in International Relations' (2014) 15(2) *International Studies Perspectives* 142–162 <<https://www.jstor.org/stable/44631205>>
- Hooks, Bell, *Feminist Theory from Margin to Center* (South End Press, 1984)
- Houston, Claire, 'How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence' (2014) 21(2) *Michigan Journal of Gender and Law* 217–272 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896291>
- Howarth, David R, *Discourse* (Open University Press, 2000)
- Hume, M, 'The Relationship between Child Sexual Abuse, Domestic Violence and Separating Families' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003)
- Hunt, Alan, 'The Big Fear: Law Confronts Postmodernism' (1990) 35(3) *McGill Law Journal* 507–540 <<https://lawjournal.mcgill.ca/wp-content/uploads/pdf/2623788-Hunt.pdf>>
- Hunter, R, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733–776 <<https://classic.austlii.edu.au/au/journals/SydLawRw/2006/31.html>>
- Hunter, Rosemary, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008)
- Husson, Christine A Desan, 'Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law' (1986) 95(5) *Yale Law Journal* 969–991 <<https://doi.org/10.2307/796379>>
- Isely, PJ, J Freiburger and R McMackin, 'In Their Own Voices: A Qualitative Study of Men Abused as Children by Catholic Clergy' (2008) 17(3–4) *Child Sexual Abuse* 201–215 <<https://doi.org/10.1080/10538710802329668>>
- Johnson, RJ, MW Ross, WC Taylor, ML Williams, RI Carvajal and RJ Peters, 'Prevalence of Childhood Sexual Abuse among Incarcerated Males in County Jail' (2006) 30(1) *Child Abuse and Neglect* 75–86 <<https://doi.org/10.1016/j.chiabu.2005.08.013>>
- Jonzon, E and F Lindblad, 'Disclosure, Reactions, and Social Support: Findings from a Sample of Adult Victims of Child Sexual Abuse' (2004) 9(2) *Child Maltreatment* 190–200 <<https://doi.org/10.1177/1077559504264263>>

Jordan, Jan, 'What Would Macgyver Do? The meaning(s) of Resistance and Survival' (2005) 11(4) *Violence Against Women* 531–559 <<https://doi.org/10.1177/1077801204273299>>

Jorgensen, Marianne W and Louise Phillips, *Discourse Analysis as Theory and Method* (SAGE Publications, 2002)

Jumper, SA, 'A Meta-Analysis of the Relationship of Child Sexual Abuse to Adult Psychological Adjustment' (1995) 19(6) *Child Abuse and Neglect* 715–728 <<https://www.ncbi.nlm.nih.gov/pubmed/7552840>>

Kaplan, A and J Svaldi, 'An Overview of Family Violence' (1979) 17(3) *Conciliation Courts Review* 1–12 <

Kaspiew, Rae, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20(2) *Melbourne University Law Review* 350–382 <<https://classic.austlii.edu.au/au/journals/MelbULawRw/1995/24.html>>

Kaspiew, Rae, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' (2007) 29 *Sydney Law Review* 131–161 <<https://www.austlii.edu.au/au/journals/SydLawRw/2007/4.pdf>>

Kaspiew, Rae, Rachel Carson, Melissa Coulson, Jessie Dunstan and Sharnee Moore, *Responding to Family Violence: A Survey of Family Law Practices and Experiences* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015) <<https://aifs.gov.au/research/research-reports/responding-family-violence>>

Kaspiew, Rae, Rachel Carson, Jessie Dunstan, John De Maio, Sharnee Moore, Lawrie Moloney, Diana Smart, Lixia Qu, Melissa Coulson and Sarah Tayton, *Experiences of Separated Parents Study* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, October 2015) <<https://aifs.gov.au/research/research-reports/experiences-separated-parents-study>>

Kaspiew, Rae, Rachel Carson, Jessie Dunstan, Lixia Qu, John De Maio, Sharnee Moore, Lawrie Moloney, Melissa Coulson and Sarah Tayton, *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) <<https://aifs.gov.au/research/research-reports/evaluation-2012-family-violence-amendments>>

Kaspiew, Rae, Rachel Carson, Lixia Qu, Briony Horsfall, Sarah Tayton, Sharnee Moore, Melissa Coulson and Jessie Dunstan, *Court Outcomes Project* (Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies October 2015) <<https://aifs.gov.au/research/research-reports/court-outcomes-project>>

Kaspiew, Rae, M Gray, R Weston, Lawrie Moloney, K Hand and Lixia Qu, *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) <<https://aifs.gov.au/research/research-reports/evaluation-2006-family-law-reforms>>

Katz, I, A Jones, B Newton and E Reimer, *Life Journeys of Victim/Survivors of Child Sexual Abuse in Institutions: An Analysis of Royal Commission Private Sessions* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) <https://www.arts.unsw.edu.au/sites/default/files/documents/Life_journeys_of_victims_survivors_of_child_sexual_abuse_in_institutions.pdf>

Kaufman, Keith, Marcus Erooga, Kelly Stewart, Judith Zatkin, Erin McConnell, Hayley Tews and Daryl Higgins, *Risk Profiles for Institutional Child Sexual Abuse: A Literature Review* (Report to the Royal Commission into Institutional Responses to Child Sexual Abuse, October 2016)

<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Risk%20profiles%20for%20institutional%20child%20sexual%20abuse%20-%20Causes.pdf>>

Kaye, Miranda, Tracey Booth and Jane Wangmann, 'Compromised 'Consent' in Australian Family Law Proceedings' (2021) 35(1) *International Journal of Law, Policy and the Family* 1–25
<<https://doi.org/10.1093/lawfam/ebab033>>

Kellogg, ND and RL Huston, 'Unwanted Sexual Experiences in Adolescents: Patterns of Disclosure' (1995) 34(6) *Clinical Pediatrics* 306–312 <<https://doi.org/10.1177/000992289503400603>>

Kelly, JB and MP Johnson, 'Differentiation among Types of Intimate Partner Violence: Reasearch Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476–499
<<https://doi.org/10.1111/j.1744-1617.2008.00215.x>>

Kelly, S and MJ Davis, 'Just Another Brick in the Wall... Or Not? A Paradigm Introduction Activity' (2011) 25(4) *Communication Teacher* 222–227 <<https://doi.org/10.1080/17404622.2011.601724>>

Kirkwood, Deborah, *"Just Say Goodbye": Parents Who Kill Their Children in the Context of Separation* (Discussion Paper No 8, Domestic Violence Resource Centre Victoria, 2012)
<<https://safeandequal.org.au/resources/just-say-goodbye/>>

Klare, Karl, 'Law-Making as Praxis' (1979) 40 *Télos* 123–135 <<https://legalform.blog/wp-content/uploads/2017/12/klare-lawmaking-as-praxis-1979.pdf>>

Klein, Dorie, 'The Etiology of Female Crime: A Review of the Literature' (1973) 8(2) *Issues in Criminology* 3–30 <<https://www.jstor.org/stable/42909683>>

Klonsky, E David and Anne Moyer, 'Childhood Sexual Abuse and Non-Suicidal Self-Injury: Meta-Analysis' (2008) 192(3) *British Journal of Psychiatry* 166–170
<<https://www.ncbi.nlm.nih.gov/pubmed/18310572>>

Knight, Rosemary A and Suzanne E Hatty, 'Theoretical and Methodological Perspectives on Domestic Violence: Implications for Social Action' (1987) 22(2) *Australian Journal of Social Issues* 452–464
<<https://doi.org/10.1002/j.1839-4655.1987.tb00837.x>>

Kogan, S, 'Disclosing Unwanted Sexual Experiences: Results from a National Sample of Adolescent Women' (2004) 28(2) *Child Abuse and Neglect* 147–165
<<https://doi.org/10.1016/j.chiabu.2003.09.014>>

Kohl, Patricia L, Melissa Jonson-Reid and Brett Drake, 'Time to Leave Substantiation Behind: Findings from a National Probability Study' (2009) 14(1) *Child Maltreatment* 17–26
<<https://doi.org/10.1177/1077559508326030>>

KPMG, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (Report, Attorney-General's Department, 5 March 2014) <<https://www.ag.gov.au/legal-system/publications/review-performance-and-funding-federal-court-australia-family-court-australia-and-federal-circuit-court-australia>>

Kuhn, Thomas S, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970)

Lacey, Nicola, 'Feminism and the Tenets of Conventional Legal Theory' (1995) 11 *Humboldt Forum Rechts* 1–7 <<https://www.rewi.hu-berlin.de/de/lf/oe/hfr/deutsch/1996-11.pdf>>

Laing, Lesley, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Report, University of Sydney, June 2010) <<http://ses.library.usyd.edu.au/handle/2123/6255>>

Laing, Lesley, 'Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System' (2016) 23(11) *Violence Against Women* 1–22 <<https://doi.org/10.1177/1077801216659942>>

Lamb, Sharon, 'Constructing the Victim: Popular Images and Lasting Labels' in Sharon Lamb (ed), *New Versions of Victims: Feminists Struggle with the Concept* (New York University Press, 1999) 108–138

Lapierre, Simon, Patrick Ladouceur, Michèle Frenette and Isabelle Côté, 'The Legitimization and Institutionalization of 'Parental Alienation' in the Province of Quebec' (2020) 42(1) *Social Welfare and Family Law* 30–44 <<https://doi.org/10.1080/09649069.2019.1701922>>

Lawrence, David M, Anna Hunt, Ben Mathews, Divna M Haslam, Eva Malacova, Michael P Dunne, Holly E Erskine, Daryl J Higgins, David Finkelhor, Rosana Pacella, Franziska Meinck, Hannah J Thomas and James G Scott, 'The Association between Child Maltreatment and Health Risk Behaviours and Conditions Throughout Life in the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S34–S39 <<https://doi.org/10.5694/mja2.51877>>

Lawson, L and M Chaffin, 'False Negatives in Sexual Abuse Disclosure Interviews: Incidence and Influence of Caretaker's Belief in Abuse in Cases of Accidental Abuse Discovery by Diagnosis of STD' (1992) 7(4) *Interpersonal Violence* 532–542 <<https://doi.org/10.1177/088626092007004008>>

Lazar, Michelle M, 'Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis' (2007) 4(2) *Critical Discourse Studies* 141–164 <<https://doi.org/10.1080/17405900701464816>>

Leckey, Robert, 'Judging in Marriage's Shadow' (2018) 26(1) *Feminist Legal Studies* 25–45 <<https://doi.org/10.1007/s10691-018-9364-5>>

Lewis, Ruth, Rebecca Emerson Dobash, Russell P Dobash and Kate Cavanagh, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10(1) *Social and Legal Studies* 105–130 <<https://journals.sagepub.com/doi/abs/10.1177/a017834>>

Litowitz, Douglas, 'Foucault on Law: Modernity as Negative Utopia' (1995) 21(1) *Queen's Law Journal* 1–36 <

Litowitz, Douglas Eliot, 'Postmodern Philosophy and Legal Thought' (PhD Thesis, Loyola University, 1997)

Little, Janine, "'Family Violence Happens to Everybody': Gender, Mental Health and Violence in Australian Media Representations of Filicide 2010–2014' (2015) 29(4) *Media and Cultural Studies* 605–616 <<https://doi.org/10.1080/10304312.2015.1025366>>

Little, Janine and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017) 1–24

Lombroso, C and G Ferrero, *The Female Offender* (D Appleton, 1897)

London, K, M Bruck, SJ Ceci and D Shuman, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11(1) *Psychology, Public Policy and Law* 194–226 <<http://www.wondercatdesign.com/mecasa/images/pdfs/disclosure%20of%20child%20sa.pdf>>

Lonsway, Kimberly, Joanne Archambault and David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* (Report, National Center for the Prosecution of Violence Against Women, 2009) <<https://www.nsvrc.org/publications/articles/false-reports-moving-beyond-issue-successfully-investigate-and-prosecute-non-s>>

