Children Exposed to Domestic Violence: Whose ‘Best Interests’ in the Family Court?

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List of acronyms

ABA – American Bar Association
ABS – Australian Bureau of Statistics
AIFS – Australian Institute of Family Studies
AIHW – Australian Institute of Health and Welfare
ALRC – Australian Law Reform Commission
FCA – Family Court of Australia
FLA – Family Law Act 1975
FLRA – Family Law Reform Act 1995
HILDA – Household, Income and Labour Dynamics in Australia
PAS – Parental Alienation Syndrome
PTSD – Post Traumatic Stress Disorder
Summary

This thesis presents a qualitative discourse analysis of the ways in which judges in the Adelaide registry of the Family Court of Australia gave meaning to the ‘best interests’ of the child in the post Family Law Reform Act 1995 sample of cases analysed. Within the context of family law and the significant changes following the introduction of the Family Law Reform Act 1995 (the Reform Act) the study is focused on disputed contact cases that reached a final hearing and where domestic violence was an issue. Reviews of the literature and research, including the work of feminist legal researchers who have critiqued the operation of family law since the introduction of the Reform Act 1995, provided a clear rationale for questioning how the special needs of children exposed to domestic violence are being understood and managed in contemporary family law in Australia.

A feminist poststructuralist perspective that draws upon the concepts of the French philosopher Foucault was applied in order to move beyond the rhetoric that accompanies the ‘best interests of the child’ principle and to deconstruct what informs judges about the needs and interests of child subjects of contact disputes who have been exposed to domestic violence. The findings demonstrate how, in the politicised context of family law, the operation of judicial discretion in forming or reinforcing what constitutes children’s ‘best interests’ is influenced by dominant patriarchal assumptions that underpin contemporary normative guidelines for post separation family life.

A discourse analysis of the judicial statements made in twenty written unpublished judgments in one registry of the Family Court of Australia exposed competing discourses influential in everyday judicial decisions made in the ‘best interests’ of children whose parents are in dispute over contact. The findings demonstrate the prevalence of strongly sanctioned discursive imperatives that underpin the orthodoxy of the reconstituted family, with the inherent pro-contact ideology. Judicial statements reflected an intersection of dominant discourses that operate as universalised ‘truths’ and reinforced ‘traditional’ gendered notions of mothering, fathering and the family. The findings also reveal reliance by judges on a narrow definition of domestic violence and suggest limited judicial understandings of the effects of domestic violence upon children.
The dominant discourses, which were predominately, but not exclusively relied on by judges and social scientists who provided evidence to the Court, served to justify a number of failures in the decisions said to be made in children’s ‘best interests’. In the majority of cases these included a failure to centralise children’s exposure to domestic violence, to identify child victim’s special needs, and to question the fathering capacity of violent men. Evidence is provided to demonstrate how patriarchal discourses, which reinforce the powerful role of fathers in family and social life, were used to idealise the father-child relationships, excuse or trivialise the abusive behaviours of fathers, to blame mothers, and to marginalise children as incompetent witnesses of their own lives.

Recommendations are made for possible ways to ensure that the ‘best interests’ of children who have been exposed to domestic violence are understood, centralised and prioritised in judicial decision-making, in particular where children are the subjects of contact disputes.
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Declaration

I declare that this thesis presents work carried out by myself and does not incorporate, without acknowledgment, any material published elsewhere. This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution. I also declare that, to the best of my knowledge, it does not contain any materials previously published or written by another person, except where due reference is made in the text of the thesis.

Amanda Shea Hart
Chapter 1: Children, families and the lore of family law

1.0 Introduction

Judges deal with real-life problems in actual cases. That anchors their decisions to the actual community. In no area of law is that more important than family law.

Chief Justice the Hon. Dame Siam Elias (2002, p.305)

Family law is a confronting and unique jurisdiction that impacts upon every member of our community, directly or indirectly, at some time in their lives (Nicholson 2001a). It deals with the fundamental unit of our society, the family that represents for children “the most significant space within which they act” (Roche 1999, p.67).

The Family Court of Australia (FCA) is a separate, specialist, superior, national Court with fifty-three judges serving 250,000 new clients per year (Nicholson 2002), operating throughout all States and Territories in Australia with the exception of Western Australia, where the legislation is administered by the State. The FCA came into operation in January 1976 to administer the Family Law Act 1975 (FLA), having received Royal assent in June the year prior. This legislation was a response to the changed expectations and beliefs of Australian society about family breakdown that needed to be reflected in the law (Williams 2001). The passage of the FLA legislation was controversial and because, the FCA operates “at the edge of social change” (Elias 2002, p.297), it remains a controversial jurisdiction (Nicholson 2001a). The FCA continues to be held under close public scrutiny (Nicholson 2000a) and has often, in the past, been referred to internationally as being a model court with a sound reputation (Mahony 2001).

There is now a widely held understanding that separation and divorce can be experienced as crises for adults and children. Because family breakdown elicits strong feelings amongst individuals and within society generally, the most litigious contested issues involving children can be generated by separation (Schaffer 1998). Disputes over children following separation or divorce create feelings of grief and loss and can bring to the fore concerns about issues of power, gender and equality before the law, and beliefs about ownership in relation to the needs and interests of children. Since the introduction of the FLA within the multicultural and pluralist contemporary Australian society there have been ongoing
debates about what are seen as the best outcomes for children following separation or divorce. Such debates are also prominent in other contemporary Western societies, where legislation\(^1\) has been introduced to provide normative guidelines about what constitutes the best interests of children (Byas 2003).

There is considerable concern in Australia and in the United Kingdom about the significant number of contact disputes that come before family courts and the difficulties that persist in finding satisfactory solutions (Rhoades, Graycar & Harrison 2000; Smart, May, Wade & Furniss 2003). Since the inception of the FCA there has been a dramatic increase of the total number of orders sought. Since the introduction of the *Family Law Reform Act 1995* (the Reform Act) there has been an increase in the number of parenting orders sought and in the number of cases where there is repeated litigation (Family Law Council 2000; Rhoades 2000a). According to some social science and legal professionals, cases are becoming more complex with the most intractable cases being contact disputes (Charlesworth, Turner & Foreman 2000; Nicholson 2000b). The Family Law Council’s (2002a, p.3) statistical report on family law in Australia showed that the highest percentage of court orders sought between 1999 and 2000 were parenting orders (fifty eight percent). Of these, contact applications formed the largest single category (twenty three percent). Numbers of contact applications are increasing (Family Law Council 2002a) as are applications for increased contact (Dewar & Parker 1999). Contact enforcement applications have also significantly increased (Smyth & Parkinson 2003). The Household, Income and Labour Dynamics in Australia (HILDA) survey shows the existence of a basic pattern in separated Australian families of contact between non-resident fathers and their children where forty seven percent of fathers have children on overnight visits and seventeen percent have day only contact (Parkinson & Smyth 2003 p.7).

Within Australia there is a commonly stated belief that “children are an important and cherished part of society” (Jamrozik & Sweeney 1996, p.187). In the jurisdiction of family law in Australia, under the Reform Act the ‘best interests’ of the child is the paramount principle and there is a strongly stated code that children’s best interests are supreme. While the rhetoric of this principle is that it is a child focused legal standard where children

\(^1\) See for example UK *Children Act 1989* that encourages shared parental responsibility; Florida’s *Shared Parental Responsibility Act 1982* that gives preference in residence disputes to the parent most likely to support contact of the children with the non-resident parent.
have rights, their needs are met, and they are protected from harm, there are widespread concerns about how this principle is applied in the legalistic and adversarial context of family law (Shannon 2000). Nevertheless, it is accepted as the common foundation for resolving post-separation parenting disputes (Byas 2003).

### 1.1 Rationale for this research study

*There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the Family Law Act.*

Family Law Council (2002b, p.15)

My motivation for conducting this study is to contribute to the development of knowledge and understanding about how contemporary ideological norms for post separation family life influence the judicial determinations of the best interests of children who have been exposed to domestic violence and who are the subjects of contact disputes. It is hoped that the analysis of judicial reasoning, as reflected in the dominant judicial discourses about the best interests of the child, will add clarity and richness to the available knowledge. Information about how judges construct children’s ‘best interests’ is needed to assist the Australian family law jurisdiction to refine socio-legal thinking and improve processes that influence judicial determinations that impact upon the post separation experiences of children who have been exposed to domestic violence.

This research study arose from interest stimulated by the remarkably consistent contemporary international research findings about the adverse effects on children from their exposure to domestic violence (Blanchard 1993; Jouriles, McDonald, Norwood & Ezell 2002; Edleson 2002; Wolfe et al 2003) and from the increasing knowledge that children from domestic violence situations are faced with special issues following family breakdown (Mullender et al 2002; Jaffe, Lemon & Poisson 2003; Shea Hart 2004). Family law is not simply law about separation and divorce. A significant number of families reflect complex interfamilial relationships including exposure to violence and abuse (Graycar 1995; Brown, Frederico, Hewitt & Sheehan 1998; Rhoades 2000a; Nicholson 2000b; Shea Hart 2004). Judges hold positions of power and make coercive determinations that “impact upon the lives of litigants to an extent not often encountered in the general courts” (Elias 2002 p.298). In addition there remains a lack of specialist knowledge held by legal and social science professionals involved in Court proceedings about the full range of violence to which children can be exposed (Family Violence Committee 2003).
Contemporary Australian feminist research provides consistent information about the post Reform Act pro-contact orthodoxy over-riding the legislative right of the child to safety (Rhoades 2000a; Rendell, Rathus & Lynch 2000; Brown 2002; Kaye, Stubbs & Tolmie 2003). This gives reason to question how the best interests of children who have been exposed to domestic violence are being served in the FCA (Family Violence Committee 2003). The “ambitious normative guideline for ‘proper familial behavior’ following separation” (Byas 2003, p.1) can create real difficulties in cases where there is domestic violence and/or child abuse, in reaching determinations that are not detrimental to children’s wellbeing (Sheehan & Fehlberg 2000).

Within the context of family law, violent perpetrators exercise power and control over their children and ex-partners through repeated litigation and these intractable cases require judicial determination (Jaffe et al 2003). Disputed contact cases where domestic violence is an issue form a significant proportion of cases that reach the stage of final hearing in the Adelaide Registry of FCA (Shea Hart 2004). Contact time can provide opportunities for various forms of violence to continue, to which the child may be exposed or directly involved (Hester & Radford 1996; Brown 2002; Kaye et al 2003; Harne 2004). However, there are notable gaps in available knowledge about specific outcomes for the children where contact is ordered in cases where domestic violence is an issue (Jaffe et al 2003; Harne 2004). What is known is that in Australian family law despite the current legislation’s aim to protect children from harm (Section 68F(2)(g); (i)(ii); and (j) Family Law reform Act 1995) there have been many instances of unintended poor outcomes for children where violence is an issue (Matthews 1999; Brown 1998).

Family law reflects the often divergent interests of government, service providers, litigants, and broad interest groups in relation to decisions made about children. All of these people are adults who have an investment in promoting their own issues (Mercer 1998). Children are the ‘subjects’ of the disputes. Reaching judicial determinations about children’s ‘best interests’ involves an interpretative, non-presumptive process that addresses the individuality of each case in which there are multiple factors that have to be considered under the legislative guidelines (Dickey 1997). Through the use of judicial discretion dominant ‘truths’ that define children’s ‘best interests’ are created or reinforced. A reliance on case law and jurisdictional rhetoric about due process hides this power that shapes dominant meanings.
Chapter 1: Children, families and the lore of family lore

The ill-structuredness and indeterminateness of judicial problem-solving is well documented... The expert judge represents each new case against his or her acquired frames of reference or constructions of reality.

Lawrence (1988, pp.229-230)

From a poststructuralist perspective, it is through powerful official discourses that the law regulates and constructs family relationships. According to the French philosopher Michel Foucault, the core of institutionalised power is dominant knowledges that underpin discursive practices and form official discourses (Rabinow 1984). Judges are employed in the operation of shaping and reshaping of what constitutes the needs and interests of children in their post separation family life. As will be discussed in the following chapters, legal systems tend to rely on ‘scientific’ ‘truths’ and common sense understandings which are presumed to have universal application (Graycar & Morgan 2002). Legal systems are sated with ‘stock stories’ from dominant social, political and professional groups that help inform legal professionals’, including judges’ ‘natural’ assumptions, opinions, values, beliefs and biases (Heerey 2000). This can lead to judicial misperceptions and assumptions about the lived experiences of the litigants, and of the child subjects of the disputes, thus making decisions subjective (Elias 2002).

Society can become complacent as the rhetoric of the principle of the ‘best interests’ of the child is very powerful and engaging and consistently provides assurances that the law truly represents children’s needs and interests. It is through examining the content of written judgments that the way this principle is interpreted by judges in practice can begin to be understood.

In some respects law is language rather than something external to language which language tries to capture and describe ... Moreover, much legal writing is an exercise in persuasion. Even judgments. Especially judgments.

Hon Justice Peter Heerey (2000, p.3)

How socio-legal discourses shape the construction of the ‘best interests’ principle has not been widely investigated and there are very few social science studies that have investigated how judges in the FCA reach determinations said to be in the ‘best interests’ of children. Two prior Australian qualitative studies conducted by Berns (1991) and Moloney (2002) used content analysis to examine judicial determinations of parenting disputes before the Family Court. However, the focus was on the debated topic of gender
neutral legislation and the role of gender in influencing the judicial determinations. These studies did not include domestic violence as a criterion for selection of the judgments analysed and the research had an adult focus.

It is important to identify discourses that reflect the variety of socio-political influences that impact upon the lived realities of separated family members (Dreyfus & Rabinow 1982), particularly children in legal contexts where the contemporary vision of the family largely remains as nuclear, Anglocentric, male-focused and heteronormative (Graycar 2000). In cases where domestic violence is an issue gendered discourse tends to form a division between those who support mothers and child victims of violence and those who mother-blame and advocate for the rights of fathers (Ptacek 1999; Jaffe et al 2003).

According to Featherstone and Trinder (1997), an important focus for research should be on how legal professionals construct definitions, understandings and meanings of domestic violence and, consequently, how notions of rights and responsibilities operate. This concept is particularly relevant to apply to how the best interests of children who have been exposed to domestic violence and who are subjects of contested contact cases before the FCA are constructed.

*Judges primarily function in purist jurisprudential theory to adjudicate facts and apply the law to those facts...These procedures are inoperable as they relate to the area of domestic violence. Judges and lawyers disserve both themselves and the legal system unless they understand that the judge’s function consists of more than adjudicating fact...*

Ptacek (1999, p.112 quoting Justice Philbin 1990)

### 1.1.1 The research focus

Given that the Reform Act was introduced in 1996, it was considered a timely step in investigating how the principle of the ‘best interests’ of the child is constructed in practice by judges in the FCA, to commence with an exploration of a sample of post Reform Act unpublished judgments drawn from the years 1996–2001. The sample of judgments from the Adelaide registry comprised actual contested contact cases where domestic violence was a factor, and that reached a final hearing.

