

## LAWYERS' INTERVIEWS WITH CLIENTS ABOUT FAMILY VIOLENCE

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### I INTRODUCTION

In recent years, there has been an increasing focus on issues concerning domestic violence in family law matters. Only 15 years ago, prior to the 1995 amendments to the *Family Law Act 1975* (Cth) ('*FLA*'), there were no references in the *FLA* to violence other than in relation to restraining orders under section 114. That changed in 1995, with a substantial number of amendments to Part VII of the *FLA* (on children) that dealt with violence. In 2006, further amendments were made to the *FLA* to strengthen the focus on family violence. There has, however, been continuing concern about the appropriateness of the current legislation, practices and procedures, and the way cases involving family violence are dealt with in the family law system.<sup>1</sup>

While the legislation requires that attention be given to family violence, courts are reliant on the evidence that is brought before them. In this regard, family lawyers play an important role first in identifying violence as an issue in the proceedings and secondly, in adducing evidence of violence.<sup>2</sup> This article reports on the practice of family lawyers about how they interview clients concerning family violence issues.

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1 Zoe Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?' (2007) 21 *Australian Journal of Family Law* 87; Tracey de Simone, 'The Friendly Parent Provisions in Australian Family Law – How Friendly Will You Need to Be?' (2008) 22 *Australian Journal of Family Law* 56; Lesley Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (University of Sydney & Benevolent Society, 2010). Concerns about how well the courts were dealing with domestic violence led the federal government to establish the Family Courts Violence Review: Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009). The Attorney-General also commissioned some empirical research on family violence: see Dale Bagshaw et al, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (Attorney-General's Department (Cth), 2010).

2 Research by the Australian Institute of Family Studies on court files found that there were significant deficiencies in this respect: See 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, 2007).

Issues of family violence may be relevant to family law proceedings for a number of reasons.

### A Family Violence and Parenting Disputes

Most obviously, issues about family violence arise in parenting proceedings since courts making decisions about the best interests of children have to take account of ‘the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’.<sup>3</sup> The legislation also requires the court to take account of ‘any family violence involving the child or a member of the child’s family’ in determining the best interests of the child.<sup>4</sup> Furthermore, judges ‘must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that ... [a parenting] order does not expose a person to an unacceptable risk of family violence’.<sup>5</sup> Family violence is also relevant to the decision whether to make an order for equal shared parental responsibility.<sup>6</sup>

### B Family Violence and Property Disputes

Violence may be relevant to property proceedings following the decision of the Full Court of the Family Court of Australia in *Kennon and Kennon*.<sup>7</sup> Although that decision opened the way for violence to be considered in property cases, the Full Court emphasised that an allowance would be made only in exceptional cases and that, for there to be an impact on the property proceedings, the history of violence must have affected a victim’s contributions.<sup>8</sup> That is hard to demonstrate. However, the alleged violence need not be frequent or constant. In *S and S*, the Full Court said, ‘[t]he term “course of conduct” is a broad one. We do not think that conduct must necessarily be frequent to constitute a course of conduct though a degree of repetition is obviously required.’<sup>9</sup>

Violence may also be the basis for an application for damages in state law.<sup>10</sup>

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3 *FLA* s 60CC(2)(b).

4 *FLA* s 60CC(3)(j).

5 *FLA* s 60CG(1)(b).

6 *FLA* s 61DA(2)(b).

7 (1997) 139 FLR 118 (*‘Kennon’*). See also *Marando and Marando* (1997) 21 Fam LR 841; Sarah Middleton, ‘Domestic Violence, Contributions and s 75(2) Considerations: An Analysis of Unreported Property Judgments’ (2001) 15 *Australian Journal of Family Law* 230. For commentary on *Kennon*, see Peter Nygh, ‘Family Violence and Matrimonial Property Settlement’ (1999) 13 *Australian Journal of Family Law* 10.

8 In *Kennon* (1997) 139 FLR 118, 140, Fogarty and Lindenmayer JJ said:

Where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party’s contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties’ respective contributions within s 79.

9 [2005] FLC 93, [65]. In this case the wife gave evidence of assaults that occurred in 1991 and 1994. She also estimated that incidents occurred about once every six months when there were physical assaults against her, either by the husband assaulting her directly or by him throwing objects at her. An adjustment of five per cent to the wife was upheld on appeal.

10 See, eg, *Giller v Procopets* (2008) 40 Fam LR 378.

Even in cases where the *Kennon* principle is unlikely to be applied, domestic violence should be seen as a relevant issue in property cases. Sheehan and Smyth found in a study of domestic violence and the outcomes of property division conducted in the late 1990s that women who suffered severe abuse were about three times more likely than women who reported no physical abuse to indicate that they had received less than 40 per cent of the total property. Women who reported physical violence, but were not afraid of their former partners, were more than twice as likely as women who reported no physical abuse to indicate that they had received less than 40 per cent of the property.<sup>11</sup> Curiously, women who experienced moderate violence and who reported being afraid of their former partners were apparently less disadvantaged than the other two groups. Women who suffered moderate abuse were, however, less likely to have entered into a private agreement with their former partner.