Lubit, Roy, 'Valid and Invalid Ways to Assess the Reason a Child Rejects a Parent: The Continued Malignant Role of "Parental Alienation Syndrome"' (2019) 16(1) *Child Custody* 42–66 <<https://doi.org/10.1080/15379418.2019.1590284>>

Lugosi, Nicole VT, "'Truth-Telling" and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry' (2011) 44(2) *Canadian Journal of Political Science* 299–315 <<https://doi.org/10.1017/S0008423911000187>>

Lyon, TD, 'Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation' in JR Conte (ed), *Critical Issues in Child Sexual Abuse: Historical, Legal and Psychological Perspectives* (Sage, 2002) 107–138

MacKinnon, Catharine A, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987)

Malloy, LC, SP Brubacher and ME Lamb, "'Because She's One Who Listens": Children Discuss Disclosure Recipients in Forensic Interviews' (2013) 18(4) *Child Maltreatment* 245–251 <<https://doi.org/10.1177/1077559513497250>>

Malloy, Lindsay C, Thomas D Lyon and Jodi A Quas, 'Filial Dependency and Recantation of Child Sexual Abuse Allegations' (2007) 46(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 162–170 <<https://www.ncbi.nlm.nih.gov/pubmed/17242619>>

Mathews, Ben, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2014) <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Mandatory%20reporting%20laws%20for%20child%20sexual%20abuse%20in%20Australia%20A%20legislative%20history%20-%20Identification.pdf>>

Mathews, Ben, Rosana Pacella, James G Scott, David Finkelhor, Franziska Meinck, Daryl J Higgins, Holly E Erskine, Hannah J Thomas, David M Lawrence, Divna M Haslam, Eva Malacova and Michael P Dunne, 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(6) *Medical Journal of Australia* S13–S18 <<https://doi.org/10.5694/mja2.51873>>

Mathews, Ben, Hannah J Thomas and James G Scott, 'A New Era in Child Maltreatment Prevention: Call to Action' (2023) 218(6) *Medical Journal of Australia* S47–S51 <<https://doi.org/10.5694/mja2.51872>>

McCarthy, Therese, "'Battered Woman Syndrome": Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1995) 4(1) *Australian Feminist Law Journal* 141–151 <<https://doi.org/10.1080/13200968.1995.11077161>>

McElvaney, Rosaleen, 'Disclosure of Child Sexual Abuse: Delays, Non-Disclosure and Partial Disclosure. What the Research Tells Us and Implications for Practice' (2013) 24(3) *Child Abuse Review* 147–165 <<https://doi.org/10.1002/car.2280>>

McGregor, Kiah, *National Community Attitudes Towards Violence against Women Survey 2009* (Project Technical Report, Australian Institute of Criminology, 2009) <https://www.vichealth.vic.gov.au/sites/default/files/Project_Technical_Report.pdf>

McInnes, Elspeth, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' (Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 1–2 May 2003)

McInnes, Elspeth, 'System Failure and Children at Risk When Family Law, Mental Illness and Family Violence Come Together' (Conference Paper, Shared Parental Responsibility in Australian Family Law and the Impact on Children Seminar, 13–15 April 2008)

McInnes, Elspeth, 'Madness in Family Law: Mothers' Mental Health in the Australian Family Law System' (2014) 21(1) *Psychiatry, Psychology and Law* 78–91 <<https://doi.org/10.1080/13218719.2013.774688>>

McKee, Alan, 'A Beginner's Guide to Textual Analysis' (2001) 127/128 *Metro* 138–149 <

McNeil, Maureen, 'Dancing with Foucault: Feminism and Power-Knowledge' in Caroline Ramazanoglu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* (Taylor & Francis Group, 1993) 147–178

Megill, A, *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (University of California Press, 1987)

Meier, Joan S, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3–4) *Child Custody* 232–257 <<https://doi.org/10.1080/15379410903084681>>

Meier, Joan S and Sean Dickson, 'Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation' (2017) 32(2) *Law and Inequality* 311–334 <<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1576&context=lawineq>>

Milchman, Madelyn Simring, 'Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases' (2017) 14(4) *Child Custody* 211–233 <<https://doi.org/10.1080/15379418.2017.1416722>>

Milchman, Madelyn Simring, 'Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations' (2017) 14(4) *Child Custody* 234–259 <<https://doi.org/10.1080/15379418.2017.1416723>>

Milchman, Madelyn Simring, 'Commentary: Implicit Cultural Arguments Affect the Science of Shared Parenting' (2018) 15(3) *Child Custody* 218–227 <<https://doi.org/10.1080/15379418.2018.1543035>>

Milchman, Madelyn Simring, 'How Far Has Parental Alienation Research Progressed toward Achieving Scientific Validity?' (2019) 16(2) *Child Custody* 115–139 <<https://doi.org/10.1080/15379418.2019.1614511>>

Milchman, Madelyn Simring, 'Oversimplified Beliefs About Child Abuse Allegations in Custody Cases with Alienation Rebuttals: Review of Empirical Data' (2024) 21(2) *Journal of Family Trauma, Child Custody & Child Development* 165–192 <<https://doi.org/10.1080/26904586.2024.2307612>>

Mill, John Stuart, *Auguste Comte and Positivism* (Cambridge University Press, 2nd ed, 2015 [1866])

- Millar, Erica, 'Choice Makers or Failures: Providing a Genealogy of Abortion Shame and Shaming' (2015) 2 *Law and History* 114–145
<<https://search.informit.org/doi/10.3316/informit.325087893767412>>
- Moloney, Lawrie, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Research Report No 15, Australian Institute of Family Studies, May 2007)
<<https://aifs.gov.au/research/research-reports/allegations-family-violence-and-child-abuse-family-law-childrens>>
- Moussaieff Masson, J, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Penguin Books, 1985)
- Mugford, Jane, *Domestic Violence* (Violence Today No 2, Australian Institute of Criminology, 1989)
<<https://www.aic.gov.au/publications/vt/vt2>>
- Mugford, Jane, Stephen Mugford and Patricia Weiser Eastal, 'Social Justice, Public Perceptions, and Spouse Assault in Australia' (1989) 16(3) *Social Justice* 103–123
<<https://www.jstor.org/stable/29766487>>
- Mumby, Dennis K, *Narrative and Social Control: Critical Perspectives* (Sage Publications, 1993)
- Murray, S and A Powell, *Domestic Violence: Australian Public Policy* (Australian Scholarly Publishing, 2011)
- Murray, Suellen and Anastasia Powell, "'What's the Problem?": Australian Public Policy Constructions of Domestic and Family Violence' (2009) 15(5) *Violence Against Women* 532–552
<<https://journals.sagepub.com/doi/abs/10.1177/1077801209331408>>
- Nabokov, Vladimir Vladimirovich, *Lolita* (Weidenfeld and Nicolson, 1959)
- Naffine, Ngaire, 'Possession: Erotic Love in the Law of Rape' (1994) 57(1) *Modern Law Review* 10–37
<<https://doi.org/10.1111/j.1468-2230.1994.tb01919.x>>
- Naffine, Ngaire, 'Criminal Law and the Moral Education of Men' (2018) 11(2) *Fudan Journal of the Humanities and Social Sciences* 129–144 <<https://doi.org/10.1007/s40647-018-0217-z>>
- National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009–2021* (Report, March 2009) <https://www.dss.gov.au/sites/default/files/documents/05_2012/the_plan.pdf>
- National Indigenous Australians Agency, *National Aboriginal and Torres Strait Islander Early Childhood Strategy* (Report, 07 Dec 2021) <<https://www.niaa.gov.au/resource-centre/national-aboriginal-and-torres-strait-islander-early-childhood-strategy>>
- National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, Human Rights and Equal Opportunity Commission, April 1997) <<https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>>
- Nelson, Camilla, *"They Thought It Was Safe—but It Wasn't": Recognising Children's Rights as a Means of Securing Children's Safety in Australia's Family Law System* (Report, Whitlam Institute, May 2022) <<https://www.whitlam.org/publications/they-thought-it-was-safe>>

Neumann, DA, BM Houskamp, VE Pollock and J Briere, 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1(1) *Child Maltreatment* 6–16 <<https://doi.org/10.1177/1077559596001001002>>

Newlands, Lyn, 'Publishing Family Court Judgments: Problems and Solutions' (2016) 24(2) *Law, Information and Science* 81–89 <<https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/JILawInfoSci/2016/6.html>>

Nonomura, Robert, Nick Bala, Kennedy McMillan, Andrew Au-Yeung, Peter Jaffe, Lisa Heslop and Katreena Scott, *When the Family Court Becomes the Continuation of Family Violence after Separation: Understanding Litigation Abuse* (Family Violence & Family Law Brief No 15, Alliance of Canadian Research Centres on Gender-Based Violence, July 2022) <<https://alliancevaw.ca/wp-content/uploads/2023/12/Issue-15-When-the-Family-Court-Becomes-the-Continuation-of-Family-Violence-After-Separation.pdf>>

Notestein, W, *A History of Witchcraft in England from 1558 to 1718* (American Historical Association, 1911)

O'Donohue, William, Lorraine T Benuto and Olga Cirlugea, 'Analyzing Child Sexual Abuse Allegations' (2013) 13(4) *Forensic Psychology Practice* 296–314 <<https://doi.org/10.1080/15228932.2013.822245>>

O'Donohue, William, Caroline Cummings and Brendan Willis, 'The Frequency of False Allegations of Child Sexual Abuse: A Critical Review' (2018) 27(5) *Child Sexual Abuse* 459–475 <<https://doi.org/10.1080/10538712.2018.1477224>>

O'Donovan, Katherine, 'Defences for Battered Women Who Kill' (1991) 18(2) *Law and Society* 219–240 <<https://doi.org/10.2307/1410138>>

Oates, R Kim, David Jones, David Denson, Andrew Sirotnak, Nancy Gary and Richard Krugman, 'Erroneous Concerns About Child Sexual Abuse' (2000) 24(1) *Child Abuse and Neglect* 149–157 <[https://doi.org/10.1016/s0145-2134\(99\)00108-8](https://doi.org/10.1016/s0145-2134(99)00108-8)>

Office of the Status of Women, *Community Attitudes to Violence against Women* (Detailed Report, 1995)

Ogloff, James RP, Margaret C Cutajar, Emily Mann and Paul E Mullen, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-up Study* (Trends & Issues in Crime and Criminal Justice No 440, Australian Institute of Criminology, 2012) <<https://doi.org/10.52922/ti251190>>

Olson, Greta, 'Narration and Narrative in Legal Discourse' in Peter Hühn, Jan Christoph Meister, John Pier and Wolf Schmid (eds), *Handbook of Narratology* (De Gruyter, 2nd ed, 2014) 371–383

Outram, Dorinda, *The Enlightenment* (Cambridge University Press, 4th ed, 2019)

Pacella, Rosana, Alexandra Nation, Ben Mathews, James G Scott, Daryl J Higgins, Divna M Haslam, Michael P Dunne, David Finkelhor, Franziska Meinck, Holly E Erskine, Hannah J Thomas, Eva Malacova, David M Lawrence and Claire Monks, 'Child Maltreatment and Health Service Use: Findings of the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S40–S46 <<https://doi.org/10.5694/mja2.51892>>