As will be discussed in more detail in Chapter 4, the chosen methodology in this study relied on the application of feminist poststructuralist thinking in the analysis of the role and function of discourse in informing judicial determinations of the ‘best interests’ of the child in the judgments analysed. Poststructuralism recognises that within the socio-political
context of a particular historical era there exists a complex web of interpretations and dominant accounts that are sustained discursively to form knowledge systems (Slembrouck 2002). Texts are active in the production, reproduction and transformation of social relations and structures, but their power is often overlooked (Fairclough 1995). The application of discourse analysis was, therefore, used to examine unpublished written judgments to provide tangible information about the judicial decision-making said to be in the best interests of the child.

1.1.1.1 The research questions

This study sought to identify in the written judgments the dominant discourses on childhood, family roles, family relationships and domestic violence that informed judicial assumptions and common wisdoms about what constituted children’s best interests.

The research questions were as follows:

1. What are the dominant and competing discourses used by judges to identify and define the best interests of children?

2. What role does the ‘traditional’ construction of gendered family relations play in the judicial construction of the children’s best interests?

3. To what extent do judicial discourses reflect the dominant socio-cultural discourses on childhood and post separation family life?

4. How do judges construct the issue of children’s exposure to domestic violence when giving meaning to children’s best interests?

5. Whose voices are privileged and whose are marginalised in informing judicial constructions of the children’s best interests?

1.1.1.2 Researcher self-reflexivity

A qualitative approach to research reflects the researcher’s own values, perceptions and experiences in contributing to the development of knowledge. It cannot, therefore, be neutral (Habermas 1971). The research approach of discourse analysis aims to identify the constructed nature of knowledge and who it serves. This means acknowledging that the
representation of the findings comes from the researcher’s own perspective (Howing et al 1989; Alldred 1998). It is important to make the influences on the researcher’s perspectives as transparent as possible (Shimahara 1990; Bazerman & Pardis 1991). It is the responsibility of the researcher therefore, to be self-reflexive and to “account reflexively for the textuality of their own texts” (Lee 2000, p.202). To this end I am providing some background information about my position in relation to the research topic and the research context. After acknowledging the following information I have endeavoured to keep myself ‘off the page’, while at the same time acknowledging that I am, in effect, ‘present on every page’.

The methodology I selected and the literature and research I reviewed have influenced the generation of the research questions for this study and my own understandings of the analysed texts. The perceptual lens through which I approached the research relates directly to the following information. I am a social science professional with over thirty years experience as a counsellor, therapist and mediator working with children and families, and have specialised in working with children exposed to violence and abuse. I have over seventeen years experience working with clients in dispute over post separation parenting arrangements within three registries of the FCA and within a community based agency. I have held management positions in mediation services within the Adelaide registry of the FCA and within a community based agency. Also, I have provided lectures and tutorials over a number of years at the University of South Australia to postgraduate and undergraduate students in the areas of dispute resolution, child inclusive practice and social work studies, as well as providing training programs to practitioners in the field. I am a member of the University of South Australia’s Conflict Management Research Group.

My work history demonstrates my commitment to the development of ‘best’ practice models of intervention for children and families and this is clearly evident from the range of innovative programs I have conceptualised and introduced into practice. This includes the introduction of child inclusive conciliation to the FCA over 15 years ago at the Sydney registry. My ideological goal continues to be to assist disadvantaged children cope with their disturbing life experiences. In seeking to advance knowledge, develop programs, and advocate on behalf of disadvantaged and traumatised children and their families I have
faced many challenges over the years. These have, at times, been posed by the hierarchical, gendered professional relations that existed within the institutions where I have worked.

I wish to acknowledge that I have experienced positive and mutually respectful working relationships with all of the judicial officers of the Adelaide registry. I have provided these judicial officers with a series of presentations on some contemporary knowledge about children’s developmental needs. I maintain respect for the judges in the FCA and acknowledge the demanding and challenging role that judges have, particularly in determining cases where violence is an issue. My own management and clinical experience within the FCA and my knowledge about what some judges and other professionals have been subjected to by violent perpetrators, have made me very aware of the potential dangers involved in cases where violence is redirected towards decision-makers, to people in senior positions within the Court, and to the Court as an institution.

My direct work with children and families where domestic violence is an issue and my experience in management positions within and external to the FCA are significant influences in motivating and informing this research. Key understandings that have emerged from my own experiences as a senior professional working with children who have experienced domestic violence in contested contact disputes include: children of all ages exposed to domestic violence can be adversely affected in various ways; children can experience a range of types of violence/abuse from their mothers and/or their fathers; domestic violence often, but not always, continues post-separation and is most often perpetrated by men against women and children; children’s lived experiences of witnessing domestic violence and signs of their trauma are often not recognised by parents and professionals in the field; and there is great complexity and diversity in the dynamics of the family relationships where domestic violence exists.

My own consistent value position is that both mothers and fathers are important people in the lives of their children, but where domestic violence is an issue there are unique and complex family relationship dynamics. It is the quality of those relationships that affects the wellbeing of children of all ages and stages of development. I strongly agree with Jaffe, Lemon and Poisson (2003) that wherever domestic violence is present as an issue within contested parenting disputes, a careful analysis of the relationship dynamics and a different construction of the needs and interests of the children must be made by judges, social science professionals and policy makers.
During my years working at the FCA, the role of supervising the counsellors’ production of family reports for the Court, as well as undertaking family report assessments myself, informed me that there is an often unspoken assumption held by legal and social science professionals that contact would be ordered by the Court at a final hearing unless there was hard evidence of direct child abuse. As a manager I was also aware that not all social science professionals, within and external to the FCA, had specialised knowledge or expertise relevant for working with cases where domestic violence and/or child abuse were issues. In contested parenting cases where these professionals provided evidence to the Court as ‘expert witnesses’ they powerfully undermined any competing evidence about the need to protect the children from potential harm in an ongoing relationship with the violent parent.

Over the majority of the five years that it took to complete this thesis I remained working in the specialised field of managing services for dispute resolution for separated families. I chose to do this to keep abreast of the evolving issues within the family law jurisdiction. Remaining in the field until the final five months of preparing this thesis also played a significant role in preventing me from becoming overly influenced by the literature, the ongoing socio-political debates, and from becoming too immersed or lost within particular emotive themes that emerged from the data analysis. Working with adult and child clients, lawyers, a variety of professionals from across disciplines, the FCA and the Federal Magistrates Service, as well as doing a number of presentations and radio interviews, producing articles for publication in refereed journals, and the process of supervision for this thesis have all provided me with an important ‘reality check’ in relation to the important issues and in relation to my own perspectives. These processes have all kept me grounded and accountable for my thoughts. The time span to complete this thesis also provided me with time to digest and analyse the issues and the data and to refine and develop my thinking, consistent with a feminist poststructuralist approach.

All of the above influences have combined to influence the direction and establishment of the research framework and my analysis of the data. I wish to acknowledge that I had no direct involvement in any of the cases, nor was I present at any of the trials of the cases that formed the sample of judgments analysed for the in depth qualitative research study. I
also acknowledge that over the years that it took to complete this research, the culture and knowledge within the Adelaide registry of the FCA may have changed.

1.2 Contextualising information

As the jurisdiction of family law is an ever-changing one, examining how the best interests of children is interpreted by judges involved understanding contemporary knowledge and beliefs about childhood, post separation family life, the gendered construction of parenting and the effects on children of exposure to domestic violence. The politicised context of family breakdown and the patriarchal system of family law that support these constructions is briefly explored in the following sections to provide a context for information provided in the following chapters.

1.2.1 Patriarchy

This thesis uses the concept ‘patriarchy’ as a social structure and a gendered ideology that has explanatory power for the oppression of women and children (Walby 1990). The concept of patriarchy provides a useful construct for identifying and analysing the maleness of the law against which women and children are positioned. Turner (1987) refers to the concept of ‘patrism’ within family and social life, where cultural hegemony is founded in prejudicial beliefs that favour men and discriminate against women and children. This promotes continued inequality within the operational norms of society, religion and the law. Under this paradigm children are constructed as objects rather than people (Knibiehler 1995) and there are proprietal notions of fatherhood, with fathers having the essentialised role of maintaining their children and stabilising family life and society (Mason 1995). Feminist theorists such as MacKinnon (1989) and Mason (2002) have drawn attention to the relationship between patriarchal gendered relationships and the operation of male violence within the home. The concept of patriarchy has provided a way of perceiving how cultures and social institutions that sanction male dominance through the normalising effect of patriarchal hegemony influence the ongoing presence in society of domestic violence (Dobash & Dobash 1992).

1.2.2 Children and domestic violence

Growing up in a home where there is family violence is also a clear risk factor.

Hughes, Graham-Bermann and Gruber (2002, p.83)
Within society each generation makes decisions about what is considered to be the ‘best interests’ of children. These choices are made at every level of society, including the law. They reflect our value judgments about what significant, repetitive experiences we will expose children to, thus indelibly influencing how they will develop (Perry 2000). A child’s actual experience influences how that child will develop. How children then function as adults determines how society functions (Perry 2000). The process of separation for all families is unique and dynamic, but where domestic violence is present children face a distinctive predicament that must be recognised and understood if their best interests are to be served (Jaffe et al 2003).

Historically there has been poor attention paid by all levels of society to the problem of domestic violence, but this issue is now being increasingly recognised as a serious social problem (Laing 2000b). This is evidenced by the recognition given to family violence in the 1995 Reform Act (see Chapter 2) and by the 1997 initiative of the Commonwealth, State and Territory Governments of Australia, *Partnerships Against Domestic Violence*. This initiative endorsed the goal of seeking to identify better ways of preventing and responding to domestic violence through a range of aims that included the protection of the law and the development of best practice (Troeth 2000). Despite such progress child victims of domestic violence continue to receive less attention to their needs than the adults (Maxwell 1995; Mathias, Mertin & Murray 1995; Jouriles et al 2002). There are a range of problems that inhibit the development and acceptance of comprehensive knowledge on domestic violence and its impact on children’s wellbeing (Laing 2000a; Jouriles et al 2002). These issues are explored in Chapter 3 and include a relatively recent focus by researchers on the complexity of violent families and the negative impact that children’s exposure to violence has on their adjustment and wellbeing (Smith, O’Connor & Berthelsen 1996; Hughes, Graham-Bermann & Gruber 2002).

### 1.2.3 Defining domestic violence to which children have been exposed

From a poststructuralist perspective it is understood that naming and defining domestic violence are part of a political and historical process supported by multiple and variable discourses that create certain understandings and are dependent upon the context, the position and the purpose of the person doing the defining (Irwin, Waugh & Wilson 2002). Theoretical and ideological views about domestic violence underpin definitions and understandings that inform decision-making in legal jurisdictions (Walby 1990).
The conceptualisation of domestic violence is socially constructed and various terms have been used at different times to reflect different meanings or ideologies, or to create different emphasis (Tomison 2000). The terminology used to define the violence to which children are exposed is important to recognise as language defines the space within which experiences can be identified, named and researched, and defines policy and practice directions (Laing 2000a). Terms such as, ‘family violence’, ‘intimate partner violence’, ‘spousal abuse’, ‘family conflict’ are used interchangeably in the literature on domestic violence, thus confusing the populations being studied. While the generalisation of a problem is a powerful modernist way of communicating and developing understanding, it also limits understandings as it constructs others (Guba 1989).

Within family law jurisdictions the debate between feminists and non-feminists about what constitutes domestic violence indicates different understandings about the severity and types of violence that female victims experience compared to male victims. Traditionally in society and the law there has been a heavy reliance on narrow definitions of domestic violence that exclude psychological and emotional abuse (Walby 1990). How judges conceptualise and define domestic violence and who are seen to be credible witnesses have a profound impact on how the ‘best interests’ of children is determined.

The position taken in this research is informed by the feminist perspective that supports the importance of understanding the full range of violence that children can be exposed to. It is only through the recognition and naming of all forms of dominance and oppression (Cook & Bessant1997) that attention is drawn to the significance of judicial responses and the role that powerful institutions play in the perpetuation of social entrapment of the victims of domestic violence (Ptacek 1999). This understanding is important for the best interests of children with special needs to be served.

1.2.3.1 Feminist definition of domestic violence

*Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women both in relationship and after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.*

National Domestic Violence Summit (COAG 1997, p.1)
Although the term ‘domestic violence’ has been criticised for masking the gendered nature of relationship violence, it is a term that is commonly accepted in Australia as referring to violence perpetrated by one partner or ex-partner upon the other. It is a useful term as it explicitly names violence in the home (Laing 2000a). This thesis uses the term ‘domestic violence’ (or ‘violence’) to reflect feminist epistemology that constructs violence as patriarchal domination where women and children are primarily the victims (Bagshaw & Chung 2000a). The feminist paradigm informs that domestic violence claims by women and children are valid and are under-reported, that male violence is far worse than female violence, and that mothers are dissuaded within legal systems from naming the violence. Violence usually extends beyond single acts of physical assault (Jaffe et al 2003) and forms a pattern of dominating, humiliating, coercive and fear creating behaviours that increase over time and are used by an intimate partner without consent (Bograd 1990). The term ‘domestic violence’ includes marital homicide, homicide/suicide, stalking and intimidation following separation (Laing 2000a).

Feminists have drawn attention to the complex nature of domestic violence, its negative impact upon children, and the frequent co-existence of child abuse and domestic violence (Bagshaw & Chung 2000b). As a result of feminist activism it is now understood that children are affected, not only by direct and indirect exposure to a violent incident, but to a complex pattern of behaviour that continues post-separation and which negatively undermines the victimised parents’ capacities to cope, and may affect their ability to help the children cope (McIntosh 2000).

1.2.3.2 The Family Court of Australia’s definition of family violence

The FCA uses the term ‘family violence’ which is consistent with the gender neutral terminology of the Reform Act. Section 60D of the Family Law Reform Act 1995 defines ‘family violence’ as:

... conduct, whether actual or threatened by a person towards, or towards the property of, a member of a person’s family that causes that or any other member or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety...