While these findings have yet to be replicated in other research, they do suggest that women who have experienced domestic violence may find it harder than others to negotiate a fair property settlement with a former partner. Lawyers ought to be aware of this issue when advising clients on property settlement, particularly if a client is prepared to accept much less than she would be likely to receive if the matter were litigated.

### C Separation and Processes of Dispute Resolution

Issues of family violence are also relevant to the way in which the case is handled both in the initial stages and in terms of negotiating a settlement. In the initial interview, the client may only be contemplating separation and may still be living in the same house with her or his partner. Issues of family violence will be relevant to the decision whether clients should leave the house before making the decision to separate known to the other.

Family violence will also be relevant to the decision whether to seek exemption from participating in family dispute resolution under section 60I of the *FLA* in parenting matters and whether private mediation should be used for property matters; whether the clients should be kept separate or should attend a conciliation conference together; or whether the clients should participate together in collaborative law sessions.

However, caution is needed in taking a one-size-fits-all approach to family violence. Explaining the outcomes of the landmark Wingspread Conference in 2007, Ver Steegh and Dalton write:

In many jurisdictions domestic violence cases, identified principally by evidence of physical violence, are handled on a one-size-fits-all basis ... once the label of 'domestic violence' attaches, important differences among families are often ignored ... It is commonly assumed that, in families that have experienced at least one seriously violent incident or in which there is a pattern of physical violence, the recipient of the violence should obtain a protective order ... and both partners should be prevented from using (or alternatively should be required to use)

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11 Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* 102, 112.

services such as mediation. While such assumptions may be appropriate in many cases, their rigid application is based on the mistaken assumption that all families experiencing domestic violence are alike.<sup>12</sup>

### D Lawyers' Practices in Asking about Violence

There has been little previous research on Australian lawyers' interviewing practices concerning domestic violence. Rosemary Hunter, in interviews with ten family lawyers in Victoria in 1996–97, found that lawyers' approaches ranged from always waiting for a client to volunteer the information to always asking every client. Those who did not ask routinely relied on cues from the clients before raising the subject.<sup>13</sup>

Rhoades et al, in a study of the relationships between family dispute resolution practitioners and lawyers, found that dispute resolution practitioners identified family violence in a greater proportion of their cases than lawyers did.<sup>14</sup> Double the proportion of dispute resolution practitioners estimated that 50–75 per cent of their cases involved violence issues (22.9 per cent of dispute resolution practitioners compared with 11.9 per cent of lawyers). Just over half (55.6 per cent) of the lawyers indicated that 0–25 per cent of their cases involve violence issues, whereas a third (33.6 per cent) of dispute resolution practitioners nominated the same proportion. Violence was not defined in this survey, so participants were left to give the term their own meanings.<sup>15</sup>

The Australian Institute of Family Studies' evaluation of the family law reforms also found that lawyers were less likely to identify family violence or abuse in their clientele of families with children than were the staff of Family Relationship Centres ('FRC').<sup>16</sup> About a third (32.3 per cent) of FRC staff said family violence or abuse was an issue in about half their cases compared with less than a quarter (23.8 per cent) of lawyers. Conversely, 26 per cent of lawyers said family violence was an issue in less than a quarter of their cases, compared with 10.4 per cent of FRC staff.<sup>17</sup>

One reason for the differences in outcomes between family dispute resolution practitioners and lawyers may be that family dispute resolution practitioners are specifically required to look for domestic violence, as it is one of the issues to be assessed in deciding whether the case is suitable for mediation. Family lawyers have no such professional requirement to explore whether there has been a history of violence.

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12 Nancy Ver Steegh and Clare Dalton, 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454, 456.

13 Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court* (Cambria Press, 2008) 215–16.

14 Helen Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) 45  
<<http://www.law.unimelb.edu.au/files/Inter-ProfessionalRelationshipsStudyFinalReport.pdf>>.

15 *Ibid* 36, n 126.

16 Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institute of Family Studies, 2009).

17 *Ibid* 234.

It is also possible that the results reflect differences between professional groups in definitions of family violence.<sup>18</sup> Violence may, on the one hand, be defined as physical violence or the threat of it, or may be given an extended meaning to include all kinds of abuse such as social, financial, verbal and emotional abuse.<sup>19</sup> Family lawyers may well be inclined to think in terms of the (more limited) statutory definition.<sup>20</sup> There may well also be differences between practitioners in whether they assess violence in terms of incidents or in terms of indicia of power and control.

## II METHOD

Forty-two family lawyers, 21 men and 21 women, were asked about various issues concerning family violence, including how they explored the issue with their clients, as part of a longer interview for a study on children's participation.<sup>21</sup> All the lawyers practiced in Sydney, New South Wales. Most of these lawyers were very experienced practitioners. Twenty-two had experience as independent children's lawyers.