- Paine, ML and DJ Hansen, 'Factors Influencing Children to Self-Disclose Sexual Abuse' (2002) 22(2) *Clinical Psychology Review* 271–295 <[https://doi.org/10.1016/s0272-7358\(01\)00091-5](https://doi.org/10.1016/s0272-7358(01)00091-5)>
- Paolucci, EO, ML Genuis and C Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135(1) *Psychology* 17–36 <<https://www.ncbi.nlm.nih.gov/pubmed/11235837>>
- Papaleo, V, 'When Children Refuse Contact with a Parent: The Language of Conflict and the Reciprocal Relationship between the Court and the Social Sciences' (Conference Paper, World Congress on Family Law and Children's Rights, 17–20 March 2013)
- Parkinson, Patrick, 'The Idea of Family Relationship Centres in Australia' (2013) 51(2) *Family Court Review* 195–213 <<https://doi.org/10.1111/fcre.12020>>
- Parkinson, Patrick, Judith Cashmore and Atlanta Webster, *The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation* (Legal Studies Research Paper No 11/13, Sydney Law School, February 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753404>
- Parkinson, Patrick and Judy Cashmore, *The Views of Judicial Officers* (Report to the Family Court of Australia and the Federal Magistrates Court, University of Sydney, 2006)
- Parkinson, Patrick and Judy Cashmore, 'Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges' (2007) 21(2) *International Journal of Law, Policy and the Family* 160–189 <<https://doi.org/10.1093/lawfam/ebm005>>
- Pether, P and T Threadgold, 'Feminist Methodologies in Discourse Analysis: Sex, Property, Equity' in A Lee and C Poynton (eds), *Culture and Text: Discourse and Methodology in Social Research and Cultural Studies* (Allen & Unwin, 2000) 132–151
- Pierce, Roger, 'Understanding and Adopting Discourse and Narrative Analysis', *Research Methods in Politics: A Practical Guide* (SAGE Publications, 2008) 279–305
- Polak, Shely, Tom Altobelli and Linda Popielarczyk, 'Responding to Severe Parent-Child Rejection Cases without a Parentectomy: A Blended Sequential Intervention Model and the Role of the Courts' (2020) 58(2) *Family Court Review* 507–524 <<https://doi.org/10.1111/fcre.12496>>
- Pollak, Otto, *The Criminality of Women* (University of Pennsylvania Press, 1950)
- Pond, Rachael and Mandy Morgan, 'Protection, Manipulation or Interference with Relationships? Discourse Analysis of New Zealand Lawyers' Talk About Supervised Access and Partner Violence' (2008) 18(5) *Community and Applied Social Psychology* 458–473 <<https://doi.org/10.1002/casp.948>>
- PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) <<https://www.ag.gov.au/LegalSystem/Courts/Documents/pwc-report.pdf>>
- Priebe, G and CG Svedin, 'Child Sexual Abuse Is Largely Hidden from the Adult Society: An Epidemiological Study of Adolescents' Disclosures' (2008) 32(12) *Child Abuse and Neglect* 1095–1108 <<https://doi.org/10.1016/j.chiabu.2008.04.001>>
- Pringle, Rosemary and Sophie Watson, 'Women's Interests and the Post-Structuralist State' in M Barrett and A Phillips (eds), *Destabilizing Theory: Contemporary Feminist Debates* (Polity Press, 1992) 53–73

Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) <<https://www.pc.gov.au/inquiries/completed/access-justice/report>>

Productivity Commission, *Report on Government Services 2020: Part F, Section 16: Child Protection Services* (Report, 22 January 2024) <<https://www.pc.gov.au/ongoing/report-on-government-services/2024/community-services/child-protection>>

Public Policy Research Centre, *Community Attitudes Towards Domestic Violence in Australia* (Report, Australian Government, 1988)

Public Policy Research Centre, *Domestic Violence Attitude Survey* (Report conducted for the Office of the Status of Women, Department of the Prime Minister and Cabinet, 1988)

Quadara, A, M Stathopoulos and R Carson, *Family Relationships and the Disclosure of Institutional Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse Australian Institute of Family Studies, July 2016) <<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Family%20relationships%20and%20the%20disclosure%20of%20institutional%20child%20sexual%20abuse%20-%20Treatment%20and%20support%20needs.pdf>>

Quadara, Antonia, Vicky Nagy, Daryl Higgins and Natalie Siegel, *Conceptualising the Prevention of Child Sexual Abuse* (Research Report No 33, Australian Institute of Family Studies, June 2015) <<https://aifs.gov.au/research/research-reports/conceptualising-prevention-child-sexual-abuse>>

Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) <<https://www.justice.qld.gov.au/initiatives/end-domestic-family-violence/about/not-now-not-ever-report>>

Quilter, Julia, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law and History* 89–113 <https://search.informit.org/toc/10.3316/lawhis.2015_v002>

Radford, L and M Hester, *Mothering through Domestic Violence* (Jessica Kingsley Publishers, 2006)

Rathus, Zoe, 'A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and Their Consequences' (2020) 42(1) *Social Welfare and Family Law* 5–17 <<https://doi.org/10.1080/09649069.2019.1701920>>

Rhoades, H, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16(1) *International Journal of Law, Policy and the Family* 71–94 <<https://doi.org/10.1093/lawfam/16.1.71>>

Rhoades, Helen, Reg Graycar and Margaret Harrison, 'The Family Law Reform Act 1995: The First Three Years' (2001) 15(1) *Australian Family Lawyer* 1–8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1170057>

Royal Commission into Family Violence: Report and Recommendations (Final Report, March 2016)

Royal Commission into Institutional Responses to Child Sexual Abuse: Beyond the Royal Commission (Final Report, 15 December 2017) vol 17

Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report (Parts III–VI, August 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse: Identifying and Disclosing Child Sexual Abuse (Final Report, 15 December 2017) vol 4

Royal Commission into Institutional Responses to Child Sexual Abuse: Impacts (Final Report, 15 December 2017) vol 3

Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting (Final Report, 15 December 2017) vol 7

Royal Commission into Institutional Responses to Child Sexual Abuse: Making Institutions Child Safe (Final Report, 15 December 2017) vol 6

Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Cause (Final Report, 15 December 2017) vol 2

Royal Commission into Institutional Responses to Child Sexual Abuse: Our Inquiry (Final Report, 15 December 2017) vol 1

Royal Commission into Institutional Responses to Child Sexual Abuse: Preface and Executive Summary (Final Report, 15 December 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse: Private Sessions (Final Report, 15 December 2017) vol 5

Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations (Final Report, 15 December 2017)

Royal Commission into Institutional Responses to Child Sexual Abuse: Recordkeeping and Information Sharing (Final Report, 15 December 2017) vol 8

Royal Commission on Human Relationships (Final Report, 1977)

Saunders, DG, KC Faller and RM Tolman, *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, IPV Knowledge and Custody-Visitation Recommendations* (Final Technical Report Submitted to the National Institute of Justice, October 2011) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/child-custody-evaluators-beliefs-about-domestic-abuse-allegations>>

Sawicki, Jana, 'Foucault and Feminism: Toward a Politics of Difference' (1986) 1(2) *Motherhood and Sexuality* 23–36 <<https://www.jstor.org/stable/3809894>>

Scott, James G, Eva Malacova, Ben Mathews, Divna M Haslam, Rosana Pacella, Daryl J Higgins, Franziska Meinck, Michael P Dunne, David Finkelhor, Holly E Erskine, David M Lawrence and Hannah J Thomas, 'The Association between Child Maltreatment and Mental Disorders in the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S26–S33 <<https://doi.org/10.5694/mja2.51870>>

Scutt, Jocelyne A (ed), *Violence in the Family: A Collection of Conference Papers* (Australian Institute of Criminology, 1980)

Semple, Des, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Report, Attorney-General's Department, August 2008) <<https://www.ag.gov.au/legal->

[system/publications/future-governance-options-federal-family-law-courts-australia-striking-right-balance>](#)

Shaw, Morgan, 'Misperceptions and Misapplications of Research in Family Law Cases: Myths of "Parental Alienation Syndrome" and Implanted False Memories' (2019) 16(1) *Child Custody* 1–6 <<https://doi.org/10.1080/15379418.2019.1609384>>

Shaw, Wendy Cheryl, 'The Weaver and the Web: A Foucauldian Analysis of the Discourses Which Produce Women Abusing Women in the Workplace' (PhD Thesis, University of Regina, 2012)

Shea-Hart, Amanda, 'Children Exposed to Domestic Violence: Whose "Best Interests" in the Family Court?' (PhD Thesis, University of South Australia, 2006)

Shea Hart, Amanda, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases' (2011) 46(1) *Australian Psychologist* 31–40 <<https://doi.org/10.1111/j.1742-9544.2010.00001.x>>

Siddiqua, A and FU Yousafzai, 'A Critical Discourse Analysis of the Coverage of Human Rights Violation in Indian Held Kashmir' (2019) 22(1) *Kashmir Journal of Language Research* 233–255 <<http://kjlir.pk/index.php/kjlir/article/view/107>>

Silberg, Joyanna and Stephanie Dallam, 'Abusers Gaining Custody in Family Courts: A Case Series of over Turned Decisions' (2019) 16(2) *Child Custody* 140–169 <<https://doi.org/10.1080/15379418.2019.1613204>>

Smart, Carol, *Women, Crime and Criminology: A Feminist Critique* (Routledge & Kegan Paul, 1978)

Smart, Carol, *Feminism and the Power of Law* (Taylor and Francis, 1989)

Smart, Carol, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Law and Society* 194–210 <<https://doi.org/10.2307/1410085>>

Smart, Carol, 'The Woman of Legal Discourse' (1992) 1(1) *Social and Legal Studies* 29–44 <<https://doi.org/10.1177/096466399200100103>>

Smith, H, 'Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases' (2016) 11(1) *University of Massachusetts Law Review* 64–99 <<https://scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1109&context=umlr>>

Stanko, Elizabeth, *Intimate Intrusions: Women's Experiences of Male Violence* (Routledge and Kegan Paul, 1985)

Stevens, Nicole and Sarah Wendt, 'The "Good" Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing' (2014) 24(2) *Judicial Administration* 95–107 <<https://aija.org.au/publications-introduction/journal-of-judicial-administration-jja/>>

Stoltenborgh, Marije, Marinus H van IJzendoorn, Eveline M Euser and Marian J Bakermans-Kranenburg, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence around the World' (2011) 16(2) *Child Maltreatment* 79–101 <<https://www.ncbi.nlm.nih.gov/pubmed/21511741>>

Stubbs, Julie, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women against Violence* 14–26 <https://www.researchgate.net/publication/228133936_Sexual_Assault_Criminal_Justice_and_Law_a

nd_Order?enrichId=rgreq-2f7f4f23507341816df285f787e42c73-
XXX&enrichSource=Y292ZXJQYWdlOzIyODEzMzkzNjtBUzoxMDQxMzc1MDA5MjE4NjBAMT
QwMTgzOTcyMzI5OQ%3D%3D&el=1_x_2&_esc=publicationCoverPdf>

Stubbs, Margot, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63–91 <<https://classic.austlii.edu.au/au/journals/AUJILawSoc/1986/6.pdf>>

Tang, Shin Shin, Jennifer J Freyd and Meggy Wang, 'What Do We Know About Gender in the Disclosure of Child Sexual Abuse?' (2008) 6(4) *Psychological Trauma* 1–26 <<https://doi.org/10.1080/19322880802096442>>

Tarrant, Stella, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15(4) *Legal Service Bulletin* 147–150 <

Taylor, Caroline Shannon, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995' (PhD Thesis, University of Ballarat, 2001)

Taylor, Caroline Shannon, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004)

Taylor, Chloe, 'Infamous Men, Dangerous Individuals, and Violence against Women: Feminist Re-Readings of Foucault' in Christopher Falzon, Timothy O'Leary and Jana Sawicki (eds), *A Companion to Foucault* (John Wiley & Sons, 2013) 419–435

Taylor, N and M Mouzos, *Community Attitudes to Violence against Women Survey 2006* (Full Technical Report, Australian Institute of Criminology, November 2006) <<https://www.aic.gov.au/publications/archive/archive>>

Teicher, Martin H, Jacqueline A Samson, Carl M Anderson and Kyoko Ohashi, 'The Effects of Childhood Maltreatment on Brain Structure, Function and Connectivity' (2016) 17 *Nature Reviews Neuroscience* 652–666 <<https://doi.org/10.1038/nrn.2016.111>>

Thomas, WI, *Sex and Society* (Little, Brown and Company, 1907)

Thomas, WI, *The Unadjusted Girl* (Harper and Row, 1923)

Thompson, Lucy, Bridgette Rickett and Katy Day, 'Feminist Relational Discourse Analysis: Putting the Personal in the Political in Feminist Research' (2018) 15(1) *Qualitative Research in Psychology* 93–115 <<https://doi.org/10.1080/14780887.2017.1393586>>