Family Court of Australia (1997, p.7)
While this appears to be an inclusive definition, its generality fails to draw attention to specific dynamics of intimate partner abuse. Bagshaw and Chung (2000a) have critiqued the use of commonly used research paradigms that underpin particular terminologies to describe intimate partner violence. Their findings are that the terminology of ‘family violence’ often rests upon understanding violence in the following ways: as being single acts of physical assault or aggression that are not differentiated in terms of intention or consequences; the construction of the problem is typically that of a ‘conflict of interests’ where acts of violence are seen to emerge from a specific conflict; there are gender neutral presumptions of equal power and equal violence between intimate partners and there are gendered stereotypes reflected in the explanations of violence where men’s violence is instrumental and women’s violence is expressive; and there is no clear victim or perpetrator as the violence is seen to stem from family relationships.

The construction of ‘family violence’ upon which the FCA relies is clearly different to the feminist definition of ‘domestic violence’. Where narrow definitions of domestic violence are used the central experiences of the adult, usually female, and child victims, who are subject to a complex range of violent acts and to deliberate and systematic controlling and intimidating behaviours, are denied (Johnson 1995).

1.2.4 The context of family diversification

Shifts in family structures can be linked to social and economic changes that provide the context for family life. Over the past thirty years, the rapidly changing social world has been reflected in the diversity of modern relationships and family life within which children are raised (Smyth 2004b). Social changes in the latter part of twentieth century saw a departure from the common structure of the nuclear family that developed following the Second World War. From the late 1960s mothers have increasingly participated in the labour force, an ageing population of grandparents has been more involved in child care and children have extended the number of years they live within the family because of more complete education (Sanson & Lewis 2001).

While the heterosexual couple family continues to predominate in Australia, many children experience changes in the types of family in which they live (Australian Institute of Health and Welfare 2005) (AIHW). Trends in separation and divorce have contributed to the increase of single parent families by fifty three percent between 1986 and 2001 (Australian
Bureau of Statistics 2005a, p.1) (ABS), and these represented twenty one percent of all family types in 1999 (Sanson & Lewis 2001, p.5). The number of divorces has increased over the past decade by nine point nine percent and there is a projected decline in the numbers of children living in two parent families, as well as a projected increase in numbers of children living in single parent families in Australia (ABS 2005b, p.9). In 1997, approximately one million children were living with one natural parent, eighty eight percent of whom lived with their mothers and about one third rarely or never saw their fathers (Smyth 2004a, p.107). In 1999, step-parent families constituted three point seven percent of all families, and blended families where parents had repartnered and had a child from that relationship represented three point one percent of all families (Sanson & Lewis 2001, p.5). These statistics on family diversification reveal a dramatic departure from the prevailing mores of a century ago that defined the ‘respectable’ family as one based on marriage. The complexity of modern family life is challenging moral beliefs and the perceived destabilisation of society is an issue of public concern (Nicholson 2001c).

1.2.4.1 Regulation of post-separation family life

Due to the context of social “diversity and change” (de Vaus & Gray 2004, p.3) that reflects secularisation and individualisation and characterises contemporary family life (Kaltenborn 2004), Australian society now relies less on the persuasive power of social institutions such as religion, class and community to regulate behaviours and reinforce society’s traditional norms. There has been an increased political focus on the family. Family breakdown has evolved as a social phenomenon in which the law plays a significant part in constructing and regulating normative outcomes of post-separation family life (Holtrust, Sevenhuijsen & Verbraken 1989; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997; Graycar 2001).

The Government and the family now share responsibility for the development of children in Australia. This has resulted from the individual adjustment process of adults and children during the transition of family breakdown and the associated uncertainties about the ‘right’ way to conduct family life (Lupton & Barclay 1997; Sheehan & Fehlberg 2000). In Australia, the Commonwealth has jurisdictional responsibilities under family law in relation to private disputes between parents and caregivers and the States and Territories are involved in the public law issue of child protection. These jurisdictions overlap in a complex way in determining the post-separation living arrangements for children.
Chapter 1: Children, families and the lore of family lore


As demonstrated by the large numbers of parenting disputes that come before the FCA family breakdown is for many families a legal event (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997). An Australian study conducted by Byas (2003, p.2) estimated that approximately eighty percent of separated couples seek legal advice. When compared to all other types of legal issues family law issues lead to higher rates of legal advice being sought (Dewar 2002).

It is a major challenge for family law to manage the large numbers of litigants and to take into account the varying structures, cultures and qualities of family relationships (Murch 2005). The State and its legislative regulative arm of the FCA manage this diversity by relying heavily on contemporary normative social standards (Dickey 1997). Prevailing community values in Australia reflect the expectation that children should have both parents in their lives (de Vaus 1997) and that intimate partnerships should be based on negotiation, communication and egalitarianism (Lupton & Barclay 1997). Discourses on post-separation family life that emerged from the Reform Act legislation that are reflected in the media (Tapp & Taylor 2001), reinforced these dominant beliefs and values. These define which arrangements for separated families in dispute over parenting issues are acceptable (Kennedy 1996; Dewar 1997). In this way the Reform Act provides a regulatory structure for the social organisation of post-separation family life (Rhoades 2002). The following quotation, made by the prior Chief Justice of the FCA the Hon. Alastair Nicholson, illustrates this.

_In many cases parents will be required to deal with each other on a regular basis and to have regular contact through their children. This means that the process and outcome of the litigation must be such as to permit the parties to have a sensible ongoing relationship._

Nicholson (2000a, p.1)

In Australia, an idealised vision of the reconstituted family has grown in prominence (Sheehan & Fehlberg 2000). This is demonstrated by the spirited debates in Australian society that focus on the emotionally charged area of parent-child contact. The Australian community has been described as being extremely concerned about ensuring that father-child contact continues following family dissolution (Garwood 2004). The recommendations of the Family Law Pathways Advisory Group made in 2001 emphasised
that “to secure Australia’s future” (Family Law Pathways Advisory Group 2001, p1) the family law system should further acknowledge “the value of family relationships” and the “ongoing capacity in families to provide nurturing parenting to children of the family, whether it is intact or separated” (Family Law Pathways Advisory Group 2001, p.5). The Prime Minister’s press release in July 2004 referred to intended future reforms to the family law system and the goals for community service delivery for separated families aimed at helping fathers to have a substantial ongoing role with their children. Also the proposed legislative changes of the Family Law Amendment Bill, submitted to the House of Representatives in December 2005 stated the object of creating new principles that include a presumption of joint parental responsibility for the care of the child.

It is important to note that the ideology of the reconstituted post-separation family has evolved without specificity. The Reform Act does not state what roles parents should play and how to be ‘responsible’ for facilitating positive outcomes for their children. The idealised reconstituted family can be seen as a stereotype that relates to the simplistic ‘traditional’ views of patriarchal family life (Smart & Sevenhuijsen 1989; Wise 2003). Because of the strength of the socio-political focus on this ideology within contemporary Australian society the issue of domestic violence within families is not easily recognised nor brought to the fore. In the Prime Minister’s (2004) press release on the future direction of family law scant attention was given to the need to identify and differentiate the goals and interventions for the significant number of separated families where domestic violence is an issue (Smyth 2004a).

1.2.4.2 The role of gendered discourse in defining the post-separation family

According to Collier (1999) beliefs in the ontological differences between men and women and the ‘natural’ social order are significant underpinnings to the stereotypical gendered thinking that is apparent in Western societies. As socio-cultural notions of motherhood, fatherhood and childhood are abstract and define the power relationships within families (Lupton & Barclay 1997) the issue of gender is one important factor in how the post-separation family life is constructed and regulated.

Under the ‘no fault’ Reform Act legislation parenthood is presented as a gender neutral concept (Moloney 2001a). However, far from ‘deconstructing’ notions of the family, the Reform Act supported the “gendered pedigree” of the law (Buckley 2001, p.180). This
statement is supported by the findings of Moloney’s (2001b) study on the gendered construction of parenting in determinations made by judges of the FCA. The findings from that study show how the dominant socio-legal discourses placed mothers and fathers from separated families in gender ‘appropriate’ positions. Stereotypical gendered expectations of mothers formed the imperative for mothers to provide selfless ongoing support to all interfamily relationships, and stereotypical expectations of fathers allowed father presence without scrutinising fathering qualities (Moloney 2001b). These findings support the claim by Dobash and Dobash (1992) that legal and social institutions reinforce patriarchal family relationships.

1.2.4.3 The changing role of fathers

Across the Western world the diminished social status of men as fathers post-separation together with the high rates of disengagement of fathers from parenting and financial support of their children, have led to social and political concern articulated in the dominant discourse of ‘father absence’ (Smyth 2004a; Harne 2004). Since the 1980s there has been a significant increase in the number of world wide studies on fatherhood that have a strong focus on separated fathers (Smyth 2004a). This is reflected in Australian research where approximately one-third of research into fatherhood has addressed this issue (Fletcher, Fairbairn & Pascoe 2004). A comprehensive review of studies on fatherhood conducted by Smyth (2004a) found that there was a common focus on the dissatisfaction of fathers, who perceived an inequality in post-separation parenting arrangements and a power imbalance in the decision-making of mothers. These studies demonstrate that ‘father absence’ following separation is a central issue of concern in contemporary Western societies replacing the traditional focus of family research on mothering practices (Fletcher, Fairbairn & Pascoe 2004).

1.2.4.4 A feminist perspective on the idealised post-separation family

Feminists argue that changing family forms and structures in the contemporary Western world have given rise to a politicised concern that fathers are losing their power and status in the family. Within societies where this is an issue it has successfully been connected to a “form of power claim, namely that children need fathers” (Smart & Sevenhuijsen 1989, p.9). As gender inequalities remain part of the social system in which the law is located (Fredman 1997; Graycar & Morgan 2002) it is important to recognise how the dominance
of fathers over mothers and children, as well as the alliance between fathers and the state, provide the context for post-separation family relationships (Graycar 1989; Hearn 1998). This is particularly relevant in cases where domestic violence is an issue as the parenting practices of violent fathers are characterised by a misuse of power and control (Harne 2004). Feminist research has revealed that following separation fathers can: maintain hostility directed towards mothers and other perceived sources of inequality (Smart 1999; Kaye et al 2003); fail to take responsibility for their negative feelings and behaviours (Arditti & Allen 1993; Walker 1997; Harne 2004); and be intent on maintaining male privilege following separation (Arendell 1995). Feminist studies indicate the importance of giving recognition to the operation of gendered social power relations in the practice of fatherhood rather than supporting idealised versions of post-separation family relationships.

The dominant stereotypical gendered presumptions that define acceptable parenting roles and children’s post-separation needs deny the importance of the history and the quality of the child’s relationship with each parent in determining the value for the child in maintaining that relationship (Rendell et al 2000). The dominant presumptions also deny the complex ‘personhood’ of children (James & Prout 1990) which, from a feminist poststructuralist perspective, is a significant oversight. It is important to recognise the huge diversity in the population of separated families. A ‘one size fits all’ solution which produces a homogeneous idealised reconstituted family system can be harmful to children (Sheehan & Fehlberg 2000; Smyth & Wolcott 2004).

Feminists challenge the enhancement of fathers’ rights without requiring a change in violent fathers’ parenting practices. This perspective is not reflected in the way family law constructs the ideology of the reconstituted post-separation family (Smart & Sevenhuijsen 1989). Feminist studies of family law in Australia by Rendell, Rathus and Lynch (2000), and Kaye, Stubbs and Tolmie (2003) show that where mothers fail to comply with the discursive imperative to support fathers in their parenting role, mother-blaming discourses come to the fore (Williams 1998). This discourse can also support notions of mothers being ‘unfit’ parents (Jaffe & Geffner 1998). According to Stoltz and Ney (2002) these discourses have been embedded in family law for over twenty-five years. The beliefs upon which mother-blaming rests, have been appropriated for use in the legal and political settings by Fathers’ Rights groups (Kaye & Tolmie 1998; Harne 2004) and are reflected in
legal and policy discourse which essentialise fatherhood within the prevailing model of a reconstituted family (Neale & Smart 1999).

### 1.2.5 The social construction of childhood

How childhood is constructed reveals how society positions and values children. The social construction of childhood is influenced significantly by a range of factors that vary throughout history and include political, social and economic conditions, concepts of family, and ideological and cultural perspectives (Jamrozik & Sweeney 1996). In our contemporary society the media is a strong influence in how childhood is understood (Goddard 2000). An historical perspective shows how the construction of childhood varies greatly over time and within different cultures (Hendrick 1997; Swain 2001; Smith & Taylor 2003).

Foucault’s understanding of the knowledge-power relationship is helpful in perceiving how children are positioned and regulated within society and how their needs and risks to their wellbeing are defined (Fullagar & Gattuso 2002). The dominant frame of reference for childhood in contemporary Australia and other Western societies continues to rely on modernist child development theories based on the work of Freud (1996) and Erickson and Piaget (Maier 1969). These theories describe childhood as a series of predetermined stages through which children grow and develop competencies and eventually emerge as adults (James & Prout 1990). Children are defined as biologically and psychologically immature and vulnerable (Taylor 1998) and are categorised and compartmentalised into fixed positions as ‘less than’ adults in terms of competency (Law 1999). Outdated biological and philosophical theories that do not individualise children inform these understandings.

Adults rely too heavily on these grand generalisations that provide what are widely accepted as ‘reliable’ interpretations for parents and other adults about events, issues and expectations in regard to children. The epistemological foundations to the accepted ‘truths’ about childhood have been generated and legitimised from social science research studies in the modernist tradition. These research studies have promoted notions of neutrality, objectivity and reasoned judgment, and have produced assumptions about the universality and homogeneity of humanity (Hartsock 1996). The modernist frame of reference, that has the patina of science, has failed to study children as active agents located within their own life experiences (Neale & Smart 2000; Smith & Taylor 2003). A poststructural perspective
recognises the limitations of such dominant ‘truths’ that have evolved from partial knowledge that is represented as if the meanings are complete (Hare-Mustin & Maracek 1990).

1.2.5.1 Childhood and the legal context

Traditionally, the law has used general assumptions about children’s developmental capacities...young children have been traditionally viewed as incompetent to give evidence based on assumptions that they are untruthful, suggestible, prone to fantasy and unable to make accurate and reliable observations about events.


As a signatory nation to the United Nations Convention on the Rights of the Child, Australia as a nation accepted a departure from the commodification of children and moved towards recognition of children as individuals with rights and needs that are different to their caregivers (Rayner 1997; Thomas & O’Kane 1998). This demonstrated a significant reconstruction of childhood (Moloney 2001b). Also with the evolution of a child focused legal standard under the Reform Act, discussed in Chapter 2, a substantial move was made away from the long established view that within family law children are solely the objects of disputes and should rely upon the adults to ensure their needs are met (Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission 1997; Rotman, Tompkins, Schwartz & Samuels 2000). However, the dominant contemporary interpretations of the meaning of childhood that rely on accepted ‘truths’ about child development continue to dominate society’s thinking about the needs, interests and identities of children (Taylor 1998; Smith & Taylor 2003). These ‘truths’ have consequences for children as they shape children’s relationships within and outside the family unit (Law 1999).