The aim of these questions was to examine the extent to which lawyers relied on clients to volunteer information about violence. Not all practitioners were asked identical questions, as the interviews ranged over a number of different issues, some practitioners had more time available than others, and the answers to one question might lead to a discussion of other issues. However, all but three

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- 18 Rhoades et al, above n 14, 46. For example, Max Wright, a mediator, has argued that in some circumstances, parental conflict should be regarded as falling within the definition of 'family violence': Max Wright, 'Best Interests, Conflict and Harm – A Response to Chisholm and Parkinson' (2008) 22 *Australian Journal of Family Law* 72. The definition of 'violence' in the recent study led by Dale Bagshaw and Thea Brown was particularly wide, including, for example 'criticising or judging my behavior', 'putting me down socially' and 'having sex with others': Bagshaw et al, above n 1, vol 2, 10.
- 19 See, eg, Family Violence Act 2004 (Tas) s 7, in which the definition of family violence includes verbal abuse, economic abuse and emotional abuse; *Family Violence Protection Act 2008* (Vic) s 5 in which the definition includes emotional, psychological and economic abuse. Emotional or psychological abuse includes behaviour which is 'offensive to the other person': s 7. See also *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1). The Australian Law Reform Commission ('ALRC') and the New South Wales Law Reform Commission ('NSWLRC') has proposed an expansive definition of violence based on the Victorian model: ALRC and NSWLRC, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9 (2010) ch 4.
- 20 *FLA* s 4 defines family violence as 'conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety'.
- 21 These interviews were conducted in 2004, in the course of a study on children's participation in resolving disputes about parenting after separation. The lawyers were asked some questions concerning their practice of family law prior to the questions about children's participation. Most of the interviews were conducted by Richard Crallan and some were conducted by Tharini Mudaliar. For the full study, see Patrick Parkinson and Judith Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008). This research was supported under the Australian Research Council's Discovery Projects scheme (Project No DP210033) and approved by the Human Ethics Committee of the University of Sydney.

were asked a question along the following lines: ‘Do you always explore whether there are issues of violence in initial interviews with female clients?’. All but eight either mentioned in response their practice in terms of interviewing male clients, or were asked a follow-up question concerning their practices with male clients. In total, therefore, 39 lawyers (20 women and 19 men) responded about whether they always interview women about violence, and the answers of 34 lawyers (20 women and 14 men) also referred to their interviews with male clients.

### III RESULTS

#### A Asking about Violence as a Standard Question

There are four possible responses that lawyers could give when asked if they routinely ask about violence: (i) both males and females may be asked routinely; (ii) females may be asked routinely but not males; (iii) the question may not be asked routinely; and (iv) males may be asked routinely but not females. The survey demonstrated a variety of responses which included all four possible answers.

Just over half the lawyers who answered the question (21 out of 39; 54 per cent) stated that they routinely ask females whether there was a history of violence. There was a trend for more women to ask this question routinely than men: 12 out of 20 female lawyers (60 per cent) compared with 9 out of 19 male lawyers (47 per cent). Nineteen of the 34 lawyers (56 per cent) who answered the question stated they would routinely ask males whether there was a history of violence, whether or not the assumption behind the question was that the male was the perpetrator. Eleven out of 20 female lawyers (55 per cent) asked this question routinely compared with eight out of 14 male lawyers (57 per cent).

Three lawyers (two female and one male) routinely asked women about violence but did not routinely ask men. One female lawyer asked men routinely about violence but only asked women routinely about whether there were domestic violence orders. She would not otherwise ask routinely about any history of violence.

There were two female solicitors who gave ambivalent answers, for example:

*Do you always explore whether there are issues of violence?*

Always.

*If they haven't volunteered the information do you ask them anyway?*

I will pick up on things. Maybe. If they say something. If an ordinary situation presented itself to me and they just went through the scenario and I could detect nothing in it. It is always in the back of my mind – but I don't raise it.

These two lawyers were classified as not asking routinely.

## **B Reasons for Not Asking about Violence**

There were a number of reasons given, and assumptions expressed, which explained why some lawyers did not routinely ask clients whether there was a history of violence.

### **1 *The Belief That Clients Would Volunteer Information about a History of Violence If It Had Occurred***

Some male lawyers held the belief that if a female had been subjected to violence in the history of the relationship, then she would usually volunteer that information to the lawyer:

'I'll leave it to them to volunteer it. Or if they say anything that I suspect there might be some violence as an answer to why they're telling me what they're telling me, I'll ask whether anything's happened.'

'My experience is that most women will disclose to you if there's been violence in the relationship because quite often that's the reason they come to see you. ... But also, it's very unusual for the client not to tell you. Sometimes they hold out on you. I normally don't raise it specifically.'

'It is one of the first things they will tell you ... I would tend to think that in most instances, if the husband is violent, the women will say so quickly.'