Thornton, Margaret, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5–29 <<https://classic.austlii.edu.au/au/journals/AUJILawSoc/1986/7.pdf>>

Thornton, Margaret, 'Portia Lost in the Groves of Academe and Wondering What to Do About Legal Education' (1991) 9(2) *Law in Context* 26–32 <<https://files.eric.ed.gov/fulltext/EJ439765.pdf>>

Thornton, Margaret, *Law and the Quest for Gender Equality* (ANU Press, 2023)

Toivonen, Cherie and Corina Backhouse, *National Risk Assessment Principles for Family and Domestic Violence* (ANROWS Insights, Australia's National Research Organisation for Women's Safety, 2018) <<https://www.anrows.org.au/research-program/national-risk-assessment-principles/>>

Trites, Roberta S, *Disturbing the Universe: Power and Repression in Adolescent Literature* (University of Iowa Press, 2004)

Trocmé, Nico and Nicholas Bala, 'False Allegations of Abuse and Neglect When Parents Separate' (2005) 29(12) *Child Abuse and Neglect* 1333–1345 <<https://doi.org/10.1016/j.chiabu.2004.06.016>>

Tyson, Danielle, *Sex, Culpability and the Defence of Provocation* (Routledge-Cavendish, 2013)

Ullman, Sarah E, 'Relationship to Perpetrator, Disclosure, Social Reactions, and PTSD Symptoms in Child Sexual Abuse Survivors' (2007) 16(1) *Child Sexual Abuse* 19–36 <<https://www.ncbi.nlm.nih.gov/pubmed/17255075>>

Ungar, M, K Barter, SM McConnell, LM Tutty and J Fairholm, 'Patterns of Abuse Disclosure among Youth' (2009) 8(3) *Qualitative Social Work* 341–356 <<https://doi.org/10.1177/1473325009337842>>

Ungar, M, L Tutty, S McConnell, K Barter and J Fairholm, 'What Canadian Youth Tell Us About Disclosing Abuse' (2009) 33(10) *Child Abuse and Neglect* 699–708 <<https://doi.org/10.1016/j.chiabu.2009.05.002>>

Walker, Lenore EA, 'Nonjudicial Influence on Family Violence Court Cases' (2020) 64(12) *American Behavioral Scientist* 1749–1767 <<https://doi.org/10.1177/0002764220956688>>

Walker, Lenore EA, Kristi L Brantley and Justin A Rigsbee, 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court' (2004) 1(2) *Child Custody* 47–74 <https://doi.org/10.1300/j190v01n02_03>

Wallace, Anne, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2015) 41(2) *Monash University Law Review* 445–468 <<https://www.austlii.edu.au/au/journals/MonashULawRw/2015/16.pdf>>

Wangmann, Jane, "'She Said ..." "He Said ...": Cross Applications in NSW Apprehended Domestic Violence Order Proceedings' (PhD Thesis, University of Sydney, 2009)

Wangmann, Jane, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695–719 <<https://www.austlii.edu.au/au/journals/SydLRev/2012/32.pdf>>

Webb, Nola, Lawrence J Moloney, Bruce M Smyth and Robyn L Murphy, 'Allegations of Child Sexual Abuse: An Empirical Analysis of Published Judgements from the Family Court of Australia 2012–2019' (2021) 56(3) *Australian Journal of Social Issues* 1–22 <<https://doi.org/10.1002/ajs4.171>>

Webster, K, K Diemer, N Honey, S Mannix, J Mickle, J Morgan, A Parkes, V Politoff, A Powell, J Stubbs and A Ward, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence against Women Survey* (ANROWS Insights No 3, Australia's National Research Organisation for Women's Safety, March 2018) <<https://www.anrows.org.au/publication/australians-attitudes-to-violence-against-women-and-gender-equality-findings-from-the-2017-national-community-attitudes-towards-violence-against-women-survey/>>

Webster, Kim, Darren Pennay, Rebecca Bricknall, Kristin Diemer, Michael Flood, Anastasia Powell, Violeta Politoff and Andrew Ward, *Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes Towards Violence against Women Survey* (Full Technical

Report, Victorian Health Promotion Foundation, 2014)
<https://www.vichealth.vic.gov.au/sites/default/files/NCAS-TechnicalReport_2014.pdf>

Weedon, Chris, *Feminist Practice and Post-Structuralist Theory* (Blackwell, 1987)

Wild, Jessica, 'Gendered Discourses of Responsibility and Domestic Abuse Victim-Blame in the English Children's Social Care System' (2023) 38 *Family Violence* 1391–1403
<<https://doi.org/10.1007/s10896-022-00431-4>>

Windsor, Matthew, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) *Leiden Journal of International Law* 743–769 <<https://doi.org/10.1017/S0922156515000412>>

Wodak, Ruth and Michael Meyer, *Methods of Critical Discourse Studies* (SAGE Publications, 3rd ed, 2015)

Worrall, Anne, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, 1989)

Wright, Katie, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10–22
<<https://doi.org/10.1016/j.chiabu.2017.08.028>>

Wright, Katie, Shurlee Swain and Kathleen McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1–9
<<https://doi.org/10.1016/j.chiabu.2017.09.031>>

Yanagida, EH and JJ Ching, 'MMPI Profiles of Child Abusers' (1993) 49(4) *Clinical Psychology* 569–576 <<https://pubmed.ncbi.nlm.nih.gov/8408685/>>

B Cases

Ainsley & Ainsley & Anor [2019] FCCA 3816 (16 December 2019)

Ainsley & Ainsley (No 3) [2023] FedCFamC1F 211 (30 March 2023)

Belton & Braim (No 2) [2019] FamCA 840 (15 November 2019)

Bentleigh & Bentleigh [2017] FamCA 294 (11 May 2017)

Bentleigh & Bentleigh [2018] FamCA 264 (27 April 2018)

Donaghey & Donaghey [2011] FamCA 13

DPP v Farquharson [2007] VSC 469 (16 November 2007)

DPP v Williamson [2000] VSC 115 (31 March 2000)

Farquharson v The Queen [2012] VSCA 296

Farquharson v The Queen [2013] HCATrans 182 (16 August 2013)

Farquharson v The Queen (2009) 26 VR 410

Featherstone & Adey [2018] FCCA 754 (29 March 2018)

Fletcher & Littlemore [2018] FamCA 1126 (20 December 2018)

Fletcher & Littlemore [2019] FamCA 119 (13 February 2019)

Hammond & Hammond [2021] FamCA 329 (24 May 2021)

Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic) [1987] HCA 56 (2 December 1987)

Inquest into the Death of Darcey Iris Freeman [2015] COR2009 000447 (30 October 2015)

Inquest into the Death of Luke Geoffrey Batty [2015] COR2014 0855 (28 September 2015)

Inquest into the Deaths of Antony Way, Tania Simpson, Kyla Rogers, Paul Rogers (2012) [2012] COR 2011/1619, COR 2011/1620, COR 2011/1640 COR 2011/1641 (21 June 2012)

Inquest into the Deaths of Heather Glendinning and Jessica Rose Cuzens and Jane Lesley Margaret Cuzens: Summary (2016) 7044/2011, 7045/2011 and 7046/11 (21 July 2016)

Inquest into the Deaths of John, Jack and Jennifer Edwards (2021) 2018/209420, 2018/208842, 2018/208843 (7 April 2021)

Johnson v Johnson [1997] FamCA 32

Lehrmann v Network Ten Pty Limited [2024] FCA 369

M v H [1996] FamCA 42

M v M (1988) 166 CLR 69 (8 December 1988)

Martin & Payne [2017] FamCA 1041 (18 December 2017)

Mazorski v Albright [2007] (2007) FamCA 520

N v S (1995) 19 Fam LR 837

P v D [2001] FamCA 1197 (29 August 2001)

Palmer & Kagan [2019] FCCA 2298 (18 December 2019)

R v Donald [1993] Morwell County Court (15 April 1993)

R v Farquharson [2010] VSC 462

R v Freeman [2011] VSC 139 (11 April 2011)

R v Johns (unreported, Supreme Court of South Australia, 26 August 1992)

R v Raby (unreported, Supreme Court of Victoria, 22 November 1994, no 94)

Re: W [2004] FamCA 768

Stacey & Woden [2015] FamCA 1107

Summers v Nathan [2005] FamCA 1406 (9 March 2005)

Tabano & Yabon [2019] FamCA 952 (10 December 2019)

Tabano & Yabon [2018] FCCA 2313 (13 August 2018)

Tabano & Yabon (No 2) [2020] FamCA 831 (1 May 2020)

Tabano & Yabon [2020] FamCA 643 (5 August 2020)

Tabano & Yabon (No 3) [2020] FamCA 923 (3 November 2020)

Tabano & Yabon (No 4) [2020] FamCA 1001 (27 November 2020)

Yabon & Tabano [2020] FamCAFC 22 (31 January 2020)

Welby & Raine [2020] FamCA 189 (7 April 2020)

Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens [2016] FCWA 6 (4 February 2016)

Yabon & Tabano [2019] FamCAFC 159 (17 September 2019)

Zaida & Badouri [2018] FamCA 645 (24 August 2018)

C Legislation and Treaties

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS (entered into force 2 September 1990)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth)

Family Law Act 1975 (Cth)

Family Law Amendment (Information Sharing) Act (No 88) 2023 (Cth)

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

Family Law Amendment Act (No 87) 2023 (Cth)

Family Law Bill 1974 (Cth)

Family Law Legislation Amendment (Family Violence and Other Measures) Act (No 189) 2011 (Cth)

Family Law Reform Act 1995 (Cth)

Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act (No 13) 2021 (Cth)

Hague Convention on the Civil Aspects of International Child Abduction, opened for signature 25 October 1980 (entered into force 1 December 1983)

Inquiries Act 2014 (Vic)

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 10 December 1999, 2131 UNTS (entered into force 22 December 2000)

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, opened for signature 19 December 2011, 330 UNTS (entered into force 14 April 2014)

D Parliamentary Materials

Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019 (Christian Porter, Attorney-General)

Commonwealth, *Parliamentary Debates*, Senate, 17 October 2023 (Anthony Chisholm, Senator)

Community Affairs References Committee (Commonwealth), Senate, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-Of-Home Care as Children* (Report, August 2004)

Community Affairs References Committee (Commonwealth), Senate, *Protecting Vulnerable Children: A National Challenge* (Second Report on the Inquiry into Children in Institutional or Out-Of-Home Care, March 2005)

Finance and Public Administration Committees (Commonwealth), Senate, *Delivery of National Outcome 4 of the National Plan to Reduce Violence against Women and Their Children* (Report, 15 December 2017)

Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015)

Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016)

Joint Select Committee on Australia's Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings: Australia's Child Support Scheme* (Third Interim Report, November 2021)

Joint Select Committee on Australia's Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021)

Joint Select Committee on Australia's Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021)

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (Commonwealth), House of Representatives, *The Family Law Act 1975: Aspects of Its Operation and Interpretation* (Report, 1992)

Legal and Constitutional Affairs Legislation Committee (Commonwealth), Senate, *Estimates* (Report, 9 February 2016)

Legal and Constitutional Affairs References Committee (Commonwealth), Senate, *Inquiry into Domestic Violence with Particular Regard to Violence against Women and Their Children* (Report, May 2020)

Prime Minister Scott Morrison (Commonwealth), House of Representatives, *National Apology to Victims and Survivors of Institutional Child Sexual Abuse* (Speech, 22 October 2018)

Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003)

Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017)

Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021)

E Media

'6th World Congress on Family Law and Children's Rights: Voices That Need to Be Heard', (Registration Brochure, Family Court of Australia, 17–20 March 2013) <<https://nswbar.asn.au/circulars/2012/dec/flc.pdf>>

'Annual Progress Reports', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/royal-commission/annual-progress-reports>>

Bitá, Natasha, 'Court in the Crossfire', *Courier Mail* (online, 16 June 2019) <<https://www.proquest.com/newspapers/court-crossfire/docview/2240824730/se-2>>