The development of policies, practices and the law rely upon the classification of subjects according to established norms. This regulates and controls people according to their established subject positions (Rabinow 1984). The law attributes a different status to children and to adults, with the dividing point being based on a specified chronological age, which in Australian family law is age 18 years. This adult-child binary is artificial, simplistic and fails to account for individual differences between children (Rodham 1973). Children are positioned as passive, underdeveloped beings in need of imposed social rules.
and ‘appropriate’ adult care and protection in order to mature to adulthood and to take their place as acceptable future citizens (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997; Taylor 1998; Piper 2000). Childhood within the legal context is defined in “paternalistic, protective and primarily adult-defined perspectives of past and present practice” (Taylor 1998, p.12). What children say about themselves is largely overlooked in the legal context (Alldred 1998).

1.2.5.2 A contradictory discourse on childhood

According to Foucault it is important to trace the ways by which subjectivities are formed, thereby creating a process to unmask oppression (Hartsock 1996). This process involves identifying the sites of resistance through examining discourses that compete with dominant discourses. In relation to childhood, the Western world is increasingly coming to understand the complexity and difference of individual children’s experiences of post-separation issues (Neale 2001), and the relevance of listening to the perspectives of children when making determinations that directly impact upon them (Smart, Neale & Wade 2001; Murch 2005). However, the dominant constructions of childhood are slow to change (Smith & Taylor 2003) and this is particularly evident within legal systems (Taylor 1998).

There is a newly evolving academic discipline of childhood studies that challenges the powerful dominant discourses that inform the lack of civil and legal status of children (Kaltenborn 2001). This has emanated primarily from the fields of anthropology and sociology, but has also included contributions from a wide range of disciplines including education, social work and law (Raitt 2005). The focus of this academic discipline that has contributed to the growing body of literature in this area, is on understanding and recognising children as active social agents with rights, and with competencies that are defined as ‘different’ to, rather than ‘less’ than those of adults (Taylor 1998; Kaltenborn 2001; Smart, Neale & Wade 2001; Harne 2004; Raitt 2005). Under this construction children’s development is not simply seen as linear, defined, and predictable, but is understood as strongly influenced by the socio-cultural environment where the adults and children together construct understandings and knowledge (Wenger 1998).

The emerging new paradigm has influenced the development of different research approaches that are based on the ideology of children being central to the research and of
valuing and trusting children (Smart, Neale & Wade 2001). A limited number of research studies (Gollop, Smith & Taylor 2000; Smart et al 2001; Kaltenborn 2004; Campbell 2004) in Australia and other Western countries have used this approach to seek the views of children about post-separation parenting decisions and about the children’s involvement in the decision-making process. Also, as discussed in Chapter 3, a small number of child inclusive studies provide information on children’s own accounts of their exposure to domestic violence.

Child inclusive studies have consistently found that children want to be consulted and to have their perspectives heard about their own needs and what issues should be considered in making decisions about their post-separation family relationships. Research has also recently emerged that demonstrates children are reliable witnesses to their parent’s separation and are competent to contribute to post-separation decisions that directly affect them (Smart & Neale 2000; Smart, Neale & Wade 2001; Kaltenborn 2001; Butler et al 2002; Smith & Taylor 2003). These studies show that it is important for children not to be constructed as ‘vulnerable victims’ of their own circumstances, but rather as individuals who bring unique and important perspectives about their family environments to the decision-making process (Smart & Neale 2000; Taylor, Smith & Nairn 2001; Nairn & Smith 2002).

The alternative construction of childhood challenges the “dividing practices” of exclusion that are supported by the policy and practice of the social sciences (Rabinow 1984, p.8). Under this alternative construction the belief that children are placed at risk from being involved in the decision-making process is recognised as the oppression of children (Smith & Taylor 2003). This has particular relevance for children whose life experiences, such as their exposure to domestic violence, have already oppressed them.

1.3 Overview of chapters

Chapter 1 discusses the rationale for the research study and the position of the researcher in relation to the topic. Relevant contextualising information is provided on the dominant and alternative constructions of childhood that position children in society and under the law. The context of contemporary family law in Australia, the diversification of family life and the regulation of the structure of the post-separation family are discussed. The definition of
domestic violence that is used as the basis for this research is provided and the important issue of children’s exposure to domestic violence is raised.

Chapter 2 provides an overview of the extensive literature reviews undertaken for this study that provide relevant background information for the identification of the commonly accepted and rejected knowledges which contribute to judicial presumptions about the needs and interests of children from separation and divorce. This chapter explores the relevant historical context of decision-making in the Australian family law arena and focuses on the significant legislative changes introduced under the Reform Act. This provides a context for considering how the judicial discourses on the ‘best interests’ principle have evolved.

Chapter 3 focuses on an in-depth discussion on children’s exposure to domestic violence and the adverse effects on their wellbeing. A number of issues relevant to children from family breakdown are discussed along with the difficulties that are encountered in developing understandings about the extent of, and children’s reactions to, their exposure to domestic violence. Information is provided on the findings of a small number of child inclusive studies that have identified children’s own perspectives on their experiences and needs which relate to their exposure to violence.

Chapters 4 and 5 address the research approach to this project. The discussion on the methodology in Chapter 4 explores the contrast between modernist and poststructuralist approaches to research. A feminist poststructuralist perspective and Michel Foucault’s construction of the knowledge-power relationship are explored. The value of reflexive practice and the development of discursive consciousness in contributing to the quality of discourse analysis are discussed. Discourse analysis is explained as are some of the challenges in using this approach to research. Chapter 5 explains the method used for the small quantitative analysis and provides detailed information on the qualitative research methods used for the data collection, sampling and in-depth analysis applied in this study. The process used to ensure that the interpretative findings are sound and trustworthy is discussed. Some of the challenges encountered during the research process and the ways with which they were dealt are also discussed.

Chapters 6, 7 and 8 provide the findings of this research study and give examples of the dominant, prevailing and intersecting discourses used by judges to construct the ‘best
Chapter 1: Children, families and the lore of family lore

interests’ of the child. These chapters address the research questions. Chapter 6 explores how judges constructed childhood. Chapter 7 explores how judges constructed children’s exposure to domestic violence and the risks to children’s wellbeing. Chapter 8 explores the role of gendered discourse in the judicial construction of the roles and relationships of parents and the structure of the post-separation family. These chapters also provide information on a hierarchy of evidence credibility. This refers to whose voices were privileged and whose were marginalised by judges, in the determinations of children’s best interests.

Chapter 9 draws on the prior chapters to present some considered thoughts on the key themes that emerged from the analysis of judges’ narratives that defined children’s ‘best interests’. The role that the dominant normative ideologies play in the reinforcement of social power relationships in the construction of the best interests of children who have been exposed to domestic violence is discussed. Some suggestions are made about possible ways of improving how the best interests of child victims of domestic violence are understood and constructed by professionals who are influential in the determinations of children’s best interests. Suggestions are also made on how cases involving domestic violence could be managed in the context of the FCA to centralise the needs of child victims of domestic violence.
Chapter 2: Children’s ‘best interests’ in family law

This chapter explores the origins, nature and the prevailing constructions of the concept of the paramount principle, the ‘best interests’ of the child in contemporary Australian family law. While the principle of the ‘best interests’ of the child is regarded by law as the paramount consideration, it is important to look beyond the statement of this principle and the rhetoric surrounding it to find its meaning (MacDevitt 1989). Children and their ‘best interests’ need to be contextualised within the social and political structures within the society in which they are reared (Brophy 1989). As discussed in Chapter 1, dominant discourses inform current constructions of childhood and influence the ideological normative assumptions about family structures following family breakdown. These assumptions are influential within socio-legal contexts in the justification of discretionary determinations made in the best interests of children (Thery 1989).

2.1 An historical snapshot of the origins of the paramount principle

According to Foucault, specific historical frames of reference operating at particular places and times serve to regulate society and to influence contemporary interpretations and historical accounts (McHoul & Grace 1993). An historical perspective is relevant to any construction of the present (Danaher, Schirato & Webb 2000). The contemporary construction of the paramount principle of the ‘best interests’ of the child, by legal and social science professionals, cannot be isolated from the legal history of decisions on post-separation parenting. This includes having an appreciation of the social and political influences that have shaped the law.

History shows that family preservation has been a longstanding value in our society and over time there generally has been a move in family law in the contemporary Western world away from seeking to attribute blame for family dissolution and a move towards restructuring the family (Landerkin 1997). Legislative and social changes have worked together to alter the dynamics of contested matters before the Family Court of Australia (FCA) and have contributed to the contemporary focus on the ‘best interests’ of children. The significant paradigm changes within the law that influenced this change include: the
shift from paternal rights to maternal preference under the ‘tender years doctrine’ (Brophy 1985); the introduction of ‘no fault’ divorce in Australia in 1975; the recent introduction of the legal principle of gender neutrality; and the recognition under the Family Law Reform Act 1995 (the Reform Act) of the rights of the child. From an historical perspective these shifts have occurred within the context of increasing social diversity (Collier 1999) and state intervention in the ‘welfare’ of the child (Swain 2001). These changes have challenged the power of fathers in post-separation families (Thery 1989; Fineman 1995).

2.1.1 The socio-legal context

Historically, English law formed the foundation of Australian law. During the late seventeenth century in England the state began to play a role in protecting the welfare of children. The doctrine of parens patriae reconceptualised childhood from children being chattels of their fathers to emerging citizens of the state, where the interests of society were paramount (Mercer 1998). This was the first challenge and potential restriction to the rights of fathers, as under seventeenth and eighteenth century English common law children were regarded as possessions of, and as having duties to, their fathers (Rodham 1973). During the mid-1800s the emerging understanding of, and concern for, the ‘welfare’ of children was significantly influenced by the social sciences that constructed children as vulnerable, needing care, protection, and a regulated environment in order to grow into sound, healthy adults (Goldstein, Freud & Solnit 1973). However, while the interests of the child were referred to under the English legislation of the Custody of Infants Act 1839, courts gave married fathers complete legal power over their children regardless of the quality of care provided by the fathers (Smart 1989; Taylor 1998).

In the second half of the nineteenth century there was a growth of philanthropic interest in various aspects of the lives of children. With the introduction in England of the new Custody of Infants Act 1873 mothers were able have their interests considered before the court, were successful in making some claims against violent husbands and were able to separate and take children up to the age of seven years with them (Smart 1989). However, fathers’ rights continued to predominate in a social context where fathers were seen as providers and protectors and the interests of mothers and children remained subordinate (Graycar 1989; Mercer 1998; Taylor 1998).

Following the First World War and Australian Federation there was an increased interest in the concept of the child as representing the future of the nation, and a more interventionist
approach was adopted to deal with perceived problems of child rearing that were more specifically defined as emanating from the family, rather than from a social environment of inequality (Swain 2001). In 1925 under the English Guardianship of Infants Act a fundamental change in the common law rights of parents was introduced in custody and access proceedings (Dickey 1990). The welfare of the children was accepted under the court’s rules as the paramount consideration and this was reflected in various ways in State legislation in Australia, including the Infants Custody and Settlements Act 1899 (NSW) (Chisolm 2002).

During the early twentieth century, alliances emerged between the state, philanthropists and professional groups who were seen to advance the knowledge and implementation of ‘scientific’ child rearing practices in the interests of the future of society (Jamrozik & Sweeney 1996). With the advent of a ‘scientific’ Freudian approach, theories emerged about the psychological and emotional concepts of childhood and the need for stable family relationships (Goldstein, Solnit, Goldstein & Freud 1998). Bowlby’s research and theorising drew attention to the importance of dyadic relationships (Bronfenbrenner 1979). The mother-infant bond (Bowlby 1953; 1958) achieved wide influence and cautioned against depriving children of a primary relationship with their mothers and what became known as the ‘tender years doctrine’ emerged (Brophy 1985). Under the ‘tender years doctrine’ normalising discourses on mothers ‘naturally’ devoting their lives caring for young children prevailed (Jacob 1988; Harne 2004). This began a tradition of scrutinising mothering practices and blaming mothers if the needs of children were perceived to have not been met (Jamrozik & Sweeney 1996; Allan 2004). It also established an enduring focus, in social and legal policy, on the sanctity of the family for the wellbeing of the child, rather than a focus on the child as an individual (Mason & Steadman 1997).

In Australia under the Matrimonial Causes Act 1959, there was a provision in custody and guardianship proceedings that the court regard the interests of the child as paramount (Section 85(1)(a) Matrimonial Causes Act 1959). While the ‘tender years doctrine’ provided a powerful challenge to the absolute rights of fathers (Smart 1989), under the Matrimonial Causes Act 1959 the ‘welfare’ of the child was solidly linked to the fitness of the mother to be the custodial parent, as judged by her morality. This continued to be a consideration of the court in relation to custody and access well into the second half of the
twentieth century, but the moral conduct of fathers, unless extreme, was not a consideration in court proceedings (Dickey 1997).

In 1975 a landmark reform occurred in Australia with the introduction of the *Family Law Act 1975* (FLA) (Graycar 1989). It introduced ‘no fault’ divorce under a gender neutral legislative scheme, and established the integral change that the ‘welfare of the child’ of a marriage was different to parents’ interests and was recognised legally and procedurally as the paramount consideration (Section 64(1)(a) FLA 1975). From the late 1980s children not from a marriage were also covered by this legislation (Chisolm 2002). While the new legal principles of ‘legal equality’ and ‘gender neutrality’ were significant signs of progress, these discourses masked the influence of the past patriarchal ideology of the nineteenth century laws and the importance of the biological family (Graycar 1989). As mentioned in Chapter 1, enduring gendered discourses about the traditional roles of mothers and fathers intertwined with notions of social stability continue to prevail in family law in Australia (Moloney 2002).

A discourse on ‘the child from separation and divorce’, that was based on research from the 1970s on the adverse affects of separation and divorce on children’s adjustment, emerged and gained prominence in the contemporary Western world (Thery 1989). This, together with the advent of family systems theory and family therapy approaches, focused society’s attention on the effects of family breakdown on children’s adjustment (Sanson & Lewis 2001). Under the FLA, ‘welfare’ referred to a range of issues that were seen to relate to children’s healthy development and included physical, moral, religious and emotional welfare (Chisolm 2002). The discourse on the welfare of the child showed a shift from a focus on parents’ rights to concern about the welfare of children (Rotman et al 2000). Because of society’s assumed deficits where children are raised by a single parent (Kelly 2001) and because of the marginalisation of fathers (Smart 1989; Hetherington & Stanley-Hagan 1999), a strong focus emerged on the importance of dyadic family relationships where loyalty ties were perceived to bind parents to each child, regardless of the nature of the relationships (Boszormony-Nagy & Spark 1973).