'If they don't raise it, I don't. Because I find if it's something serious and worrying them, they will always tell you that. And I don't believe in trying to put words into their mouth on things like that. Because they tell you.'

The assumption that a client was likely to volunteer the information was also seen in views on males volunteering the information about being victims of violence.

'I think that it's certainly less common for me to ask a bloke if he's been the victim of domestic violence. I must say that men who have been the victims of domestic violence bring it up.' [Male lawyer]

'If there was ever somebody coming in here saying they'd been a victim, they'd be telling you straight up, I think.' [Female lawyer]

This is in stark contrast to another lawyer whose experience was that males tend not to volunteer that they have been a victim of violence. In this case, the lawyer relies on intuition to ascertain whether there may have been issues of violence.

I don't suppose I do [ask males]. I mean I occasionally get the male who's been assaulted by the female ... but usually there will be some indication. But men generally don't talk about it, they don't volunteer the information. [Female lawyer]

### **2 *The Belief That You Would Be Able to Tell If There Was Violence by Looking at the Client***

Another presumption made was that the lawyer would be able tell if there was a history of domestic violence by the perceived nature of the client. One lawyer stated that her instinctual and assumptive questioning is based on her expectations of what a domestic violence 'victim' is 'like':

No, I can't say that I ask the question. I think you get a pretty good idea what the client's like. If I had a female whom I thought was acting very much [as if] the husband was a bully, I'd ask. [Female lawyer]

Another lawyer also stated that for him appearance is a factor in asking whether a male had been the perpetrator of violence based on whether he would fit the stereotypical mould of a violent man:

normally I wouldn't specifically raise it with them ... I know it's probably very judgmental, but if the person – the guy in front of me – looks like he might be a bit of a thug, then you might well ask them about it. That's a very judgmental sort of thing to say, but you know if you've got a guy who's got a very ruddy face and he's a big boofy sort of ex-footballer type, and he's quite clearly a heavy drinker or something like that then it often might follow and you might ask them are there any issues that your wife might raise about this sort of thing. So I just need to know. [Male lawyer]

### **3 The Socioeconomic Status of the Client**

Another factor that influenced whether certain lawyers would ask about violence was the socioeconomic position of the client. One woman lawyer indicated that she wouldn't ask whether there was a history of violence unless her instinct is triggered based on a factor such as socioeconomic status that would give cause to ask:

Well, I don't do it as a standard. But there would be clients who would present where you'd think it's probably more likely, but then that's ... sort of a presumption of mine, that domestic violence is with certain economic groups or whatever, so – I mean I guess you just sort of get an instinct, or what they say sort of triggers you for that, and other people wouldn't. So if it didn't feel appropriate to ask it, I guess I wouldn't unless I thought there was some reason to ask them.

This view that violence was more likely to occur – or at least more likely to be revealed – in lower socioeconomic groups, was also expressed by another female lawyer:

I think usually, particularly there are certain areas of the community where violence is more predominant and that is definitely [Housing] Commission areas and things. I'm not saying that violence occurs more there, but it's just if violence occurs on the North Shore, it's a lot less likely that anyone even talks about it, it's just behind closed doors.

### **4 Responding to Client Cues**

Several lawyers indicated that they would only ask about violence if there was something in the initial interview which aroused concern about possible violence. This might be, for example, the nature of the contact order being sought or the manner in which the client communicates the family situation (without any reference to violence) to the lawyer. This involves reliance on a high level of sensitivity by the lawyer. For example:

'It depends ... [if] it's the usual contact orders then no, I wouldn't enquire as to whether there's any violence. If on the other hand they're reluctant to give the father contact, or the way they want the contact order made indicates that they don't want to have any further role in corresponding with or talking to the husband, that may make me question if there has been any violence. ... but I would only ask those questions if they were proposing to give the



father minimal contact... But as a matter of course, no, I wouldn't ask it.' [Male lawyer]

'If there was nothing that came out in the interview that alerted me to a problem or something in the background, then I wouldn't just ask it as a bold-faced question. I would expect them to come up with it or there would be something that triggers me ... I think I would say there is something else you are not telling me because this is making sense or that's not making sense. ... But as a bold-faced question – does your husband bash you? No.' [Male lawyer]

'Yes, if there's any conflict at all. I wouldn't bother seeking that information from either client if they were no longer living together. And one didn't indicate any fear of the other. But if they were still residing together, or on the same premises or there was an indication of fear, or an indication of someone not being able to feel free to do what they think is available to them, then I would ask.' [Female lawyer]

One female lawyer took a similar view in relation to interviewing male clients. She would explore to some extent, but would only pursue the issue further if the answers to the exploratory questions indicated there might be more to be revealed:

Oh, I've questioned male clients as to whether there has been violence – whether they have used violence. Whether it was fairly heated towards the end – might be towards the end. Most people admit towards the end it might be a bit heated and then you can back track. If there is no hint of it – why raise it? If there is no complaint about the male or the woman, why raise it? I'm not going to go where there is no need to go.