Burke, Liz, 'Social Services Minister Christian Porter Cops It for Skipping Royal Commission Hearings for Cricket', *News.com.au* (online, 15 December 2017) <<https://www.news.com.au/national/politics/social-services-minister-christian-porter-cops-it-for-skipping-royal-commission-hearings-for-cricket/news-story/8f46e08c49211a742a2f5d8bc1802a7d>>

Campbell, Kate, 'Day Two of Inquest into Deaths of Heather Glendinning, Daughters Jane and Jessica', *Perth Now* (online, 2 February 2016) <<http://www.perthnow.com.au/news/western-australia/day-two-of-inquest-into-deaths-of-heather-glendinning-and-daughters-jane-and-jessica/news-story/9cf5956c45d76eadcd0b225aaaa02656>>

Carlyon, Patrick and Paul Anderson, 'Explaining the Inexplicable: How Could Arthur Freeman Kill Darcey?', *Perth Now* (online, 29 March 2011) <<https://www.perthnow.com.au/news/explaining-the-inexplicable-how-could-arthur-freeman-kill-darcey-ng-a0636309b67ed3423e41009bfb32d742>>

Clarke, Tim, 'Port Dennison Killings: Surviving Sister Tells of Chaotic Life', *The West Australian* (online, 4 February 2016) <<https://thewest.com.au/news/australia/port-denison-killings---surviving-sister-tells-of-chaotic-life-ng-ya-333432>>

Coulthart, Ross, 'Investigation Exposes the Dad Accused of an Unsolved Crime Spree That Killed Four People', *Sunday Telegraph* (online, 7 July 2013) <<https://www.dailytelegraph.com.au/news/opinion/investigation-exposes-the-dad-accused-of-an-unsolved-crime-spree-that-killed-four-people/news-story/9e0c22589a2c76bbf88be1ba57d9efff>>

Cunningham, Melissa, 'Almost One in Ten Ballarat Priests Accused of Child Sex Abuse, Inquiry Told', *The Courier* (online, 6 February 2017) <<https://www.thecourier.com.au/story/4450467/almost-one-in-ten-ballarat-priests-accused-of-child-sex-abuse-inquiry-told/>>

'Custody Battle Behind Gold Coast Murders', *ABC News* (online, 19 May 2011) <<https://www.abc.net.au/news/2011-05-19/custody-battle-behind-gold-coast-murders/2720672>>

Davey, Melissa, 'Church Response to Melbourne Victims of Child Sexual Abuse "a Betrayal"', *The Guardian* (online, 18 August 2014) <<https://www.theguardian.com/world/2014/aug/18/church-response-to-melbourne-victims-of-child-sexual-abuse-a-betrayal>>

Davidson, Helen, 'Swimmers Felt "Insulted" When DPP Dealt with Their Abuse Claims', *The Guardian* (online, 7 July 2014) <<https://www.theguardian.com/world/2014/jul/07/swimmers-felt-insulted-when-dpp-dealt-with-their-abuse-claims>>

'Across the Night Sky', *Australian Story* (Australian Broadcasting Corporation, 28 March 2011) <<https://www.abc.net.au/austory/across-the-night-sky/9170766>>

'Child Homicide Study: Main Findings', *Dispatches* (Channel 4, 2009)

'Find an Accredited Family Dispute Resolution Practitioner', *Family Dispute Resolution Register* (Web Page, 2024) <<https://fdrr.ag.gov.au/>>

Garner, Helen, 'Mother Courage: At Home with Rosie Batty', *The Monthly Essays* (online, October 2014) <<https://www.themonthly.com.au/issue/2014/october/1412085600/helen-garner/mother-courage>>

Green, Leslie and Thomas Adams, 'Legal Positivism', *Stanford Encyclopedia of Philosophy* (Web Page, 2019) <<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>>

Gregory, Peter, 'Darcey Papers Stolen from Car', *Sydney Morning Herald* (online, 7 February 2009) <<https://www.smh.com.au/national/darcey-papers-stolen-from-car-20090206-7zzc.html>>

'In the Child's Best Interests', *Background Briefing* (ABC Radio National, 14 June 2015)

'Home', *Australasian Legal Information Institute* (Web Page) <<https://www.austlii.edu.au/>>

Innes, Prue and Andrew Gleeson, 'From the Archives: Derryn Hinch Sentenced to Jail for Contempt of Court', *Sydney Morning Herald* (online, 26 May 2019) <<https://www.smh.com.au/national/from-the-archives-derryn-hinch-sentenced-to-jail-for-contempt-of-court-20190526-p51raq.html>>

'Jehovah's Witnesses Destroyed Notes About Child Sex Abuse, Inquiry Told', *The Guardian* (online, 27 July 2015) <<https://www.theguardian.com/australia-news/2015/jul/27/jehovahs-witnesses-destroyed-notes-about-child-sex-abuse-inquiry-told>>

'The Key Events That Led to the Child Abuse Royal Commission', *ABC News* (online, 12 December 2017) <<https://www.abc.net.au/news/2017-12-12/royal-commission-child-sexual-abuse-timeline/9222816>>

Lateline and Emma Alberici, 'Brother Convicted of Sex Abuse a Church "Treasure"', *ABC News* (online, 27 November 2012) <<https://www.abc.net.au/news/2012-11-27/brother-convicted-of-sex-abuse-a-church-treasure/4393618>>

Law Council of Australia, National Aboriginal and Torres Strait Islander Legal Services, NSW Bar Association and Women's Legal Services, 'Family Court Merger Opposed by 155 Stakeholders, Including 13 Retired Judges' (Media Release, 16 February 2021) <<https://lawcouncil.au/media/media-releases/family-court-merger-opposed-by-155-stakeholders-including-13-retired-judges#:~:text=16%20February%202021,%2C%20stand%20Dalone%20Family%20Court>>

'Law Council President, Pauline Wright, Statement on Abject Failure of Domestic Violence Inquiry', (Media Release, Law Council of Australia, 20 May 2020) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-president-pauline-wright-statement-on-abject-failure-of-domestic-violence-inquiry>>

'Losing the Children', *Four Corners* (Australian Broadcasting Corporation, 16 August 2004)

Macmillan, Jade and Nour Haydar, 'Women's Safety Summit to Bring National Leaders Together to Tackle Domestic Violence', *ABC News* (online, 7 April 2021) <<https://www.abc.net.au/news/2021-04-07/womens-safety-meeting-national-summit-anne-ruston/100053944>>

Maley, Jacqueline 'Her Story: The Woman Who Said the Attorney-General Raped Her as a Teen', *Sydney Morning Herald* (online, 13 March 2021) <<https://www.smh.com.au/politics/federal/her-story-the-woman-who-said-the-attorney-general-raped-her-as-a-teen-20210312-p57a9g.html>>

Marcus, Candice 'Child Sex Abuse Royal Commission: SA Government "Knew of Sexual Abuse" at Salvation Army Boys' Home from Early 1940s', *ABC News* (online, 7 October 2015) <<https://www.abc.net.au/news/2015-10-07/sa-govt-knew-sexual-abuse-salvation-army-home-early-1940s/6833036>>

Martin, Sarah, 'Christian Porter and Linda Reynolds Demoted as PM Reshuffles Cabinet with "Fresh Lens" on Women', *The Guardian* (online, 29 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/29/christian-porter-and-linda-reynolds-demoted-as-pm-reshuffles-cabinet-with-fresh-lens-on-women>>

McKinnell, Jamie, 'Family Court Bomber Leonard Warwick Sentenced to Life in Prison', *ABC News* (online, 3 September 2020) <<https://www.abc.net.au/news/2020-09-03/family-court-bomber-leonard-warwick-jailed-for-life/12624080>>

'Inside the Canberra Bubble', *Four Corners* (Australian Broadcasting Corporation, 9 November 2020)

Nally, Alicia, 'Women's March 4 Justice: Thousands March at Rallies around Australia to Protest against Gendered Violence', *ABC News* (online, 15 March 2021) <<https://www.abc.net.au/news/2021-03-15/live-blog-canberra-women-march-4-justice-sexual-assault/13246896>>

'Framework Requirement 4 – Annual Reporting', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/our-work/lead-commonwealth-child-safe-framework/framework-requirement-4-annual-reporting>>

'Lead the Commonwealth Child Safe Framework', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do/lead-commonwealth-child-safe-framework>>

'What We Do', *National Office for Child Safety* (Web Page) <<https://www.childsafety.gov.au/what-we-do>>

'National Redress Scheme', *National Redress* (Web Page, 13 February 2024) <<https://www.nationalredress.gov.au/>>

'Preventing Violence against Women', *Our Watch* (Web Page, 2024) <<https://www.ourwatch.org.au/>>

'Release of Family Law Reviews', (Media Release, Attorney-General Robert McClelland, 28 January 2010)
<https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/AKWV6/upload_binary/akwv60.pdf;fileType=application/pdf#search=%22chisholm%20FAMILIES%22>

Sainty, Lane, 'Horror Note Found in John Edwards' Pocket an Enduring Mystery as Systemic Failures Laid Bare', *The Australian* (online, 12 April 2021) <<https://www.theaustralian.com.au/breaking-news/horror-note-found-in-john-edwards-pocket-an-enduring-mystery-as-systemic-failures-laid-bare/news-story/d57cd96c41748875cfdcf60caf95ce48>>

Scott Morrison, Prime Minister and Minister for Foreign Affairs Marise Payne, 'Press Conference' (Parliament House, 29 March 2021)

Stayner, Tom, 'How Australian Politics Has Been Shaken to the Core in the Wake of Brittany Higgins' Rape Allegation', *SBS News* (online, 2 March 2021) <<https://www.sbs.com.au/news/how-australian-politics-has-been-shaken-to-the-core-in-the-wake-of-brittany-higgins-rape-allegation>>

Stolz, Greg and Sophie Elsworth, 'Paul Rogers, Who Killed Tania Simpson and Kyla, Became Tormented Loner after Break-Up', *Courier Mail* (online, 19 May 2011)

Thomson, Andrew, 'Church Head "Moved" Abusive Priests, Says Warrnambool Detective', *The Standard* (online, 14 November 2012) <<https://www.standard.net.au/story/1075280/church-head-moved-abusive-priests-says-warrnambool-detective/>>

Tippett, Gary, 'How Love and Hate Killed Braddon', *The Age* (online, 11 March 2000) <<https://link.gale.com/apps/doc/A290636489/AONE?u=dixon&sid=AONE&xid=026a60a7>>

F Other

Bryant, Diana, Submission no 147 to Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (22 September 2014)

Family Court of Australia and Federal Circuit Court, Legal and Constitutional Affairs Legislation Committee, *Radio National Interview: In the Child's Best Interests* (Response to question taken on notice, AE16/017, 11 December 2016)

Family Law Section—Law Council of Australia, Submission no 863 to State of Victoria, *Royal Commission into Family Violence* (31 May 2015)

Justice Peter McClellan, 'Final Sitting Opening Address' (Speech, Royal Commission into Institutional Responses to Child Sexual Abuse, 14 December 2017)

Prime Minister Kevin Rudd, 'Respecting Women and Leading Men' (Speech, White Ribbon Foundation, 17 September 2008)

Royal Commission into Institutional Responses to Child Sexual Abuse (Letters Patent, 11 January 2013)

Women's Legal Services Australia, Submission no 49 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment Bill 2023* (23 June 2023)

Appendix A: Major Inquiries Conducted this Century of Relevance to the Safety of Children within Australia’s Family Law System

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
Family Law Pathways Advisory Group, <i>Out of the Maze: Pathways to the Future for Families Experiencing Separation</i> (Report, July 2001)	Recurring issues are in bold font. RECOMMENDED ○ Integration at state and federal levels so that “family law, violence and child abuse matters can be dealt with in the same place at the same time”, and such matters can be “streamlined” and “expedited”.²²¹⁴ ○ Healthy relationships education for young people.²²¹⁵ ○ “Multidisciplinary education” for judicial officers and training for all legal and non-legal professionals within the family law system.²²¹⁶ ○ A code of conduct for family lawyers featuring a “commitment to actively promote non-adversarial dispute resolution”.²²¹⁷
Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, <i>Every Picture</i>	FOUND ○ A need for “radical” reform of the family law system to support families to finalise their parenting arrangements through dispute resolution and non-adversarial tribunal processes.²²¹⁸ ○ “Widespread community dissatisfaction with current family law processes”.²²¹⁹

²²¹⁴ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 100–101, rec 28.