There have been numerous amendments to the family law legislation in Australia, but the most far-reaching changes were introduced under the *Family Law Reform Act 1995* (the Reform Act) that received Royal Assent on 16th December 1995 and came into operation in June 1996 (Nygh 1996). It was not the intention of the Australian Parliament to alter the
existing paramount principle or its operation by changing the terminology from ‘welfare’ to ‘best interests’ of the child (Dickey 1997; Finlay, Bailey-Harris & Otlowski 1997). However, the ‘best interests’ principle was seen to be more child focused than the principle of the ‘welfare’ of the child. (Chisolm 1996; Staindl 2000) and was perceived to have less limited and confusing connotations than the term ‘welfare’ (Finlay, Bailey-Harris & Otlowski 1997). Under the Reform Act (Section 60B(1) FLRA 1995), the definition of ‘interests’ incorporated the ‘care, welfare, and development’ of children, thus covering what was perceived to be all aspects of parenting to enable children to reach their full potential (Mushin 1996; Chisolm 1996). However, as will be discussed in more detail in the following sections, it would be naïve to assume that the sole focus of this principle could be on the interests of the children (Thery 1989).

2.1.2 The Reform Act and the impetus for change

Within changing social and political contexts the status of children and what are recognised as their needs affects the legislative and policy responses (Bagshaw & Chung 2000a; Smith & Taylor 2003). The aims of the Reform Act legislative changes were perceived at the time of enactment to be unclear (Dewar1996). However, the legislative changes were heralded by the Commonwealth Government and by the Family Law Council in 1992 as aiming to ensure that children receive adequate and proper parenting (Rhoades 2000b) and to transform the functions of post-separation family life (Staindl 2000; Morosini 2000; Mushin 1996).

The proposed reforms were not preceded by any research that suggested the legal regime of the time was detrimental to child subjects of disputes or that there were deficiencies in the legal system (Rhoades 2000b). The impetus for the reforms originated during the later part of the 1980s when increasing changes in the demographic characteristics of households in the Western world intensified concerns about the demise of the heterosexual, two-parent family unit (Collier 1999). Under the dominant socio-legal discourses that suggested that the welfare of children was intrinsically linked to ‘continuity of care’ and ‘stability’, a widely debated perception came to the fore that the rights of parents were masquerading as representing the ‘welfare of the child’ (Neale & Smart 1998). The common perceptions in Australia were that, under the FLA custodial mothers had proprietorial ‘rights’ over their children and that access fathers had a prima facie ‘right’ of
access to their children. This became a strong impetus for legislative reform (Boland 1996; Staindl 2000).

The quest for legislative change gathered momentum in 1992 when the Joint Select Committee inquiry into family law supported the need to make changes to family law to reflect the changing philosophy with regard to post-separation parenting (Armstrong 2001). The report, Patterns of Parenting After Separation produced by the Family Law Council (1992) was also released that year. This was influential in stimulating the direction of legislative change as the report referred to research that showed a declining pattern of parent-child contact and that children fared better when both parents were involved in their care (Moloney 2001b).

2.1.2.1 Fathers’ rights activism

In the 1990s the feminist movement continued to gain strength in the contemporary Western world, along with the discourse of gender ‘equality’ and this fuelled responses from Fathers’ Rights groups seeking to maintain patriarchal power and parenting ‘rights’ (Harne 2004). As reflected in the report of the Joint Select Committee (1992) on the operation and interpretation of the FLA, while public comment and debate contributed to the reforms, the dominant voices calling for legislative change were aggrieved, non-custodial fathers who claimed discrimination in family law in Australia and who sought to achieve a presumption of shared parenting (Rhoades, Graycar & Harrison, 1999). Their stated grievances, that relied on the rhetoric of equality expressed in the legal discourse of ‘rights’, were not supported by research conducted within the FCA by Horwill and Bordow (1983) and Bordow (1994). However, a significant minority of contact fathers held strong beliefs that existing contact arrangements were unfair to their children and to themselves (Smyth, Sheehan & Fehlberg 2001). A prime motivation for the reforms was to redress the perceived power imbalance between custodial and non-custodial parents (Rhoades 2000b).

The advocacy by non-custodial fathers brought the role of fathering following family dissolution to the foreground as a politically contentious issue that continues to have complex inter-relationships with contemporary constructions of fatherhood, masculinity and gender relations (Collier 1999). The sustained campaigns and the international
connections between Fathers’ Rights organisations\(^2\) have kept the issue of post separation fathering firmly on the political agenda (Raitt 2005).

### 2.1.2.2 Feminist advocacy

Prior to the introduction of the Reform Act in 1995 children were to be protected under the FLA from abuse or ill treatment which could physically or psychologically harm them (Armstrong 2001). According to Rhoades, Graycar and Harrison (2000) developments in case law, based on a number of reported cases since 1994, had established that domestic violence was an issue relevant for consideration in the determination of custody and access disputes. However, there was a widely held perception that the position held by the FCA was that domestic violence was not relevant to the determination of a child’s welfare (Nygh 1996).

The inclusion into the Reform Act legislation of the need to ensure safety for adults and children from exposure to family violence was not a straightforward path. Following submissions and advocacy from women’s groups, family law professionals and the National Women’s Justice Coalition, the government amended the Reform Bill 1994 to include the qualification that children’s right to contact was to be subject to the child’s best interests and the requirement be strengthened that the FCA make orders consistent with any existing family violence orders (Armstrong 2001).

Predictions made by women’s legal groups about the overall reforms to the legislation included concerns about the emphasis on parental equality and a lack of emphasis on the issue of gender power imbalances. There was concern that an increase in the rights of contact parents would be detrimental to the children and that a child’s right to contact would be used to pressure resident parents into agreements that would compromise the safety of the child in cases where violence is an issue (Rhoades 2000a; Armstrong 2001).

### 2.1.2.3 The influence of the UK Children Act 1989


\(^2\) See for example websites http\:/\:/www.fnf.org.uk; http\:/\:/www.fathers-4-justice.org
on the development of the Reform Act (Chisolm 1996). The government sought to make a deliberate movement away from the proprietorial notion of parenthood (Mushin 1996). Support was given to the Family Law Council’s recommended legislative change sent in a letter of advice to the Attorney-General in 1994, much of which was in line with the *UK Children Act 1989* (Children Act). In particular, it was recommended that the language of post-separation parenting arrangements change from ‘custody’ and ‘access’, as a way of removing the ‘win/lose’ connotations of post-separation parenting and to encourage both parents’ ongoing cooperation and responsibility for the welfare of the child. This reflected the underlying philosophy of the Children Act that children in separated families fare better when they maintain a good relationship with both parents. This view was also reflected in Article 18 of the *United Nations Convention on the Rights of the Child* (UNCROC 1989). Although there were significant differences between the Children Act and the Reform Act (Rhoades 2000a) this philosophy influenced the Reform Act’s incorporation of principles relating to post-separation parenting and reinforced the concept of the family as the fundamental, natural group in society for the growth and the wellbeing of children (Landerkin 1997; Law Council of Australia 1996). However, this concept could not guarantee that the needs of children would be met as the parents’ own interests could easily take priority (Graycar 1989).

### 2.1.2.4 A focus on children’s rights

UNCROC had some influence in the drafting of the Reform Act (Nicholson 2002). As shown by the Articles of UNCROC\(^3\), the ‘rights’ and ‘best interests’ of the child embrace both the right to self-determination and the right to protection. Under UNCROC the ‘best interests’ and ‘rights’ of children are controlled by adults, with the self-determination of children being limited by adult interpretations of children’s competency (Smith & Taylor 2003; Campbell 2004). The principles of UNCROC respect the personhood of children, but the Reform Act’s dominant paradigm of the idealised post-separation family failed to incorporate this notion (Tapp & Taylor 2001).

\(^3\) UNCROC (1989) Article 3.1 the ‘best interests’ of the child as the primary consideration; Article 9.3 the right of the child to maintain personal relations and direct contact with both parents on a regular basis, except where it is contrary to the child’s best interests; Article 12.1 the right of the child to express his or her views and that the views be given due weight in accordance with the age and maturity of the child; Article 12.2 the child be given the opportunity to be heard in legal proceedings either directly or via the appointment of a representative; Article 18 both parents to have responsibility for the upbringing and development of the child with the best interests of the child being their basic concern; Article 19.1 protection of the child from violence, abuse, and neglect.
In practice, the principles of the ‘rights’ and ‘best interests’ of the child create problems in selecting which processes to adopt in the direct participation of children in decisions that directly affect them and in deciding on the weight to give to their stated views (Thomas & O’Kane 1998). As will be discussed later in this chapter, under the Reform Act it is the adults who construct the ‘best interests’ and regulate the ‘rights’ of children (Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission 1997).

2.2 Contemporary constructions of the ‘best interests’ of the child

Each society has its own regime of truth. Its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true.

Foucault (1980, p.131)

From a poststructuralist perspective it is important to identify the hidden arguments and beliefs that underpin the dominant universalised ‘truths’ (Tesh 1994) that form powerful foundations for policy and practice directions. How the ‘best interests’ of children is defined reflects the normative constructions of the era (Thery 1989; Byas 2003). In the fertile ground of the discretionary ‘best interests’ legal battleground it remains a significant challenge for those who make decisions about the future of children to determine what is in their best interests (King 1997). Concerns have been raised by some authors that judicial determinations reflect the normative construction of the regulation of family life and prioritise the interests of the state and parents over the interests of children (Mercer 1998). It is, therefore, important to make transparent the dominant assumptions and beliefs that inform the contemporary criteria for meeting the ‘best interests’ of children within family law in Australia.

As discussed in the following sections, it is clear that established meta-narratives, stemming from large selective bodies of research which demonstrate the harmful effects of family dissolution upon children and society, form a comfortable alliance with legal systems that rely on the embodiment of reason to construct and reinforce what constitutes the ‘best interests’ of the child (King 1997).

A poststructuralist approach recognises that debates are ongoing about which knowledges and beliefs should be privileged as the ‘truth’ at any given time (Thery 1989; Larrain
Poststructuralism encourages the recognition of alternative epistemologies which inform us that there are no absolute truths, that universalising principles should give way to a recognition of individual differences and specific life experiences (Larrain 1994), and that a complex personhood underpins the identity and post-separation adjustment of each man, woman and child (Featherstone & Trinder 1997).

2.2.1 A discursive construction privileged by research

Institutional practices are created, supported and changed by dominant discourses that emanate from research, produced at particular times and within particular cultures and locations, to be ‘knowledge’ and ‘truth’ (Danaher, Schirato & Webb 2000). Over time meta-narratives have emerged from research into the effects of separation and divorce to inform dominant ‘truths’ about what are the necessary factors for preventing detrimental outcomes for children, families and society. While “the most critical issue is that the research must inform legislation” (Jaffé, Poisson & Cunningham 2002 p.200), it is important to identify which research informs the contemporary construction of the ‘best interests’ principle.

‘Scientific’ discourses establish normative guidelines and contribute to the apparatuses of power used for social regulation (Foucault 1977). The early quantitative longitudinal research into family breakdown, based on a modernist rationale from the ‘scientific’ age (Sanson & Lewis 2001), produced discourses that established divorce as a damaging ‘event’ and not as a ‘process’ for children (Amato 2000; Wise 2003). Numerous early studies were adult focused (James & Wilson 1984) and established family structure as having the explanatory power for the adjustment of children (Thery 1989; Sanson & Lewis 2001). However, contradictory findings were made in a range of early studies, including the research by Dunlop and Burns (1983), Furstenberg et al (1987), Kalter et al (1989) and Amato (1993), that have contributed to ongoing debates about the effects of separation and divorce on children. Despite this, there has been a selective reliance on findings from the early research. For example the research undertaken by Wallerstein and Kelly (1980) and Hetherington et al (1982), that influenced the foundations for the development of contemporary normative expectations about what affects children’s post-divorce adjustment. The influential studies support dominant generalised beliefs in the Western world, that children’s post-separation adjustment is significantly linked to father-child
contact (Amato 1993; Sanson & Lewis 2001) and that mothers need to cooperate and take responsibility for facilitating this (Williams, Boggess & Carter 2002; Nicholson 2004).

2.2.1.1 ‘Conflict’ as the determinant for children’s post-separation wellbeing

In most contemporary Western countries the vision of ongoing parenting and cooperation has been reinforced by a dominant discourse on the need to reduce interparental conflict post-separation. This emerged from a large body of research, for example studies conducted by Dunlop and Burns (1983), Emery (1982,1994), Amato (1993), Johnston and Campbell (1993), Johnston (1995), Hetherington and Stanley-Hagan (1999), Grych et al (2003) and from the literature over a couple of decades (Jaffe & Geffner 1998). A number of more recent studies have linked the emotive issue of social concern, ‘father absence’, to interparental conflict (Rodgers & Pryor 1998; Parkinson & Smyth 2003; Baum 2004).

A belief has become dominant amongst social science and legal professionals, as well as politicians and members of society that children’s exposure to ongoing conflict between parents is the prime issue that adversely affects children’s adjustment to family breakdown (Ricci 1997; Sanson & Lewis 2001; Jaffe, Lemon & Poisson 2003; Harne 2004; Murch 2005). Parents’ failure to resolve their conflict is perceived to lead to increased emotional instability, academic problems, behavioural and psychological disorders and other symptoms in the children (Kelly 2000). This belief has informed ‘scientific’ discourses on ‘syndromes’ and ‘disorders’ in children exposed to interparental conflict. These discourses classify mother-blaming (Smart & Sevenhuijsen 1989; Brown et al 2001; Allan 2004) that in the past referred to the ‘psychological alignment’ of the mother with the child against the father. This formulation has shifted over time to become ‘Parental Alienation Syndrome’ and has now become the formulation of ‘child alienation’ (Kelly & Johnston 2001). These ‘scientific’ discourses remain powerful constructs in family law jurisdictions that categorise and problematise children’s adjustment to separation and divorce (Featherstone & Trinder 1997).