### C Victims and Perpetrators

In speaking about violence, lawyers tended to divide men and women into victims and perpetrators. Mostly, it was assumed that women are victims and men are perpetrators. However, if acknowledgement was made that women could also be violent towards their partners or former partners, the same dichotomisation remained. The assumption was then made that the man is the 'victim'. There was not an evident awareness that an argument between the parties might erupt into mutual violence, or that both parties might have been violent towards each other on different occasions.

The lawyers who asked questions about violence routinely typically did so in a neutral way with both women and men, and without making assumptions about who might be responsible for the violence. For example, one lawyer described his practice in this way:

*Now do you always explore whether there are issues of violence with female clients?*

And male clients. Yes, at the first interview.

*You always do?*

Yes.

*Is that males as perpetrators or males as victims?*

Both. It's a non-gender based question that is asked in every matter.

Another female lawyer recognised the way in which violence can erupt out of heated arguments, without assuming that the male was responsible:

I just say ‘what is your communication like?’ and they may say we have terrible arguments and I would say do they ever result in violence? What sort of level of abuse do we have? What did he say? What did she say? I always ascertain that – always. Even in property cases I ask.

However, a minority of lawyers indicated that when questioning men, they were seeking to ascertain whether men had been perpetrators of violence, or at least had been accused of violence:

‘With the husband or the father, I raise [it] to see what allegations the other side may raise and that would be part of the allegations that the other party may raise so I raise with them ‘What do you think your former spouse is going to say about you in the Family Court? Is she going to say that you are an alcoholic? That you never were home? That you were violent during the relationship? Are there some behavioural issues? I think that’s just part of the preparation of your case so that you are not caught offside.’ [Male lawyer]

‘I’ll ask both parents, regardless, if I’m acting for dads as well, because you may as well know what’s coming.’ [Male lawyer]

‘You say that to the men, you say, this stuff’s going to come out, it’s really better to address it, to say what you’ve done about it, rather than not acknowledge these things and get it all thrown at you later, when you’ll be in a very weak position to handle it.’ [Female lawyer]

There was a tendency for some lawyers to discount the idea that women could behave violently towards men.

‘Sometimes a client comes in and they feel like they have been the victim ... but generally we come from the preconceived idea that the male is the perpetrator rather than the victim.’ [Male lawyer]

‘You’d pick that up if they were the victim. I would have seen one or two cases in the whole of my practice.’ [Male lawyer]

‘[I]t’s just more likely that a man is the perpetrator. In my experience, often when a bloke is saying that [the woman was violent], generally I’m not sure whether there is too much substance to what they’re saying.’ [Male lawyer]

Three lawyers referred specifically to men as the victims of violence. One male lawyer stated that he had come across many male victims despite admitting that he was less likely to ask if men were victims of violence because ‘men who have been the victims of violence bring it up’: ‘I’ve had many blokes actually say, she’s woken me up in the middle of the night and spat in my face and slapped me, and punched me, and all those sorts of things.’

Another male lawyer referred to what he had seen in his own practice, but thought that the courts minimised violence against men:

More often you hear complaints from women, but equally we’ve had a number of men who have complained about violence from their wives and again there’s a perception I think, in the judiciary, that it’s not the same serious social problem ... I had a client who was bashed with a brick by his wife. One at the moment where the wife stabbed him in the chest and he responded, to deflect the blow and disarm her, and he was charged with assault for using excessive force and the wife wasn’t charged at all ... you do have that perception that violence by men on women is somehow more serious than the other way round.

In referring to violence towards men, lawyers typically referred to physical aggression only, whereas many of them spoke in broader terms about the kinds of behaviours that women may experience and which can be classified as forms of violence.

## IV DISCUSSION

Like Rosemary Hunter's study in Victoria in the 1990s,<sup>22</sup> this research indicated a range of different practices of family lawyers in terms of asking about domestic violence. Just over half the lawyers in this study indicated that they routinely asked both female and male clients about violence, with a trend for female lawyers being somewhat more likely to ask women than male lawyers.

### A Screening for Violence

The finding that those lawyers who do not routinely ask questions think that victims will readily disclose it is consistent with the research by Kaye, Stubbs and Tolmie, published in 2003.<sup>23</sup> As part of their study on domestic violence and contact arrangements, they interviewed 22 individuals and representatives of organisations who were professionally involved in the field, including lawyers, counselors, refuge workers, domestic violence court assistant scheme workers and supervised contact centre workers. There were five solicitors in the interview group.<sup>24</sup> All but one of these professionals believed that their clients would readily disclose violence to them.<sup>25</sup>