²²¹⁵ Ibid 26, rec 3.

²²¹⁶ Ibid 26–33, rec 4.

²²¹⁷ Ibid 26–33, rec 4.

²²¹⁸ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.69].

²²¹⁹ Ibid [4.1].

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
<i>Tells a Story</i> (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003)	Recurring issues are in bold font. ○ [A]dversarial litigation [is] “inappropriate” in family law.²²²⁰ ○ Jurisdictional fragmentation in response to issues of family violence and child protection can negatively impact children.²²²¹ RECOMMENDED ○ Creation of a Families Tribunal with jurisdiction over parenting disputes and the power to investigate allegations of violence and child abuse.²²²² ○ Implementing opportunities for children to participate in the decisions that affect them at all stages of the family law system.²²²³ ○ A presumption of equal shared parental responsibility.²²²⁴ ○ A presumption <i>against</i> shared parental responsibility in cases of ongoing conflict, substance misuse, family violence or established child abuse.²²²⁵ ○ That “a longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs”.²²²⁶
Richard Chisholm, <i>Family Courts Violence Review</i> (Report, 27 November 2009)	FOUND ○ The “vexed issue” of the interrelation of family law and state family violence proceedings.²²²⁷

²²²⁰ Ibid [4.3].

²²²¹ Ibid [4.20]–[4.27].

²²²² Ibid 104–105, recs 12, 16.

²²²³ Ibid 104, rec 13.

²²²⁴ Ibid 41, rec 1.

²²²⁵ Ibid 41, rec 2.

²²²⁶ Ibid 106, rec 19.

²²²⁷ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 80.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. ○ Every aspect of the family law system “needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively”.²²²⁸ RECOMMENDED ○ Requiring the family courts to conduct a risk assessment in each case, rather than requiring families to disclose the risks they face.²²²⁹ ○ Family violence education for legal professionals and judicial officers.²²³⁰
Family Law Council, <i>Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues</i> (Report, December 2009)	FOUND ○ Potential inconsistencies between state and territory protection orders and federal family court orders can place families at risk of further abuse.²²³¹ RECOMMENDED ○ A national court order database and improved information sharing between jurisdictions.²²³² ○ The creation of a family violence common knowledge base to be available to family law professionals, and legislative amendment to enable judicial officers to take judicial notice of it.²²³³
Rae Kaspiew, M Gray, R Weston, Lawrie Moloney, K Hand and	FOUND

²²²⁸ Ibid 5.

²²²⁹ Ibid 79, rec 2.3.

²²³⁰ Ibid 166–168, 172, recs 4.3, 4.4, 4.6.

²²³¹ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 56–60.

²²³² Ibid 61–62, rec 5.

²²³³ Ibid 45–46, rec 2.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
Lixia Qu, <i>Evaluation of the 2006 Family Law Reforms</i> (Report, Australian Institute of Family Studies, 2009)	Recurring issues are in bold font. ● Poor understandings of family violence and other forms of child abuse by family law professionals.²²³⁴ ● The ‘friendly parent’ provision and requirement that courts order costs against parties found to have “knowingly made a false allegation” has “discouraged concerns about family violence and child abuse from being raised”.²²³⁵ ● Family dispute resolution was employed by some families in the context of “very significant concerns about violence and safety”.²²³⁶
Australian Law Reform Commission and NSW Law Reform Commission, <i>Family Violence: A National Legal Response</i> (ALRC Report No 114, NSWLRC Report No 128, October 2010)	FOUND ○ Fragmentation between state and territory family violence orders and federal family law processes.²²³⁷ RECOMMENDED ○ A national court order register and increased interjurisdictional information sharing.²²³⁸ ○ The hearing of family law matters by state and territory magistrates,²²³⁹ particularly in dedicated family violence courts.²²⁴⁰ ○ Improved risk identification by family dispute resolution practitioners and family lawyers.²²⁴¹

²²³⁴ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 15.

²²³⁵ Ibid 15.

²²³⁶ Ibid 364.

²²³⁷ *Australian Law Reform Commission and NSW Law Reform Commission, Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 52.

²²³⁸ Ibid 1448–1449, 1455–1457, recs 30.16–30.18.

²²³⁹ Ibid 702–712, recs 16.1–16.3.

²²⁴⁰ Ibid 1504–1505, rec 32.2.

²²⁴¹ Ibid 997–1008, recs 21.1–21.3.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. ○ Amending section 60CG of the <i>Family Law Act</i> to prioritise safety from family violence when considering the best interests of the child in making parenting orders.²²⁴² ○ The implementation and review of family violence education for all professionals working in the family law, family violence and child protection sectors.²²⁴³ ○ Ongoing education for legal and allied professionals regarding “the substantive law and the nature and dynamics of sexual assault as a form of family violence including its social and cultural contexts.”²²⁴⁴
Family Law Council, <i>Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds</i> (Report, 2012)	FOUND • That “people from culturally and linguistically diverse backgrounds face a number of barriers in seeking access to the family law system’s legal, counselling and family dispute resolution services”.²²⁴⁵ RECOMMENDED ○ The development of cultural competency training and “good practice guides” for family law professionals working with culturally and linguistically diverse clients.²²⁴⁶
Family Law Council, <i>Improving the Family Law System for</i>	FOUND

²²⁴² Ibid 714–719, rec 16.4.

²²⁴³ Ibid 1465–1477, recs 31.1–31.5.

²²⁴⁴ Ibid 1212–1214, rec 26.3.

²²⁴⁵ Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) 7.

²²⁴⁶ Ibid 90–93, rec 2.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
<i>Aboriginal and Torres Strait Islander Clients</i> (Report, 2012)	Recurring issues are in bold font. • “Family law matters involving Aboriginal and Torres Strait Islander clients tend to be particularly complex, both because of the nature of the issues involved and because of the need to resolve them in a culturally appropriate way.”²²⁴⁷ RECOMMENDED ○ The development of cultural competency training and “good practice guides” for family law professionals working with Aboriginal and Torres Strait Islander clients.²²⁴⁸
Productivity Commission, <i>Access to Justice Arrangements</i> (Overview No 72, 5 September 2014)	FOUND ○ Families experiencing family violence face particular challenges accessing justice in the family law system.²²⁴⁹ RECOMMENDED ○ A review of family dispute resolution processes and of the support provided to families for whom family dispute resolution is not appropriate.²²⁵⁰ ○ Significant “jurisdictional and structural” change aimed at addressing the fragmented state/federal family law system, which creates barriers to justice for families experiencing family violence and child safety concerns.²²⁵¹
<i>Royal Commission into Family Violence: Report and</i>	FOUND ○ Jurisdictional fragmentation in matters involving family law and family violence.²²⁵²

²²⁴⁷ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 40.

²²⁴⁸ *Ibid* 97–98, rec 2.

²²⁴⁹ Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) 855.

²²⁵⁰ *Ibid* 861, rec 24.1.

²²⁵¹ *Ibid* 869, rec 24.3.

²²⁵² *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol IV, 32.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font.
<i>Recommendations</i> (Final Report, March 2016)	RECOMMENDED ○ That the Victorian Government advocate for: ○ Reduced state/commonwealth fragmentation in matters involving family law and family violence.²²⁵³ ○ A national family violence risk assessment framework.²²⁵⁴ ○ A national court order database.²²⁵⁵
Family Law Council, <i>Families with Complex Needs and the Intersection of the Family Law and Child Protection System</i> (Interim Report, Terms 1–2, June 2015); Family Law Council, <i>Families with Complex Needs and the Intersection of the Family Law and Child Protection System</i>	RECOMMENDED ○ Amending sections 69J and section 69N of the <i>Family Law Act</i> to “remove any doubt that children's courts, no matter how constituted, are able to make family law orders”.²²⁵⁶ ○ Improved information sharing between the family courts and state and territory courts exercising jurisdiction over child protection and family violence matters, including a national database of court orders.²²⁵⁷ ○ Improved risk assessment and management within the family law system.²²⁵⁸ ○ Improving the “family violence competency” of family law professionals, including mandatory training for lawyers to be accredited as family law specialists in child sexual assault.²²⁵⁹

²²⁵³ Ibid 215–217, rec 129.

²²⁵⁴ Ibid 215–218, rec 134.

²²⁵⁵ Ibid 215–218, rec 134.

²²⁵⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 103–104, rec 1.

²²⁵⁷ Ibid 105–106, rec 5.

²²⁵⁸ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 12–13, recs 2–5.

²²⁵⁹ Ibid 14–15, rec 11.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
(Final Report, Terms 3–5, June 2016)	Recurring issues are in bold font. ○ The establishment of a “young person advisory panel to assist in the design of child-focused family law services”.²²⁶⁰ ○ Research examining “the dynamics of matters that resolve by consent”, including the interplay of alleged risks and subsequent consent orders.²²⁶¹ ○ Implementation of the recommendations of the Family Law Council’s 2009 report²²⁶², aimed at facilitating commonwealth-state information sharing.²²⁶³ ○ Implementation of the recommendations of the Family Law Council’s 2012 reports²²⁶⁴, aimed at addressing the needs of Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities in the family courts.²²⁶⁵
Finance and Public Administration References Committee (Commonwealth), Senate, <i>Domestic Violence in</i>	RECOMMENDED ● Commonwealth-facilitated “training of all judicial officers who preside over family violence matters”.²²⁶⁶ ● Consistent training and evaluation of “family consultants who write family reports”.²²⁶⁷

²²⁶⁰ Ibid 15, rec 13.

²²⁶¹ Ibid 18, rec 21.

²²⁶² Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009).

²²⁶³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 107, rec 6.

²²⁶⁴ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

²²⁶⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 16–17, recs 16–17.

²²⁶⁶ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015) 128–129, rec 18.

²²⁶⁷ Ibid 128–129, rec 17.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
<i>Australia</i> (Final Report, 20 August 2015)	Recurring issues are in bold font. • Development of a national family violence bench book.²²⁶⁸
Queensland Special Taskforce on Domestic and Family Violence, <i>Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland</i> (Report, Department of Communities, Child Safety and Disability Services, 2015)	FOUND ○ Significant concerns held by stakeholders navigating the intersection of family violence and family law proceedings.²²⁶⁹ RECOMMENDED ○ The creation of dedicated domestic violence courts with jurisdiction over child protection and limited family law matters.²²⁷⁰ ○ Best-practice guidelines and improved family violence education for legal professionals and judicial officers.²²⁷¹
Rae Kaspiew, Rachel Carson, Jessie Dunstan, Lixia Qu, John De Maio, Sharnee Moore, Lawrie Moloney, Melissa Coulson and Sarah Tayton, <i>Evaluation of the 2012 Family Violence Amendments</i> (Synthesis Report,	FOUND • Improvements in responses to family violence and other forms of child abuse since the 2011 amendments had been “minimal at best”.²²⁷² ○ Despite the repeal of the ‘friendly parent’ provision, “substantial minorities” of parents choose not to disclose their safety concerns in family law proceedings.²²⁷³

²²⁶⁸ Ibid 128–129, recs 17–18.

²²⁶⁹ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 275.

²²⁷⁰ Ibid 279–284, recs 96–99.

²²⁷¹ Ibid 288–292, recs 103–110.

²²⁷² Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) vii.