There is a growing awareness amongst some social scientists of a substantial limitation to the knowledge produced from research on interparental conflict and that this needs to be acknowledged in order to better inform decision-making about children’s ‘best interests’ (Wise 2003). The large body of research on interparental conflict has relied on a poorly
defined terminology of what is meant by ‘conflict’ and has largely excluded, or failed to
differentiate other factors that impinge upon children’s post-separation lives (Byas 2003).
Children from families characterised by high ‘conflict’ have different experiences and
needs compared to those from families characterised by ‘violence’ (Jaffe & Geffner 1998;
Jaffe et al 2002), and compared to those from the general divorcing population (Johnston
1994). The undifferentiated research on marital conflict has effectively sanitised,
normalised and obscured the effects of ‘violence’ on children within separated families.
The research on interparental conflict has reinforced a focus on the adults who, under this
gender neutral concept are assumed to be equal participants in the ‘conflict’. This has led
to a prevailing assumption that once the adult partners have separated the problem of
‘conflict’ can be resolved (Family Violence Committee 2003). This is potentially
dangerous in cases of domestic violence where the issue of conflict over contact and other
parenting issues is neither neutral nor equal (Mullender et al 2002; Kaye, Stubbs & Tolmie
2003).

Despite the limitations of research on the impact of conflict and violence on children’s
post-separation adjustment, a strong social, political and legal focus has evolved in the
contemporary Western world from research that has defined the universalised needs and
interests of children from separation (Cunningham 1995). The knowledge derived from
research about parenting and the rhetoric that supports notions of ‘acceptable’ parenting
roles and relationships following family breakdown have created powerful legal stories
(Smart 2002; Fletcher, Fairbairn & Pascoe 2004; Baum 2004). These reflect a dominant
discourse on children as being vulnerable and as needing both natural parents to aid their
development for the future of society (Mushin 1996; Lupton & Barclay 1997). What
constitutes the ‘best interests’ of the child is now being directly connected to the child’s
right of contact (Rendell, Rathus & Lynch 2000), to the reduction of interparental conflict
and to both parents having an ongoing shared involvement in their children’s lives (Neale
& Smart 1999; Kelly 2001; Jaffe et al 2003; Byas 2003). This, in turn, has led to the
establishment of standardised patterns of children’s contact with the non-resident parents
(Jaffe et al 2002; Smyth & Wolcott 2004).

2.2.1.2 Competing discursive constructions informed by research

Increasingly available contemporary research indicates that continuing to seek idealised
simplistic solutions to assist the post-separation adjustment of all children is not a
productive endeavour (Kelly 1993). Over time researchers have used more sophisticated methodologies and moved the focus of research into separation and divorce away from family structure to an examination of family processes, and to individual and demographic variables. Research has produced information about a range of relevant pre-existing variables within families that include the parent-child relationships, the interparental relationship, individual histories, and the parents’ psychological adjustment (Rodgers & Pryor 1998; Amato & Gilbreth 1999; Kelly 2001; Sanson & Lewis 2001; Smyth & Ferro 2002; Hetherington & Kelly 2002). These factors need to be conceptualised within the social and cultural contexts of the separated family population in order to better understand individual children’s adjustment to family breakdown. Increasingly contradictory discourses emerging from contemporary research suggest that the quality of post-separation parenting is a more significant determinant for children’s adjustment than family structure. This is supported by meta-analyses of studies that have investigated children’s wellbeing and the connection to father-child contact following separation (Amato & Gilbreth 1999; Pryor & Rodgers 2001, Whiteside & Becker 2000). Pryor and Rodgers (2001, p.214) found that “contact between fathers and children is not necessarily a positive experience for children…if the relationship is negative”.

New research information indicates that judges need to be exposed to a wider knowledge base about the issues they face during a trial (Elias 2002). However, it is important to recognise that legal practice continues to be strongly influenced by a selective reliance on empirical research that has not comprehensively identified the full range and complex interplay of factors, including domestic violence, that place children from separated families at risk of poor adjustment (Jaffe et al 2002; Wise 2003).

2.2.2 Legislative regulation in constructing children’s ‘best interests’

The following sections discuss the influence of the Reform Act legislation and the role that dominant legal discourses play in the constructions of the discretionary ‘best interests’ principle.

2.2.2.1 Policy direction

Under the Reform Act the principle of the child’s ‘best interests’ has been established as the paramount consideration when the Court is deciding whether to make a particular parenting order (Section 65E FLRA 1995). The term ‘paramount’ is deemed to be the
over-riding consideration in the actual judicial determination, and refers to a process where all relevant information and options are considered in relation to the child’s welfare (Dickey 1997). It is a deceptively simple principle (Finlay, Bailey-Harris & Otlowski 1997) which, given the seductive discourse of the centrality of the child in making ‘best interests’ determinations (Ralph 1998), is easy to accept as the best way of achieving good outcomes for children within a society that is assumed to be child-centered (Sandberg 1989).

The ‘best interests’ principle may appear to form a solid basis for the determination of parenting disputes but it has been widely criticised as being indeterminate and discretionary decision-making (Finlay, Bailey-Harris & Otlowski 1997; Kelly 1997; Landerkin 1997; Thomas & O’Kane 1998; Mercer 1998; Woodland 1999). In effect, it relies upon “unexamimable discretion” (Rayner 1997, p.4). There is no clarifying definition of the term ‘best interests’, nor is there consensus in law and the social sciences about what it means. There are inherent tensions in the process of determining the child’s ‘best interests’ as courtroom arguments proceed based on assumptions about what is ‘good’ and ‘bad’ for children (King 1997) and judges are charged with determining the facts of a case where competing interests are at stake (Landerkin 1997).

While Section 68F(2) of the Reform Act provides a checklist of factors that the Court must consider in making determinations about parenting arrangements (Dickey 1997; Kennedy 1996) (Appendix 2.1) the weight to be given to each factor is not prescribed under the legislation and the factors are not listed in an order of priority (Chisolm 1996). The significance attributed to any of these factors is left to judicial discretion based on the circumstances of the individual case (Finlay, Bailey-Harris & Otlowski 1997; Dickey 1997).

A policy direction has emerged from the Reform Act’s legislative statement of the object and principles that form the context for the exercise of the Court’s discretion (Kennedy 1996; Morosini 2000) (Appendix 2.2). This statement has made clear the intention of the bipartisan decision by the government in relation to the legislative reforms (Kennedy 1996; Mushin 1996). The novel provision and overarching nature of a statement of object and principles defined, at the macro-level, a normative guideline for ongoing, cooperative parenting. Parents are encouraged to cooperate and establish their post-separation parenting arrangements, if necessary, by using primary dispute resolution to resolve their
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differences (Part 111 FLRA 1995) (Armstrong 2001; Nicholson 2002). This provides a strong foundation for the child’s right to know and have regular contact with both parents (Kennedy 1996; Dickey 1997; Fisher & Pullen 2002).

Within the powerful discursive context of the law what is stated and not stated, in the statement of object and principles has a strong influence on how children’s ‘best interests’ are constructed in the legal system. The Reform Act did not overtly acknowledge that, in the context of post-separation family life, a history of domestic violence may indicate that the ‘best interests’ of the child may not be served by application of the stated object and principles (Rhoades et al 2000; Armstrong 2001). The failure of the legislation to specify this reflects an incorrect notion that cases that enter the Australian family law system where domestic violence is an issue are an exception (Rhoades 2000a).

2.2.2.2 The power of legal discourse

It is not easy to separate personal values from professional knowledge and to distinguish both of these in turn from societal values embedded in law.


Concerns about the construction of the ‘best interests’ principle in practice, have evolved in relation to the undisclosed social and political agendas for which there is no legislative provision (Sclater & Piper 1999). These agendas are masked behind legal discourses and rely on unspoken assumptions that inform the policy direction (King 1997). This has led to distrust of the ‘best interests’ principle which is viewed by some as simply a sentimental expression of hope that decisions will give rise to outcomes that meet the needs of children (Rayner 1997; Rotman et al 2000). The way that the jurisprudential standard of the ‘best interest’ of the child is interpreted is “normative rather than objective” (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997, p.389). It reflects conservative ideals and traditional concepts of family roles, relationships and structures (Brophy 1989; Neale & Smart 1999; Sheehan & Fehlberg 2000) that do not reflect the social realities of how families live (Tapp & Taylor 2001).

From a feminist perspective it is questionable whose interests are being served as the dominant ideology of patriarchy is sustained under the guise of the ‘best interests’ principle. Under the Reform Act, dominant discourses enhance the standing of fathers as parents (Charlesworth, Turner & Foreman 2000; Tapp & Taylor 2001), support notions of
fatherhood as “a status rather than an activity” (Fletcher & Willoughby 2002, p.13), and weaken the position of primary caregivers, who are usually mothers (Rhoades et al 2000; Kaye et al 2003). The emphasis on shared parental responsibility and ongoing parent-child relationships presents opportunities for violent fathers to harass and control their family victims through questioning the role and decisions of the resident parent, and through pursuing shared residence arrangements of their children (Rhoades et al 2000; Kaye et al 2003). The powerful presumption of contact has influenced the amount of litigation over contact disputes, including cases where domestic violence is an issue (Dewar & Parker 1999; Rendell, et al 2000; Rhoades et al 2000). The focus of the Court remains on the allocation of contact time and there is a failure to prioritise the ‘quality’ of family relationships (Smyth & Wolcott 2004) that would contest the continuation of patriarchal traditions (Byas 2003; Barnett & Wilson 2004).

Within the politicised context of family law in Australia the policy direction, informed by dominant discourses, places real constraints on the operation of flexible reasoning and the discretion of judicial officers in the development of options for post-separation parenting arrangements (Moloney 2001b). This also affects the establishment of case law (Counsel & Kelly 2000).

2.2.2.3 Discourses on children’s rights

The Reform Act clearly articulates the rights of children and the responsibilities of parents (Section 60(B) FLRA 1995). All courts exercising jurisdiction under this legislation are required to protect children’s rights, except where it would be contrary to a child’s best interests (Dickey 1997). However, the introduction of children as bearers of rights has not shifted the operation of patriarchy under the legislation. Reports provided by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in 1996 and 1997 have drawn attention to limitations in fulfilling children’s rights, such as children’s participatory rights, in the Australian legal context. While these reports did encourage the FCA to focus on the right of the child to safety in relation to the issue of direct child abuse, there was a failure to refocus attention on the issue of children’s exposure to domestic violence.

In the name of ‘rights’ and ‘best interests’ of the child, the legal process continues to disentitle children in the exercise of their rights and readily objectifies them as ‘cases’ to
be managed (Stacey 1995; Altobelli 2000; Smart 2002; Smith & Taylor 2003). Under the legislation children do not have the right to not exercise their rights (Staindl 2000) so, in practice, the accompanying rhetoric of parental responsibility equates to the exercise of parental rights (Nicholson 2002).

**Discourse on children’s right to contact**

One of the most controversial aspects of the Reform Act was the introduction of the child’s right to know and be cared for by both parents and to have direct, regular contact with both parents (Sections 60(B)(a),(b) & 68F(2)(d) FLRA 1995). The standing of these rights was enhanced by the provision of the legislative overarching statement of object and principles (Rhoades 2000a), referred to in a prior section. This contentious issue fuels conflict in the area of family law disputes (Collier 1999). As the following quotation highlights this was predicted following the introduction of the Reform Act.

*For good or ill, the notion of continuing parental responsibility will empower those who now languish as “access parents”. Whether the system will work if they actually start to exercise that authority remains to be seen.*

Hon. Peter Nygh (1996, p.15)

A pro-contact ideology has emerged from the Reform Act (Rhoades 2000a; Rendell 2001) where equality claims and the needs and interests of contact parents in the legal system have been successfully channeled via a discourse on the ‘rights of the child to know both parents (Kaye & Tolmie 1998; Counsel & Kelly 2000; Altobelli 2000; Rhoades 2000a; Charlesworth et al 2000; Armstrong 2001). The co-opting of the principle of the child’s right to contact by Fathers’ Rights groups has added credibility to the claims of fathers for increased contact and has made contesting father-child contact a difficult process (Raitt 2005). There has been increasing reliance upon the use of contact centres as a way of continuing contact in cases where there may be risk factors for the child (Rhoades 2000a). In effect a pro-contact ideology imposes upon children the exercise of traditional patriarchal rights where the previously more marginalised non-resident parent becomes empowered (Smart 2001; Armstrong 2001).

The pro-contact ideology in Australian family law can be seen to clash with the Articles embodied in UNCROC, previously referred to, which aim to empower the child through the exercise of their rights (Nygh 1996; Tapp & Taylor 2001). How the pro-contact
ideology serves the ‘rights’ and ‘best interests’ of children must be questioned (Collier 1999), particularly in relation to families where domestic violence is an issue. Under this ideology an analysis of the complexities of post-separation relationships, including the presence of domestic violence are avoided (Rhoades 2000) and violence can pass unnoticed by the Court (Charlesworth et al 2000; Stott 2000).

Discourse on children’s participatory rights

Foucault’s examination of Bentham’s Panopticon describes rituals of power that are enacted by institutions to regulate, control and define subjects (Dreyfus & Rabinow 1982). This can also be seen in the operation of family law in the Western world where children are positioned by dominant discourses as ‘objects’ of concern (Smart 1989; Smart, Wade & Neale 1999; Tapp & Taylor 2001). In Australian family law the established adult-child binary supports a protectionist model where children’s rights are not seen as equivalent to the satisfaction of their needs or protection of their interests (Rayner 1997; Charlesworth et al 2000; Smith & Taylor 2003). Children who are positioned as a marginalised class of people and are given perfunctory recognition (Saunders & Goddard 2001) cannot escape from, nor effectively participate in adult dominated situations (Heerey 2000). This is reflected in legal discourses on the ‘best interests’ of the child (Piper 2000; McIntosh 1997; Campbell 2002, Shea Hart 2003) where children are not recognised as legal persons (Smart 1989; Australian Law Reform Commission & the Human Rights and Equal Opportunity Commission 1997; Schetzer 2001; Smith & Taylor 2003).

Under Australian family law children can be parties to proceedings (Section 65C(b) FLRA 1995; Family Law Rules O.23 r.5), can be interviewed by a judge (Section 68G(2) FLRA 1995; Family Law Rules O.23 r.5(1)), and can provide evidence to the Court (Family Law Rules O.23 r.5(5)). Involvement in a legal process is how individuals assert and enforce their rights. However, in Australian family law children are rarely involved in proceedings (Human Rights and Equal Opportunity Commission & Australian Law Reform Commission 1996; Chisolm 1999; Barnett & Wilson 2004), are rarely directly involved in the dispute resolution process (McIntosh 1997; Campbell 2002), and in the wider Australian community children are not usually consulted by their parents about their needs and wishes post-separation (Campbell 2004).
The Reform Act gave recognition to wishes expressed by the child by requiring the Court to consider these in making determinations in the ‘best interests’ of the child (Section 68F(2)(a) FLRA 1995). While this could be seen to value children’s voices in contributing to the construction of their own best interests, it remains difficult to give effect to children’s rights where the law privileges adults’ accounts over children’s accounts (Ludbrook 1995; Kaltenborn 2004). The Reform Act did not mandate the implementation of the child’s wishes in legal proceedings (Rayner 1997; Chisolm 1999). Children’s wishes are usually heard through ‘expert’ adult witnesses’ accounts, or through the appointment, under Section 68L (FLRA 1995), of a Separate Representative who is often appointed where there is a concern about risk to the child from exposure to violence and or abuse (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997; Taylor 1998). While obliged to inform the Court of any stated wishes, a Separate Representative may never interview the child, may reject the child’s expressed wishes, editorialise or place minimal weight upon what the child says, and argue the cases according to his or her own appraisal of the ‘best interests’ of the child (Australian Law Reform Commission & Human Rights and Equal Opportunity Commission 1996). This significantly influences the decision-making outcomes as “in many cases, judges are only as effective as the quality of the information they have to consider” (Jaffe & Geffner 1997, p.26).