However, in that study, the clients told a different story. Of 31 women who spoke about their experiences of telling professionals about the violence, 22 indicated that they found it very difficult, at least initially. Ten said that this was wholly or partly because they found it hard to talk about something so personal or embarrassing, or that it was something they were in denial about themselves; the other 12 said that this was because some of the professionals had not given them an opportunity, did not appear interested, did not understand domestic violence, or did not believe them. Several referred, in particular, to the difficulties they had telling their lawyers.<sup>26</sup>

The evaluation of the 2006 family law reforms by the Australian Institute of Family Studies showed that over 70 per cent of lawyers rated their capacity to screen for the presence of violence or abuse as high or very high, with almost all of the remainder rating their capacity as moderate.<sup>27</sup> As the Kaye, Stubbs and Tolmie study demonstrates, the fact that lawyers and other professionals feel confident of their ability to detect violence, and believe that clients will feel comfortable in disclosing it, does not necessarily mean that this is so.

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22 Hunter, above n 13.

23 Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence' (Working Paper No 4, Families, Law and Social Policy Research Unit, Griffith University, 2003).

24 Ibid 20–1.

25 Ibid 43.

26 Ibid 39–42. On the difficulties of talking about violence generally, see Hilary Astor, 'The Weight of Silence: Talking about Violence in Family Mediation' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 174.

27 Kaspiew et al, above n 16, 238–9.

There is also some evidence from a relatively early Australian study of mediation clients in 1996 to suggest that many clients who reported some form of family violence or abuse in an exit survey after mediation had not had the issue identified by the mediation service.<sup>28</sup> In some cases, they did not disclose it because they did not see a need to do so. They classified the behaviour of their former partner as emotional abuse, or as a once-off physical incident that did not impair their capacity to participate in mediation.<sup>29</sup> However, in other cases, women were not asked about violence or abuse in the mediation intake, and did not reveal it of their own accord, yet they disclosed substantial, and in some cases, current abuse, to the researchers. Others revealed serious and undisclosed harassment and threats between the time of the intake and the first joint session, without disclosing this to the mediator.<sup>30</sup>

The findings in the Keys Young study are consistent with findings from research with clients of court-mandated mediation in child custody disputes in California reported in 2002. Three-quarters (76 per cent) of those surveyed reported at least one indicator of prior violence between the parents. However, the mediators, who filled in the surveys independently of the parties, identified violence as an issue in only 36 per cent of those cases in which violence had been reported by at least one parent. The report concluded that '[e]ven in cases with a history of relatively severe acts of domestic violence or restraining orders, the parents surveyed often did not raise issues of violence before or during mediation'.<sup>31</sup>

In many cases, issues of violence will emerge at some stage because of the need to disclose family violence orders when making applications to the court. However, some women clearly make strategic decisions *not* to apply for family violence orders. Melville and Hunter reported in 2001 that in the 95 cases where solicitors' files contained allegations of domestic violence, 38 per cent involved instances where a family violence order had not been obtained.<sup>32</sup>

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28 Keys Young, 'Research/Evaluation of Family Mediation Practice and the Issue of Violence' (Report, Legal Aid and Family Services, Attorney-General's Department (Cth), 1996). The issue was also explored in the study of family violence led by Bagshaw and Brown: Bagshaw et al, above n 1. Respondents to an online survey were asked:

If you have experienced family violence AND your post-separation matters have been dealt with since the 2006 changes to the Family Law Act AND you have accessed a Family Dispute Resolution (FDR) service, were you given an exemption from using the service or did you decide jointly with the FDR practitioner to proceed with mediation or counselling?

One option given to respond to this question was that 'family violence was not disclosed when we attended a FDR service'. Only 5.4 per cent of respondents to this question indicated that they did not disclose family violence, but two-thirds of those who answered the question said it did not apply to them. The researchers suggested that because of the long and wordy nature of the question, many respondents may not have understood it: Bagshaw et al, above n 1, vol 2, 213–14.

29 Keys Young, above n 28, 90–1.

30 Ibid 90.

31 Judicial Council of California, *Domestic Violence in Court-Based Child Custody Mediation Cases in California*. (2002) 9.

32 Angela Melville and Rosemary Hunter, "'As Everybody Knows': Countering Myths of Gender Bias in Family Law' (2001) 10 *Griffith Law Review* 124, 127–8.

The Family Law Council and the Family Law Section of the Law Council of Australia issued guidelines on practice in family law in 2004. These state that lawyers should 'provide the client with an opportunity to talk about violence issues if they wish'.<sup>33</sup> In an appendix, further advice is given about how it should be done.<sup>34</sup> Since some clients may need advice about applying for family violence orders, and it is relevant to so many aspects of family law practice, it might be thought that the exploration of issues of violence should be standard. However, the Australian Institute of Family Studies noted in its report evaluating the 2006 family law reforms that '[w]hile some legal services (for example legal aid commissions) and practitioners screen routinely, no uniform approach or protocol appears to be applied'.<sup>35</sup>

Screening and assessment tools have, however, been developed for the Family Relationship Centres.<sup>36</sup> The Family Law Council in its 2009 report on family violence emphasised the importance of a common framework for screening and risk assessment across the family relationship and family law system and recommended that such a consistent framework for screening and risk assessment be developed.<sup>37</sup>

## B The Victim-Perpetrator Dichotomisation

Many of the lawyers in this study also had a binary approach to the issue of domestic violence. There are victims and there are perpetrators. This professional understanding of domestic violence reflects the dominant discourse about violence used by advocacy groups and in reports to government.<sup>38</sup> To the extent that it was acknowledged that women could be aggressive towards their partners, the assumption was typically made that the man was the 'victim'.