²²⁷³ Ibid x.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
Australian Institute of Family Studies, October 2015)	Recurring issues are in bold font .
Department of the Prime Minister and Cabinet, <i>COAG Advisory Panel on Reducing Violence against Women and Their Children</i> (Final Report, 2016)	RECOMMENDED ○ Challenging gender inequality and violence-supportive norms in the public and corporate sector.²²⁷⁴ ○ Primary violence-prevention education at a community level.²²⁷⁵ ○ Training of “professionals likely to come into contact with victims and perpetrators of violence”, including legal professionals.²²⁷⁶ ○ A national family violence risk assessment framework encompassing both women and children.²²⁷⁷ ○ Improved information sharing and integration between courts, services and government agencies at commonwealth and state/territory levels.²²⁷⁸ ○ Implementation of the recommendations of the Family Law Council’s 2015 report²²⁷⁹ through increased collaboration and the development of a national court order database.²²⁸⁰
Finance and Public Administration References Committee (Commonwealth),	FOUND

²²⁷⁴ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 27–31, recs 1.1–1.2.

²²⁷⁵ Ibid 33–37, rec 1.3.

²²⁷⁶ Ibid 37–38, rec 1.4.

²²⁷⁷ Ibid 113–115, rec 6.1.

²²⁷⁸ Ibid 116–119, recs 6.4, 6.5.

²²⁷⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015).

²²⁸⁰ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 123–124, rec 6.7.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
<i>Senate, Domestic Violence and Gender Inequality</i> (Report, November 2016)	Recurring issues are in bold font. • “[A] quarter of Australians still endorse attitudes supportive of male dominance of decision-making in relationships which is identified as a risk factor for partner violence”.²²⁸¹ RECOMMENDED ○ The inquiry made no formal recommendations.
Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, <i>A Better Family Law System to Support and Protect Those Affected by Family Violence</i> (Report, December 2017)	FOUND ○ Jurisdictional fragmentation exposes parties to an increased risk of family violence.²²⁸² ○ The adversarial system is an inappropriate model to resolve family law matters.²²⁸³ RECOMMENDED ○ Enhanced information sharing via the inclusion of family law and child protection orders in the National Domestic Violence Order Scheme.²²⁸⁴ ○ Facilitating the hearing of family law issues by state and territory magistrates hearing family violence cases.²²⁸⁵ ○ Family violence risk assessment in every family law matter using a national family violence risk assessment tool.²²⁸⁶ ○ Mandatory family violence education for family law professionals.²²⁸⁷ ○ Professional development concerning family violence, cultural competency and trauma-informed practice for judicial officers hearing family law and family violence matters.²²⁸⁸

²²⁸¹ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016) [4.7].

²²⁸² Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) [3.3].

²²⁸³ Ibid [3.3].

²²⁸⁴ Ibid 155, rec 6.

²²⁸⁵ Ibid 156–158, recs 10–11.

²²⁸⁶ Ibid 150–151, recs 2–3.

²²⁸⁷ Ibid 284–287, rec 28.

²²⁸⁸ Ibid 284–286, rec 27.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. ○ The abolition of private family consultants and a national accreditation system and complaints mechanism for court-engaged family consultants.²²⁸⁹ ○ Ongoing assessment of children’s safety after family law orders are made.²²⁹⁰ ○ Implementation of the Family Law Council’s 2012²²⁹¹ and 2015–16²²⁹² recommendations regarding improving family law responses for Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities.²²⁹³ ○ Implementation of the Family Law Council’s 2015 recommendations²²⁹⁴ regarding information sharing between the federal family courts and state and territory child protection departments.²²⁹⁵
Australian Law Reform Commission, <i>Family Law for the Future: An Inquiry into the Family Law System</i> (Final Report No 135, March 2019)	FOUND ● “Children are not consistently protected from harm; nor are people experiencing family violence”.²²⁹⁶ ● Frequent amendment has rendered the Family Law Act “impenetrable”.²²⁹⁷

²²⁸⁹ Ibid 227–228, 287–288, recs 22, 30.

²²⁹⁰ Ibid 223–224, recs 20.

²²⁹¹ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

²²⁹² Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016).

²²⁹³ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 255–258, recs 24–25.

²²⁹⁴ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015).

²²⁹⁵ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 224–225, rec 21.

²²⁹⁶ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [6].

²²⁹⁷ Ibid [1.8].

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. • A “chronic lack of funding for the appointment and proper training” of judges, independent children’s lawyers and other legal professionals.²²⁹⁸ • “[A]dversarial court processes exacerbate conflict and trauma and are not in the best interests of children”.²²⁹⁹ RECOMMENDED ○ The clear prioritisation of the safety of children and carers when determining parenting matters.²³⁰⁰ ○ The establishment of state and territory family courts to preside over family law, family violence and child protection issues, and the eventual abolition of the federal family courts.²³⁰¹ ○ Improved information sharing between the family law, family violence, and child protection systems.²³⁰² ○ Consideration of judicial officers’ aptitude to hear family violence cases in all future appointments to the family courts.²³⁰³ ○ Ongoing family violence training for family law professionals.²³⁰⁴ ○ Mandatory accreditation for private family report writers.²³⁰⁵ ○ Mandatory accreditation for children’s contact services.²³⁰⁶

²²⁹⁸ Ibid [1.8].

²²⁹⁹ Ibid [1.53].

²³⁰⁰ Ibid 165–170, rec 5.

²³⁰¹ Ibid 36–38, rec 1

²³⁰² Ibid 36–38, recs 2–3.

²³⁰³ Ibid 397–401, rec 51.

²³⁰⁴ Ibid 405–409, rec 52.

²³⁰⁵ Ibid 410–414, rec 53.

²³⁰⁶ Ibid 416–421, rec 54.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. ○ The establishment of a board comprised of children and young people to inform family law policy and practice.²³⁰⁷ ○ Increased transparency and accountability through monitoring and reporting on the family law system.²³⁰⁸
Legal and Constitutional Affairs References Committee (Commonwealth), Senate, <i>Inquiry into Domestic Violence with Particular Regard to Violence against Women and Their Children</i> (Report, May 2020)	RECOMMENDED ● The inquiry made no formal recommendations.
Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, <i>Inquiry into Family, Domestic and Sexual Violence</i> (Report, March 2021)	FOUND ● The National Plan to Reduce Violence against Women²³⁰⁹ and their Children has not achieved its objective of a significant and sustained reduction in violence against women and their children.²³¹⁰ RECOMMENDED

²³⁰⁷ 395–397, rec 50.

²³⁰⁸ 388–395, rec 49.

²³⁰⁹ Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (Report, 2010).

²³¹⁰ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) ix.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
	Recurring issues are in bold font. ● Expansion of the National Domestic Violence Order Scheme to encompass family law orders and state child protection orders.²³¹¹ ● A consistent national approach to risk assessment.²³¹² ● A review of risk assessment practices “to ensure that coercive and controlling behaviour is adequately captured”.²³¹³ ● Protective behaviours and respectful relationships education campaigns targeting young people.²³¹⁴ ● Community-level awareness-raising regarding gender representation.²³¹⁵ ● The establishment of a “gender equality strategy”.²³¹⁶ ● Perpetrator behaviour change and intervention programs.²³¹⁷
Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate, <i>Improvements in Family Law Proceedings</i> (Second Interim Report, March 2021); Joint Select	FOUND ● Four common issues in family law proceedings are “extensive delays, excessive legal costs, the difficulty of enforcing court orders, and the timely and fair resolution of family violence allegations”.²³¹⁸ RECOMMENDED

²³¹¹ Ibid 343, rec 82.

²³¹² Ibid 292, rec 61.

²³¹³ Ibid 161–162, rec 27.

²³¹⁴ Ibid 243–245, recs 55, 59.

²³¹⁵ Ibid 243–244, rec 57.

²³¹⁶ Ibid 243–244, rec 58.

²³¹⁷ Ibid 293–296, recs 63–69.

²³¹⁸ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) xix.

REPORT	RELEVANT FINDINGS AND RECOMMENDATIONS
Committee on Australia’s Family Law System (Commonwealth), Senate, <i>Improvements in Family Law Proceedings</i> (Final Report, November 2021)	Recurring issues are in bold font. • The application of the family violence risk assessment initiative, the Lighthouse Project, to all parenting and property matters at all Federal Circuit and Family Court of Australia registries.²³¹⁹ • Family law courts should be made less adversarial and more child-focused.²³²⁰ • Establishment of a mechanism for reviewing and investigating allegations of wilful misrepresentation in family law proceedings.²³²¹ • Urgent legislative amendment to address a recurring misinterpretation of section 61DA of the <i>Family Law Act</i>²³²² that “equal shared parental responsibility equates to equal time with the children”.²³²³ • Regular training for all family law professionals, including judges, covering areas such as family violence and child abuse (including coercive control), trauma-informed practice, unconscious bias and “parental alienation dynamics”.²³²⁴ • Amend the <i>Family Law Act</i> to require independent children’s lawyers to follow guidelines, ensure children can express their views, and meet with the child unless exceptional circumstances prevent it.²³²⁵

²³¹⁹ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021) 7–9, rec 1.

²³²⁰ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 55–56, rec 10.

²³²¹ Ibid 65–67, rec 12.

²³²² *Family Law Act 1975* (Cth) s 61DA.

²³²³ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 86–88, rec 17.

²³²⁴ Ibid 75, rec 15.

²³²⁵ Ibid 92, rec 18.

Appendix B: Recurring Findings and Recommendations of Inquiries of Pertinence to the Protection of Children Within the Family Law System

1 Risk Assessment and the Facilitation of Disclosure

a) Findings

- Despite the repeal of the ‘friendly parent’ provision, “substantial minorities” of parents choose not to disclose their safety concerns in family law proceedings.²³²⁶

b) Recommendations

- Require the family courts to conduct a risk assessment in each case, rather than requiring families to disclose the risks they face.²³²⁷
- Every aspect of the family law system “needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively”.²³²⁸
- Improve risk identification by family dispute resolution practitioners and family lawyers.²³²⁹
- Establish a national family violence risk assessment framework.²³³⁰
- Improve risk assessment and management within the family law system.²³³¹
- Establish a national family violence risk assessment framework encompassing both women and children.²³³²
- Employ family violence risk assessment in every family law matter using a national family violence risk assessment tool.²³³³
- Establish a consistent national approach to risk assessment.²³³⁴

²³²⁶ Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) x.

²³²⁷ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 11, rec 2.3.

²³²⁸ *Ibid* 5.

²³²⁹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 997–1008, recs 21.1–21.3.

²³³⁰ Royal Commission into Family Violence: *Report and Recommendations* (Final Report, March 2016) 215–218, rec 134.

²³³¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 12–13, recs 2–5.

²³³² Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 113–115, rec 6.1.

²³³³ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 150–151, recs 2–3.

²³³⁴ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 292, rec 61.

- Conduct a review of risk assessment practices “to ensure that coercive and controlling behaviour is adequately captured”.²³³⁵
- Expand the application of the family violence risk assessment initiative, the Lighthouse Project, to all parenting and property matters at all Federal Circuit and Family Court of Australia registries.²³³⁶

2 Protecting Families with Complex Needs

a) Findings

- Family dispute resolution was employed by some families in the context of “very significant concerns about violence and safety”.²³³⁷
- Families experiencing family violence face particular challenges accessing justice in the family law system.²³³⁸
- Significant concerns are held by stakeholders navigating the intersection of family violence and family law proceedings.²³³⁹
- Improvements in responses to family violence and other forms of child abuse since the 2011 amendments had been “minimal at best”.²³⁴⁰
- “Children are not consistently protected from harm; nor are people experiencing family violence”.²³⁴¹

b) Recommendations

- Amend section 60CG of the *Family Law Act* to prioritise safety from family violence when considering the best interests of the child in making parenting orders.²³⁴²
- Conduct a review of family dispute resolution processes and of the support provided to families for whom family dispute resolution is not appropriate.²³⁴³

²³³⁵ Ibid 161–162, rec 27.

²³³⁶ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Final Report, November 2021) 7–9, rec 1.

²³³⁷ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 364.

²³³⁸ Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) 855.

²³³⁹ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 275.

²³⁴⁰ Rae Kaspiew et al., *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, Australian Institute of Family Studies, October 2015) vii.

²³⁴¹ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [6].

²³⁴² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 714–719, rec 16.4.

²³⁴³ Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) 869, rec 24.1.