The interpretations made by Separate Representatives of the child’s ‘best interests’ presented to the Court are influenced by the dominant ideology in family law (Fineman 1989) and by the opinions of social scientists, who rely on generalised, theoretical knowledge to inform them about the competence of children to express reliable wishes (Goldstein, Solnit, Goldstein & Freud 1986). Case law in family law in Australia strongly upholds the rhetoric of childhood competency as a valid criterion for deciding what weight to give to any expressed wishes of the child (Staindl 2000; Nicholes 2000; Bowen 2000; Kordos 2000; Fisher & Pullen 2002). Judicial discretion in determining the maturity of the child and the relevance of any expressed wishes, which are stated as relevant considerations in the legislation (Section 68F(2)(a) FLRA 1995), means that the child’s wishes can be easily minimised or completely disregarded (Thomas & O’Kane 1998; Rayner 1997).
The marginalisation of children is a denial that children “are the most reliable witnesses of their own experience” (Butler et al 2002, p.9; Ludbrook 1995; Trinder 1997; Smith & Taylor 2003). The acceptance of processes that marginalise children deflects attention from the need to improve adult competence in understanding what each child is capable of doing and in assisting children to participate in decision-making processes (Garbarino 1992). By the arbitrary imposition of age distinctions, children are subjected to adults determining their futures (Stacey 1995; Murch 2005). In the jurisdiction of family law in Australia the marginalisation of children can easily move the focus of parenting disputes away from the interests of the child and on to the interests of the parents, thereby compromising the wellbeing of the child (Macvean 1998; Kaye & Tolmie 1998; Counsel & Kelly 2000; Altobelli 2000; Staindl 2000). This is a serious issue in cases where children have been exposed to domestic violence as this renders each child a “silent victim” (Koverola & Heger 2003, p.331). The ancient maxim of children being ‘seen and not heard’ (Stevenson 1949) remains evident in the contemporary construction of the ‘best interests’ principle in contested parenting matters before the FCA (Australian Law Reform Commission & Human Rights and Equal Opportunity Commission 1996).

**Discourse on children’s right to safety**

Child protection is “a fundamental responsibility of government” and under the family law legislation “the Federal Government has a major responsibility for child protection” (Family Law Council 2002b, p.15). The Reform Act’s family violence provisions (Section 68F(2)(g)(i),(ii); and (j) FLRA 1995) offered the first explicit statutory recognition in Australian family law of the relevance of family violence to decision-making about children (Dewar & Parker 1999). All courts exercising jurisdiction under the Reform Act are directed to have regard for the need to ensure safety from exposure to family violence, and the provisions prescribe processes and address inconsistencies between jurisdictions in cases of family violence (Division 11 FLRA 1995). In determining the ‘best interests’ of the child “judges are now required by the Reform Act to ensure their orders for residence and contact do not expose any person to an ‘unacceptable risk’ of family violence” (Rhoades et al 1999, p.12).

From a feminist perspective there are significant concerns about how well the ‘best interests’ principle in practice incorporates the rights of the child to safety (Kaye & Tolmie 1998; Rhoades et al 2000). In contemporary Western countries, where there are legislative
provisions in relation to safety, it is not uncommon for there to be gaps between the legislation and practice (Jaffe & Geffner 1998). An additional problem under the Reform Act legislation is that, in determining what is in a child’s best interests, the statement of object and principles that gives precedence to ongoing and cooperative parenting (Nicholson 2002) does not place equivalent emphasis on the expression of children’s or adults’ rights to safety (Rhoades 2000b; Charlesworth et al 2000). It is, therefore, not surprising that under the legislation there is a real tension between the child’s right to contact with both parents and the child’s right to safety (Rhoades et al 2000).

As is further discussed in Chapter 3, over a number of years Australian literature, Australian research (Dewar & Parker 1999; Rhoades et al 2000; Rendell et al 2000; Brown et al 2001; Irwin et al 2002; Kaye et al 2003) and women’s advocacy groups have provided a consistent and concerning depiction of how children’s and adults’ rights to safety are being compromised in practice under the ‘best interests’ principle in the family law jurisdiction in cases where violence is an issue. Gaps have been identified in the FCA’s understanding of domestic violence and in the Court’s failure to differentiate the management of cases where there are issues of domestic violence and/or child abuse from cases where violence is not an issue (Rhoades et al 2000; Kaye et al 2003; House of Representatives Standing Committee on Family and Community Affairs 2003; Shea Hart 2004). In contested parenting cases that often have higher levels of violence than divorcing adults in the general population (Johnston & Campbell 1993) the ‘child’s right to contact’ is a dangerous presumption that displaces the child’s ‘right to safety’ (Rhoades 2000b). As research conducted by Brown et al (2001) shows, it is not until serious harm can be demonstrated to the FCA that the issue of the child’s right to safety can successfully challenge the assumed value of contact for the child or the assumed quality of the child’s relationship with the contact parent.

2.3 Chapter summary

This chapter has provided an overview of the relevant historical legislative changes and has identified powerful ‘scientific’ discourses that interact within the contemporary Australian socio-political context to inform the prevailing constructions of the ‘best interests’ of the child in the jurisdiction of family law. The dominant normative constructions of the highly discretionary paramount principle have been discussed and
reveal how important it is to look beyond the rhetoric of the ‘child focused’ legal standard and to identify underlying agendas and whose interests they serve.

The available information shows that the ‘best interests’ principle is constructed against the background of the Reform Act’s legislative overarching statement of object and principles that, in practice, continues to support the operation of patriarchy. The policy direction of the legislation has been informed by generalised findings from, and selective reliance upon, research into children’s adjustment following family breakdown. The dominant construction of ‘conflict’ as being the main concern for children’s post-separation adjustment provides a rationale for prioritising and regulating cooperative, ongoing parenting in the consideration of the ‘best interests’ principle. This occurs despite the legislative requirements that consideration be given by the Court to the child’s protection from harm, and to any wishes expressed by the child (Rhoades, Graycar & Harrison 2000). Determinations about children’s best interests are made by adults in the FCA without adequate participation of the child ‘subjects’ of proceedings. The strong principle of the Reform Act which prioritises ongoing, cooperative parenting has supported the development of a pro-contact culture. The dominant discourse on the ‘right of the child to contact’ masks the operation of the rights of the contact parent. The child’s right to safety does not sit easily with the more persuasive principle of the child’s right to contact.
Chapter 3: Children’s exposure to domestic violence

3.1 Prevalence and significance of children’s exposure to domestic violence

Children’s exposure to domestic violence is a significant problem in Australian society. Children can be exposed to a range of direct and indirect forms of violence and be at heightened risk of further exposure to serious violence following family dissolution. The following sections discuss some of the difficulties in establishing the extent of children’s exposure to domestic violence and provide information about why it is important to reach an understanding of the extent and seriousness of the problem and its relevance for the construction of children’s best interests in family law in Australia.

3.1.1 Problems in establishing the extent of the problem

Research on children who witness family violence is a special case of counting the hard-to-count and measuring the hard-to-measure.

Fantuzzo, Boruch, Beriama, Atkins and Marcus (1997 p.121)

A range of common problems exist in the contemporary Western world that mitigate against being able to achieve an accurate estimate of the extent of children’s exposure to domestic violence in Australia (Tomison 2000; Irwin, Waugh & Wilson 2002) and in overseas countries including the United States of America (Fantuzzo & Mohr 1999; Jouriles, McDonald, Norwood & Ezell 2002; Edleson 2002). These problems include: the application of different methodologies and definitions in incidence based studies (Jaffe & Geffner 1997); there is no universally accepted definition of domestic violence but a common understanding is often assumed in the literature; and the cross-disciplinary maze that supports different paradigms for identifying and understanding what constitutes children’s exposure to violence (Koverola & Heger 2003). The absence of ‘scientifically’ credible estimates available on national prevalence of children’s exposure to domestic violence affects how policy-makers and institutions estimate and respond to the perceived extent of domestic violence and its impact upon children (Goldner 1998; Irwin et al 2002).
The ideological positioning of the professionals involved has led to different research approaches, different outcomes and different understandings (Dobash & Dobash 1990; Bagshaw & Chung 2000a). It is essential to be aware of the research agenda and the limitations to the research (Johnson 1995). Qualitative studies undertaken by feminist researchers who view power and gender as central to research into domestic violence produce different findings and estimates on the prevalence of domestic violence to quantitative studies used by family researchers that are incidence and prevalence based and ignore the social, political, and economic contexts of domestic violence (Bagshaw & Chung 2000a). For example, quantitative studies have failed to differentiate between father violence and stepfather violence in separated families. This blurs any findings about the rates, types and impact on children of exposure to violence in relation to specific fathering relationships (Harne 2004).

Another problem identified by a number of authors that influences determinations of the rate of children’s victimisation from domestic violence is that social sanctions operate to keep domestic violence and its various manifestations a hidden crime (Peled 1996; McGee 2000; Bagshaw & Chung 2000b). “Children are easily silenced by adults placing moral strictures on them, threatening them or simply ignoring them. They can maintain a family secret in the face of considerable anxiety and isolation” (Mullender, Hague, Imam, Kelly, Malos & Regan 2002 p.227). Secrecy pervades the lives of child victims of domestic violence where shame and fear create reluctance to report episodes of domestic violence and other forms of abuse within the home (Margolin 1998; Rendell, Rathus & Lynch 2000; Greenwald, O’Brien & Nadkarni 2000; McGee 2000; Irwin et al 2002; Kaye, Stubs & Tolmie 2003). Children may also be silenced where they perceive the potential for negative outcomes for the mother victims (Edleson 2002). Social isolation imposed by the perpetrator of domestic violence also limits the avenues for support and opportunities for disclosure by the child (Herman 1992). Through the application of adult focused measurement strategies in research to determine the prevalence of children’s exposure to domestic violence, children can be inhibited or excluded from reporting the violence (Mullender et al 2002). Such factors render children powerless and they are confronted with the reality of the hidden nature of their victimisation (Smith, O’Connor & Berthelson 1996).
Available information on the prevalence of children’s exposure to domestic violence is based on data drawn from a range of broad studies. There are clear indications that large numbers of children experience domestic violence in a complex variety of ways (Laing 2000b; Edleson 2002). Appendix 3.1 provides information on some of the available statistics on rates of children’s exposure to domestic violence in Australia. There is general consensus in the literature on domestic violence that, in many instances, children’s exposure to domestic violence is easily overlooked or not understood and that this leads to a significant underestimation of the actual number of children exposed to and affected by domestic violence (Christian, Scribano, Seidl & Pinto-Martin 1997; Troeth 2000). In order to better estimate the extent and types of children’s exposure to domestic violence, children’s individual experiences must be actively sought and accepted (Laing 2000b).

### 3.1.2 Domestic violence as a common risk factor in separated families

Domestic violence issues are considerable in separated families (Laing 2000a; Bagshaw & Chung 2000b). The rates of domestic violence in this population are significant when compared to intact families (Sheehan & Smyth 2000; Jaffe, Lemon & Poisson 2003; Smyth 2004b). An Australian survey conducted in 1999 by the Australian Institute of Family Studies (AIFS) and commissioned by the Office of the Status of Women, found that domestic violence among those who divorce is widespread. Laing (2003, p.2) refers to the AIFS research finding that sixty six percent of separated couples surveyed attributed the breakdown of their relationship to domestic violence. “When broadly defined, spousal violence is not an exceptional circumstance for divorced women and men, but rather the norm” (Sheehan & Smyth 2000 p.117). The majority of those couples surveyed had experienced physical abuse or threatening behaviour during marriage or following separation (Sheehan & Smyth 2000).

Historically, there has been a lack of research into the different types and patterns of domestic violence that impact upon the adjustment of children post-separation (Brown 1998; Brown, Sheehan, Frederico & Hewitt 2001; Kelly 2001; Jaffe, Poisson & Cunningham 2002). What has been established by research in the areas of domestic violence and criminal studies is that violence often escalates at the time of separation (Ellis & DeKeseredy 1989; Mahoney 1991; Nicholson 1996; Goldner 1998; Buel 1999). Women and child victims experience particular vulnerabilities at that time as the perpetrator’s struggle for power and control is intensified by women’s attempts to separate from the
violent relationship (Greenwald et al 2000). The 1996 national Women’s Safety Survey conducted by the Australian Bureau of Statistics (ABS) found that of the 483,700 women who separated from a violent partner and later returned to that relationship, thirty five percent experienced violence by the ex-partner during the separation (ABS 2004, p.5). In Australia between the years 1989–1993, thirty five percent of children who were killed by a male died as a result of a family conflict that often was triggered by the parent’s separation (Laing 2000a, p.7). Overseas studies, referred to by Straus and Gelles (1990), Buel (1999) and Tomison (2000), show that Australia is not alone in the serious and heightened risks for child and adult victims of domestic violence following family dissolution.

3.1.3 The co-occurrence of domestic violence and child abuse

A range of contemporary studies from Australia and overseas (Hester & Radford 1996; Appel & Holden 1998; Ayoub, Deutch & Maraganore 1999; Edleson 1999; Irwin et al 2002) have investigated domestic violence in cases of child abuse, child abuse in known cases of domestic violence, or undertaken retrospective studies of victims of domestic violence. Consistent findings from research have led to emerging understandings about the frequent association between occurrences of domestic violence and direct forms of child abuse, and the compounding negative impact this has upon children’s well-being (Tomison 2000; Laing 2000b; Edleson 2002; Saunders 2003). Children’s exposure to domestic violence and child abuse has been succinctly described by Laing (2000b, p.5) as a “double whammy” for the child.