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33 Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004) 49

<<http://www.familylawsection.org.au/resource/FINAL-Bestpracticeguidelinesforlawyers.pdf>>. Similar calls have been made overseas. See Nan Seuffert, 'Lawyering for Women Survivors of Domestic Violence' (1996) 4 *Waikato Law Review* 1, 26: 'Lawyers should consider asking routinely whether female clients seeking separation or divorce feel safe with the process or are in need of protection'. See also Kathleen Waits, 'Battered Women and Family Lawyers: The Need for an Identification Protocol' (1995) 58 *Albany Law Review* 1027.

34 Family Law Council and Family Law Section of the Law Council of Australia, above n 33, 68.

35 Kaspiew et al, above n 16, 238.

36 Gail Winkworth and Morag McArthur, 'Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line' (Attorney-General's Department (Cth), July 2008). See also Rochelle Braaf and Clare Sneddon, 'Family Law Act Reform: The Potential for Screening and Risk Assessment for Family Violence' (Issues Paper No 12, Australian Domestic and Family Violence Clearinghouse, February 2007).

37 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* (2009) 43.

38 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* (2009) ('*Time for Action*'); Chisholm, above n 1.

This victim-perpetrator dichotomisation is discordant with much of the social science research on aggression within intimate relationships.<sup>39</sup> Such research indicates that there is a spectrum of family violence, and for many researchers, this is best understood in terms of different types of violence.<sup>40</sup> There are numerous categories which have been identified. One is coercive, controlling violence in which physical abuse is part of a larger pattern of dominance and oppression involving other forms of abuse as well. The perpetrators are almost always male. This is how domestic violence is often understood. Indeed, not surprisingly in terms of their remit, the National Council to Reduce Violence against Women and their Children defines domestic violence almost exclusively in these terms.<sup>41</sup>

While male-perpetrated coercive controlling violence is most likely to have an influence on the outcome of judicially determined family law cases, the most common pattern of violence, in general community surveys, has variously been classified as ‘conflict instigated violence’,<sup>42</sup> ‘common couple violence’,<sup>43</sup> ‘situational couple violence’<sup>44</sup> or, in the language of the United States Wingspread Conference, ‘violence driven by conflict’.<sup>45</sup> The Wingspread Conference defined this as follows:

This type of violence takes place when an unresolved disagreement spirals into a violent incident, but the violence is not part of a larger pattern of coercive control. It may be initiated by either the male or female partner. However, female victims are more likely to suffer negative consequences, including injury, than are men.<sup>46</sup>

The language of ‘perpetrator’ and ‘victim’, ‘abuser’ and ‘abused’ does not easily fit with violence driven by conflict, when both men and women may be

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39 While much of this research is from North America, there seems no reason to believe it is not generalisable to other countries. The same gender patterns are certainly seen in Australia.

40 Joan Kelly and Michael Johnson, ‘Differentiation among Types of Intimate Partner Violence: Research Update and Implication for Interventions’ (2008) 46 *Family Court Review* 476; Nancy Ver Steegh, ‘Differentiating Types of Domestic Violence: Implications for Child Custody’ (2005) 65 *Louisiana Law Review* 1379; Michael Johnson and Kathleen Ferraro, ‘Research on Domestic Violence in the 1990s: Making Distinctions’ (2000) 62 *Journal of Marriage and Family* 948; Janet Johnston and Linda Campbell, ‘A Clinical Typology of Interparental Violence in Disputed-Custody Divorces’ (1993) 63 *American Journal of Orthopsychiatry* 190.

41 *Time for Action*, above n 38, 138: the terminological explanation is as follows:

The term ‘domestic violence’ refers predominantly to abuse of a person, usually a woman, by their intimate partner. While there is no single definition, the central element of ‘domestic violence’ is an ongoing pattern of behaviour aimed at controlling one’s partner through fear, for example by using behaviour which is violent and threatening. It occurs between people who have, or have had, an intimate relationship. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over women and children, and can be both criminal and non-criminal.

42 Peter Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans’ (2008) 46 *Family Court Review* 500, 501.

43 Michael Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women’ (1995) 57 *Journal of Marriage and Family* 283, 285.