- Research “the dynamics of matters that resolve by consent”, including the interplay of alleged risks and subsequent consent orders.²³⁴⁴
- Abolish private family consultants and establish a national accreditation system and complaints mechanism for court-engaged family consultants.²³⁴⁵
- Implement the Family Law Council’s 2012²³⁴⁶ and 2015–16²³⁴⁷ recommendations aimed at improving family law responses for Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities.²³⁴⁸
- Implement the recommendations of the Family Law Council’s 2012 report,²³⁴⁹ aimed at addressing the needs of Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities in the family courts.²³⁵⁰
- Clearly prioritise the safety of children and carers when determining parenting matters.²³⁵¹

3 Improved Integration of the Family Law, Family Violence and Child Protection Systems

a) Findings

- Jurisdictional fragmentation in response to issues of family violence and child protection can negatively impact children.²³⁵²

²³⁴⁴ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 157, rec 21.

²³⁴⁵ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 227–228, 287–288, recs 22, 30.

²³⁴⁶ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

²³⁴⁷ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016).

²³⁴⁸ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 255–258, recs 24–25.

²³⁴⁹ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012); Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012).

²³⁵⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 16–17, recs 16–17.

²³⁵¹ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 165–170, rec 5.

²³⁵² Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.20]–[4.27].

- Potential inconsistencies exist between state and territory protection orders and federal family court orders regulating children’s contact with their parents.²³⁵³
- Fragmentation exists between state and territory family violence orders and federal family law processes.²³⁵⁴
- Jurisdictional fragmentation exists in matters involving family law and family violence.²³⁵⁵
- Jurisdictional fragmentation exposes parties to an increased risk of family violence.²³⁵⁶

b) Recommendations

- Establish a national court order database and improved information sharing between jurisdictions.²³⁵⁷
- Establish a national court order register and increased interjurisdictional information sharing.²³⁵⁸
- Enable the hearing of family law matters by state and territory magistrates,²³⁵⁹ particularly in dedicated family violence courts.²³⁶⁰
- Implement significant “jurisdictional and structural” change aimed at addressing the fragmented state/federal family law system, which creates barriers to justice for families experiencing family violence and child safety concerns.²³⁶¹
- Reduce state/commonwealth fragmentation in matters involving family law and family violence.²³⁶²
- Establish a national court order database.²³⁶³

²³⁵³ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 57.

²³⁵⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 52.

²³⁵⁵ *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol IV, 32.

²³⁵⁶ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) [3.3].

²³⁵⁷ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 61–62, rec 5.

²³⁵⁸ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 1448–1449, 1455–1457, reccs 30.16–30.18.

²³⁵⁹ Ibid 702–712, reccs 16.1–16.3.

²³⁶⁰ Ibid 1504–1505, rec 32.2.

²³⁶¹ Productivity Commission, *Access to Justice Arrangements* (Overview No 72, September 2014) 869, rec 24.3.

²³⁶² *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) 215–217, rec 129.

²³⁶³ Ibid 215–218, rec 134.

- Improve information sharing between the family courts and state and territory courts exercising jurisdiction over child protection and family violence matters, including a national database of court orders.²³⁶⁴
- Implement the recommendations of the Family Law Council's 2009 report²³⁶⁵ aimed at facilitating commonwealth-state information sharing.²³⁶⁶
- Create dedicated domestic violence courts with jurisdiction over child protection and limited family law matters.²³⁶⁷
- Improve information sharing and integration between courts, services and government agencies at commonwealth and state/territory levels.²³⁶⁸
- Implement the recommendations of the Family Law Council's 2015 report²³⁶⁹ through increased collaboration and the development of a national court order database.²³⁷⁰
- Enhance information sharing via the inclusion of family law and child protection orders in the National Domestic Violence Order Scheme.²³⁷¹
- Facilitate the hearing of family law issues by state and territory magistrates hearing family violence cases.²³⁷²
- Implement the Family Law Council's 2015 recommendations²³⁷³ regarding information sharing between the federal family courts and state and territory child protection departments.²³⁷⁴

²³⁶⁴ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 105–106, rec 5.

²³⁶⁵ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009).

²³⁶⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015) 104–107, rec 6.

²³⁶⁷ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 279–284, recs 96–99.

²³⁶⁸ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 116–119, recs 6.4, 6.5.

²³⁶⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015).

²³⁷⁰ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 123–124, rec 6.7.

²³⁷¹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 155, rec 6.

²³⁷² Ibid 156–158, recs 10–11.

²³⁷³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, Terms 1–2, June 2015).

²³⁷⁴ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 224–225, rec 21.

- Establish state and territory family courts to preside over family law, family violence and child protection issues, and the eventual abolition of the federal family courts.²³⁷⁵
- Improve information sharing between the family law, family violence, and child protection systems.²³⁷⁶
- Expand the National Domestic Violence Order Scheme to encompass family law orders and state child protection orders.²³⁷⁷

4 Educating Communities

a) Findings

- “[A] quarter of Australians still endorse attitudes supportive of male dominance of decision-making in relationships which is identified as a risk factor for partner violence”.²³⁷⁸

b) Recommendations

- Implement healthy relationships education for young people.²³⁷⁹
- Challenge gender inequality and violence-supportive norms in the public and corporate sector.²³⁸⁰
- Implement primary violence-prevention education at a community level.²³⁸¹
- Implement protective behaviours and respectful relationships education campaigns targeting young people.²³⁸²
- Implement community-level awareness-raising regarding gender representation.²³⁸³

²³⁷⁵ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 36–38, rec 1.

²³⁷⁶ Ibid 36–38, recs 2–3.

²³⁷⁷ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 343, rec 82.

²³⁷⁸ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence and Gender Inequality* (Report, November 2016) [4.7].

²³⁷⁹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26, rec 3.

²³⁸⁰ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 27–31, recs 1.1–1.2.

²³⁸¹ Ibid 33–37, rec 1.3.

²³⁸² Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *Inquiry into Family, Domestic and Sexual Violence* (Report, March 2021) 243–245, recs 55, 59.

²³⁸³ Ibid 243–244, rec 57.

5 Educating Legal and Allied Family Law Professionals

a) Findings

- Family law professionals have poor understandings of family violence and other forms of child abuse.²³⁸⁴
- There is a “chronic lack of funding for the appointment and proper training” of judges, independent children’s lawyers and other legal professionals.²³⁸⁵

b) Recommendations

- Implement “multidisciplinary education” for judicial officers and training for all legal and non-legal professionals within the family law system.²³⁸⁶
- Implement family violence education for legal professionals and judicial officers.²³⁸⁷
- Create a family violence common knowledge base to be available to family law professionals, and legislative amendment to enable judicial officers to take judicial notice of it.²³⁸⁸
- Implement and review family violence education for all professionals working in the family law, family violence and child protection sectors.²³⁸⁹
- Implement ongoing education for legal and allied professionals regarding “the substantive law and the nature and dynamics of sexual assault as a form of family violence including its social and cultural contexts.”²³⁹⁰
- Develop cultural competency training and “good practice guides” for family law professionals working with Aboriginal and Torres Strait Islander²³⁹¹ and culturally and linguistically diverse clients.²³⁹²

²³⁸⁴ Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms* (Report, Australian Institute of Family Studies, 2009) 15.

²³⁸⁵ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [1.8].

²³⁸⁶ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26–33, rec 4.

²³⁸⁷ Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) 166–168, 172, recs 4.3, 4.4, 4.6.

²³⁸⁸ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (Report, December 2009) 45–46, rec 2.

²³⁸⁹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 1465–1477, recs 31.1–31.5.

²³⁹⁰ Ibid 1212–1214, rec 26.3.

²³⁹¹ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Report, February 2012) 97–98, rec 2.

²³⁹² Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Report, February 2012) 90–93, rec 2.

- Improve the “family violence competency” of family law professionals, including implementing mandatory training for lawyers to be accredited as family law specialists in child sexual assault.²³⁹³
- Implement commonwealth-facilitated “training of all judicial officers who preside over family violence matters”.²³⁹⁴
- Implement consistent training and evaluation of “family consultants who write family reports”.²³⁹⁵
- Develop a national family violence bench book.²³⁹⁶
- Develop best-practice guidelines and improved family violence education for legal professionals and judicial officers.²³⁹⁷
- Train “professionals likely to come into contact with victims and perpetrators of violence”, including legal professionals.²³⁹⁸
- Implement mandatory family violence education for family law professionals.²³⁹⁹
- Implement professional development concerning family violence, cultural competency and trauma-informed practice for judicial officers hearing family law and family violence matters.²⁴⁰⁰
- Consider judicial officers’ aptitude to hear family violence cases in all future appointments to the family courts.²⁴⁰¹
- Implement ongoing family violence training for family law professionals.²⁴⁰²
- Implement mandatory accreditation for private family report writers.²⁴⁰³
- Implement mandatory accreditation for children’s contact services.²⁴⁰⁴

²³⁹³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 14–15, rec 11.

²³⁹⁴ Finance and Public Administration References Committee (Commonwealth), Senate, *Domestic Violence in Australia* (Final Report, 20 August 2015) 128–129, rec 18.

²³⁹⁵ Ibid 128–129, rec 18.

²³⁹⁶ Ibid 128–129, rec 18.

²³⁹⁷ Queensland Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, Department of Communities, Child Safety and Disability Services, 2015) 288–292, recs 103–110.

²³⁹⁸ Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and Their Children* (Final Report, 2016) 37–38, rec 1.4.

²³⁹⁹ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 284–287, rec 28.

²⁴⁰⁰ Ibid 284–286, rec 27.

²⁴⁰¹ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 397–401, rec 51.

²⁴⁰² Ibid 405–409, rec 52.

²⁴⁰³ Ibid 410–414, rec 53.

²⁴⁰⁴ Ibid 416–421, rec 54.

Implement regular training for all family law professionals, including judges, covering areas such as family violence and child abuse (including coercive control), trauma-informed practice, unconscious bias and “parental alienation dynamics”.²⁴⁰⁵

6 Non-adversarial and Child-focused Decision-making

a) Findings

- There is a need for “radical” reform of the family law system to support families to finalise their parenting arrangements through dispute resolution and non-adversarial tribunal processes.²⁴⁰⁶
- The adversarial system is an inappropriate model to resolve family law matters.²⁴⁰⁷
- “[A]dversarial court processes exacerbate conflict and trauma and are not in the best interests of children”.²⁴⁰⁸

b) Recommendations

- Implement a code of conduct for family lawyers featuring a “commitment to actively promote non-adversarial dispute resolution”.²⁴⁰⁹
- Implement opportunities for children to participate in the decisions that affect them at all stages of the family law system.²⁴¹⁰
- Establish a “young person advisory panel to assist in the design of child-focused family law services”.²⁴¹¹
- Establish a board comprised of children and young people to inform family law policy and practice.²⁴¹²

²⁴⁰⁵ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 75, rec 15.

²⁴⁰⁶ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) [4.69].

²⁴⁰⁷ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) [3.3].

²⁴⁰⁸ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) [1.53].

²⁴⁰⁹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 26–33, rec 4.

²⁴¹⁰ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) 104, rec 13.

²⁴¹¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, Terms 3–5, June 2016) 15, rec 13.

²⁴¹² Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 395–397, rec 50.

- Make family law courts less adversarial and more child-focused.²⁴¹³

7 Increased Transparency

a) Recommendations

- “[A] longitudinal research project on the long term outcomes of family law judicial decisions should be undertaken and incorporated into judicial education programs”.²⁴¹⁴
- Implement ongoing assessment of children’s safety after family law orders are made.²⁴¹⁵
- Increase transparency and accountability through monitoring and reporting on the family law system.²⁴¹⁶

²⁴¹³ Joint Select Committee on Australia’s Family Law System (Commonwealth), Senate and House of Representatives, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 55–56, rec 10.

²⁴¹⁴ Standing Committee on Family and Community Affairs (Commonwealth), House of Representatives, *Every Picture Tells a Story* (Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003) 106, rec 19.

²⁴¹⁵ Standing Committee on Social Policy and Legal Affairs (Commonwealth), House of Representatives, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017) 223–224, rec 20.

²⁴¹⁶ Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 388–395, rec 49.