44 Kelly and Johnson, above n 40, 479.

45 Ver Steegh and Dalton, above n 12, 458.

46 *Ibid.*

involved in these violent altercations.<sup>47</sup> Attributing responsibility to one person alone is to misrepresent the situation in these cases. It is possible that some of what is spoken about in lawyers' offices, and recorded in affidavits, is likely to be violence of this kind. Perhaps lawyers, and other professionals working in the field, need to find a new language to describe this pattern of violence, without falling into the binary dichotomisation between victims and perpetrators.

### C Gender and Aggression in Intimate Relationships

It is not correct to assume that women are almost always victims and men almost always perpetrators,<sup>48</sup> except where there is coercive controlling violence. Sheehan and Smyth, reporting in 2000 on interviews with a general population of separated parents, found that 65 per cent of women and 55 per cent of men indicated that they had experienced violence against them within a legal definition. Fifty-three per cent of women and 24 per cent of men reported violence or threats of violence that induced fear; 14 per cent of women, and three per cent of men reported injuries resulting from violence that required medical treatment.<sup>49</sup> The Australian Institute of Family Studies found in its major evaluation of the 2006 family law reforms that 26 per cent of women and 17 per cent of men reported being physically hurt by their partners before or during separation.<sup>50</sup>

Nonetheless, male violence is much more likely to lead to a need for medical treatment, as the Sheehan and Smyth study shows.<sup>51</sup> Police reports indicate a similar pattern. In one study of incidents of domestic assault reported to the police in 2004 in New South Wales, nearly 74 per cent of women who reported assault by their partners or former partners had suffered injuries, compared with 36 per cent of men who reported assault by their partners or former partners.<sup>52</sup> Women are also much more likely to be afraid of their partners.

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47 For a meta-analysis of 82 studies on sex differences between men and women in resorting to violence, see John Archer, 'Sex Differences in Aggression between Heterosexual Partners: A Meta-Analytic Review' (2000) 126 *Psychological Bulletin* 651; David Fergusson, John Horwood and Elizabeth Ridder, 'Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort' (2005) 67 *Journal of Marriage and Family* 1103; Stacey Williams and Irene Hanson Frieze, 'Patterns of Violent Relationships, Psychological Distress, and Marital Satisfaction in a National Sample of Men and Women' (2005) 52 *Sex Roles* 771. Australian Bureau of Statistics research indicates that since the age of 15, 0.9 per cent of men and 2.1 per cent of women have experienced current partner violence and 4.9 per cent of men experienced violence from a previous partner compared with 15 per cent of women: Australian Bureau of Statistics, 'Personal Safety Survey' (Catalogue No 4906, 21 August 2006) 11.

48 Chisholm, above n 1, 47.

49 Sheehan and Smyth, above n 11, 109.

50 Kaspiew et al, above n 16, 26.

51 Sheehan and Smyth, above n 11,

52 Julie People, 'Trends and Patterns in Domestic Violence Assaults' (2005) 89 *NSW Bureau of Crime Statistics and Research* 9.

<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB89.pdf/\\$file/CJB89.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB89.pdf/$file/CJB89.pdf)>. See also Richard Felson and Alison Cares, 'Gender and the Seriousness of Assaults on Intimate Partners and Other Victims' (2005) 67 *Journal of Marriage and Family* 1182.

## V CONCLUSION

As Richard Chisholm has said in his landmark review, '[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'.<sup>53</sup> While a slight majority of lawyers interviewed for the purposes of this study routinely interviewed clients about violence issues, others relied on intuition, assumptions about their clients based upon socioeconomic status or appearance, or cues within the interview. Some lawyers asked questions with male clients that were designed only to identify whether they were perpetrators of violence. Assuming a victim-perpetrator dichotomisation is likely to lead to an impaired identification and understanding of situational couple violence and its implications for family law problems.

There is a need therefore for a further focus on these issues in lawyers' professional development programs, and, as the Family Law Council has recommended, a common assessment framework. The evidence is that many women and men do not feel comfortable about disclosing violence – either as the victims or the perpetrators. As the Best Practice Guidelines indicate, lawyers should 'provide the client with an opportunity to talk about violence issues if they wish'<sup>54</sup> in an empathetic way that allows for a proper understanding of the impact of that history of violence on the client, and its potential relevance to the family law issues they are confronting. Lawyers need, however, to be comfortable in asking about violence. As Chisholm points out:

Lawyers need to understand that some victims of family violence might be reluctant to disclose it, or disclose it in detail, unless the demeanour of the lawyer is such as to give them confidence, or unless the lawyers asks specific questions. Lawyers, and judicial officers, and perhaps others, might learn to become more sensitive to the impact of their manner, and way of speaking, on people who have been exposed to violence, especially those from non-mainstream communities.<sup>55</sup>

Better identification of family violence in the context of family law disputes is an important step along the road towards a more effective response.

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53 Chisholm, above n 1, 5.

54 Family Law Council and Family Law Section of the Law Council of Australia, above n 33, 49.

55 Chisholm, above n 1, 166–7.