From a review of more than thirty-six studies, Edleson (2002, p.91) estimated the rate of co-occurrence of children’s exposure to domestic violence and direct forms of child abuse as being between thirty – sixty percent. This rate is consistent with a number of other studies, revealing that other forms of violence, such as sibling violence, are more likely to occur in families where domestic violence is present (Jaffe, Wolfe & Wilson 1990; Henning, Leitenberg, Coffee, Turner & Bennett 1996; McHugh & Hewitt 1998; McNeal & Amato 1998). According to Saunders (2003), a growing body of research shows that it is common for child victims of domestic violence to be exposed on more than one occasion to several types of violence. Child abuse perpetrated by the father, or father figure, has been found to be more likely to occur in households where there is domestic violence compared to homes where there is no domestic violence (Stark & Filterraft 1988). A recent
extensive Australian study conducted by Irwin et al (2002) analysed the responses of the New South Wales statutory authority for child protection where the exposure to domestic violence has been incorporated as a reason for notification of child abuse. That study found domestic violence to be the most common reason provided for notification to the child protection authority. Findings included, that in child abuse notifications domestic violence was present in a significant number of cases and there were significant rates of child protection reports for domestic violence involving infants and young children (Irwin et al 2002). However, children’s exposure to domestic violence is overlooked as an issue that requires intervention by the State child protection authorities (Irwin et al 2002; Family Violence Committee 2003).

Despite the methodological problems in many existing studies that do not differentiate the type of maltreatment to which children have been exposed, consistent findings are now emerging that there are more severe impacts upon children’s wellbeing when they are subjected to both child abuse and domestic violence (Stanley 1997; Saunders 2003). For example, Ayoub et al (1999) found an increased risk of poor adult functioning for child victims where they had been exposed to multiple forms of direct and indirect violence, and experienced compromised care from substance abusing or mentally ill parents. A small number of studies suggest that the severity of domestic violence and the severity of child abuse are positively correlated (Bowker et al 1988; Straus & Gelles 1990; Edleson 2002) and that this can be related to significant numbers of children’s deaths (Edleson 1999). However, as most research studies do not differentiate the different forms of child abuse and the different forms of domestic violence as a unique set of factors, to date there is no clear understanding about how exposure to these forms of violence inter-relate and cause higher risk outcomes for children (Laing 2000b; Edleson 2002).

3.1.4 Australian family law and the prevalence of multiple forms of violence

Disputed parenting cases involving domestic violence and/or child abuse form a considerable caseload of the Family Court of Australia (FCA) (Marsh 1999; Rhoades 2000a; Nicholson 2002; Brown 2002; Shea Hart 2004). This has been supported by recent Australian research studies which draw attention to domestic violence as a significant issue before the FCA and raise concerns about how the cases involving different forms of violence within the home are managed within Australian family law (Rhoades, Graycar & Harrison 2000; Rendell et al 2000; Brown et al 2001; Kaye et al 2003). These studies
support the notion that dealing with parenting disputes that involve a range of child protection issues needs to be recognised as core business of the FCA (Parkinson 1998; Shea Hart 2004).

In a comprehensive study conducted by Brown, Frederico, Hewitt and Sheehan (1998) which undertook research in two registries of the FCA, the presence of multiple forms of violence was found to be a significant issue. The findings from this study established that cases involving multiple forms of direct child abuse and domestic violence accounted for a significant proportion of all parenting disputes that reach the stage of a full defended hearing. This landmark study found that the percentage frequency of domestic violence witnessed by the children in the cases studied was forty four percent (Brown et al 2001, p.57) and that twenty six point eight percent of children witnessed domestic violence at contact handovers (Brown et al 2001, p.47). The most common form of domestic violence was found to be episodic male battering of women, which was perceived to be unlikely to abate in the cases studied. During the ongoing litigation children in that study were found to display a range of disturbance in their emotional wellbeing and, in almost all cases, a change in the contact arrangements was seen to be necessary to assist the children cope.

It is clear that since the introduction of the Reform Act the FCA has become increasingly the venue for the resolution of family violence issues (Family Law Council 2002b). As the statistical findings from the study by Brown et al (2001) show, cases of multiple forms of direct and indirect abuse require judges to determine whether or not there are further risks to children from exposure to violence and/or abuse.

### 3.2 Reaching an understanding of the effects of domestic violence on children

...to our knowledge, a large, scientifically sound study of children’s exposure to violence in which the complex issues of defining exposure are considered has not yet been conducted.

Jouriles, McDonald, Norwood and Ezell (2002, p.22)

Although domestic violence research is now rapidly growing it should be noted that this body of knowledge only emerged about twenty-five years ago. A focus on children as victims of domestic violence has been slow to emerge as, prior to the mid-1980s, feminist literature and research into domestic violence was primarily focused upon women victims (Smith et al 1996; Ptacek 1999; Hester & Radford 1996). Literature from the 1980s mainly
constructed children as ‘passive’, ‘forgotten’, ‘witnesses’ about whom there was only speculation on the affects of ‘indirect’ exposure to violence (Fantuzzo & Mohr 1999). However, some research from the 1980s on the psychological adjustment of children exposed to violence in the home did reveal that children were at risk of developing various problems including depression, anxiety and aggressive behaviours (Shaw & Emery 1987).

Over the past decade, understandings about the adverse effects upon children and their special needs that result from exposure to domestic violence have been emerging from the consistent findings of research (Edleson 2002). These understandings are now being more widely recognised by social scientists (Jaffe & Geffner 1998), policy makers and society in general (Koverola & Heger 2003). Feminists highlight the plight of both women and children who are understood as experiencing violence directly and indirectly in a variety of ways (Laing 2000b). Notions of children as passive ‘witnesses’ to domestic violence are increasingly being replaced by understandings that children are directly involved in responding to, and coping with, the negative experiences of their exposure to domestic violence (Laing 2000b; Eisikovits & Winstok 2002).

While a lot of information is currently available about children’s exposure to domestic violence, many gaps remain in knowledge about the details of the various factors involved in domestic violence which operate as risks for children’s wellbeing (Jouriles et al 2002; Koverola & Heger 2003). Research in this field has relied too heavily on the positivist tradition of developmental psychology and psychiatry in seeking to identify and categorise children’s responses to exposure to domestic violence into ‘disorders’ and ‘syndromes’ (Hughes, Graham-Bermann & Gruber 2002). This has limited the production of comprehensive understandings about the adverse impact upon children from exposure to domestic violence. The strong reliance by legal and social science professionals upon ‘scientific’ measurements continues to mask the complexities of children’s reactions to exposure to domestic violence. This includes the failure to recognise infants’ and young children’s vulnerability from exposure to domestic violence (Scheeringa, Zeanah, Drell & Larrieu 1995; Holden, Stein, Ritchie, Harris & Jouriles 1998). Older child victims of domestic violence can be diagnosed as having symptoms congruent with Post Traumatic Stress Disorder (PTSD) (Blanchard 1993), but the measurable criteria for this disorder are not sensitive to the developmental status of infants and young children. Hughes, Graham-Bermann and Gruber (2002) have noted that a number of researchers interpret the lack of
obvious measurable symptomatology in child victims of violence as a sign that the child is ‘resilient’. Assumptions are then made that children functioning without obvious pathology are unaffected from their exposure to domestic violence. What remains unknown is whether or not children who appear to have adjusted to their exposure to domestic violence are malleable (Perry 1997), whether they actually pay a price in the longer term for their ‘resilience’ (Masten & Coatsworth 1998), and whether the children can actually sustain over time this capacity to cope (Hughes et al 2002).

From a poststructuralist perspective, positivist approaches cannot always reliably measure causation of, nor explain the evolution of children’s symptoms. From the available research on children’s exposure to domestic violence it is estimated that approximately 55–sixty five percent, do not display symptomatology that classifies them as falling into the clinical problem range for psychopathology at the time of assessment (Hughes et al 2002, p.67). Amongst some social science professionals there is acknowledgment that because a child’s reactions do not fit within ‘scientific’ clinical categories, or because a child is reported to have ‘normal’ coping strategies, this does not necessarily mean that the child has not been adversely affected by the exposure to violence (Mullender et al 2002).

The tendency to generalise children’s responses to exposure to domestic violence and the lack of differentiation between mother and child victim’s needs are being challenged by feminist poststructuralist thinking. Knowledge is now emerging that the complexity of each individual child’s situation is significant in determining how each child negotiates his or her reality about the experiences of domestic violence (Laing 2000b; Eisikovits & Winstok 2002). Children as individuals are linked in complex ways to both their parents and to the violent situation (Featherstone & Trinder 1997). Increasingly, it is being recognised that while children’s recovery from exposure to domestic violence is linked to the availability, care and wellbeing of their mothers (Mullender et al 2002; Irwin et al 2002), each of the child victims has his or her own unique experience that needs to be understood from the perspective of the child. Each child also has individual needs for care, protection and assistance in coping with the trauma (Jouriles, McDonald, Norwood & Ezell 2002).
3.2.1 Problems children face from exposure to domestic violence

For children, living with domestic violence requires negotiating, making sense of, and managing a number of complex and overlapping issues: the behavior of the abuser; the responses of, and impacts on, their mother and siblings; danger and risk to themselves; their emotions; and kin and friendship relations.

Mullender, Hague, Imam, Kelly, Malos and Regan (2002, p.91)

A comprehensive review of the literature and research from the 1980s to the present on the effects on children of exposure to domestic violence has identified a wide constellation of problems that these children may experience. The overall findings from research on the potential adverse impact upon children’s development from exposure to domestic violence are largely consistent (Edleson 1999; Edleson 2002). The range of direct and indirect, long and short-term adjustment problems experienced by children across all ages and stages of development from exposure to domestic violence disrupts the normal tasks of childhood (McIntosh 2000; Rossman 2002; Jouriles et al 2002; Wolfe et al 2003). Their problems resemble those of children who have been directly abused by their parents, are similar to the problems of children who have witnessed other traumatic events and are significantly different from the problems children experience from non-violent homes (Blanchard 1993). This research information is highly relevant to decision-making about post-separation parenting arrangements made in the best interests of the child (Johnston 1995; Holden et al 1998).

Research has shown that the short and long-term negative effects on children of exposure to domestic violence can include serious physical, psychological, cognitive, behavioural, developmental, emotional and relational problems affecting the children’s life satisfaction, self esteem and future relationships (Blanchard 1993; Maxwell 1995; Mathias, Mertin & Murray 1995; Smith et al 1996; Graham-Bermann & Levendosky 1998; Margolin 1998; Tomison 2000; Laing 2000b; Rossman 2002; Eisikovits & Winstok 2002; Saunders 2003). Child victims can typically display elevated emotional problems that include increased anxiety, aggressive behaviour or depression (Fantuzzo & Mohr 1999; Wolfe et al 2003).

Exposure to domestic violence can occur at any stage of a child’s development. This includes exposure to direct and indirect violence in utero (Quinlivan 2000) and during infancy and early childhood (McIntosh 2000; Christian et al 1997). Subtle signs of trauma in children can include identifying with the perpetrator of the violence, blaming themselves for the violence (Jaffe & Geffner 1997) and, particularly in the case of infants and young
children, displaying hyperarousal or dissociative responses (Perry 1994). Research from the field of neurobiology (Perry 1994, 1997) has established that where the stressors from the experience of abuse, and/or exposure to domestic violence are severe enough, infants and children under the age of 5 years are more vulnerable to adverse adjustment than older children (Holden et al 1998). Children’s resulting state of low level fear disregulates their internal systems by over-activating the neurochemical cues that affect how they process, learn and react in their cognitive, emotional and behavioural functioning (Perry 1994).

3.2.2 Special issues for child victims of domestic violence from separated families

Children…want someone to take responsibility for them, instead of them doing it…to take the weight off their shoulders.


Children from domestic violence situations have special needs. Where children continue to be exposed directly and indirectly to the dangerous and unhealthy dynamics of domestic violence following family breakdown (Greenwald, O’Brien & Nadkarni 2000) they are faced with more frightening and complex family relationships (Shea Hart 2004). Children in these situations are confronted with the reality that the act of family breakdown has not protected them.

An Australian study shows clear correlations between children’s adjustment to separation and the frequency and intensity of domestic violence (Smith et al 1996). Separation is not a solution to the violence, as the expression of violence finds another context in the continuing power struggles over matters involving post-separation parenting arrangements (Jaffe, Lemon & Poisson 2003). Post-separation parenting disputes occur at the particularly dangerous time of post-separation adjustment. As previously stated, this can place mothers and children at heightened risk (Jaffe et al 2003) and witnessing violence toward caregivers to whom children are closely emotionally attached can create more trauma for children (Kelly 2001).

Sturge and Glasser (2000) have drawn upon research from studies investigating children’s exposure to domestic violence to highlight specific and concerning issues that can adversely impact upon the child subjects of contact disputes where domestic violence is an issue. Research conducted in Australia (Rendell et al 2000; Kaye et al 2003) and overseas, including England (Hester & Radford 1996; Harne 2004) supports the range of issues of
concern identified by Sturge and Glasser (2000). They refer to research conducted by Jaffe, Wolfe, Wilson and Zak (1986) which found that emotional damage can occur when children sustain fear and dread of recurring violence. Research by Mullender et al (2002) has found that following separation, children can have ongoing fear about the return of the perpetrator of the violence and fear of the perpetrator’s unpredictable management of anger. Some of the consistently identified research findings on the difficulties to which the child victims of domestic violence may be exposed, and which Sturge and Glasser (2002) also refer to in relation to contact cases include: a continuation of unhealthy, unstable family relationships; inappropriate role modelling; failure of parents to prioritise the needs of the children; ongoing denial of the children’s experience of violence; children being used by the violent parent to convey private information about the other parent; and children’s internalisation of patterns of violent behaviours. Where contact with the violent perpetrator occurs, children who are without the mother’s direct protection are more accessible to the violent father (Pagelow 1990) and children can become the prime focus of the perpetrator’s violence (Peled 1996; Ptacek 1999; Rendell et al 2000; Harne 2004).

Research also shows that these identified concerns apply in cases where contact, including interim and /or supervised contact, is granted to the alleged perpetrator of direct child abuse (Harrison 1989; Australian Law Reform Commission and Family Law Council 1994; Hester & Radford 1996; Rendell et al 2000; Rayner 1997; Brown et al 2001; Kaye et al 2003).

### 3.2.3 Parenting practices of violent fathers

*An abusive parent may well not have the child’s interests at heart...seeking post-separation contact so as to regain the opportunity to abuse and intimidate.*

Mullender, Hague, Imam, Kelly, Malos and Regan (2002, p.5)

In cases where children have witnessed domestic violence, the American Bar Association (ABA 1994) and prominent researchers and authors Jaffé and Geffner (1998) consider that proof of domestic violence provides strong evidence of the compromised parenting capacity of the perpetrator of violence, and that orders for contact should take this into account as a serious issue.

It is significant that across the contemporary Western world there is a dearth of knowledge about the role of the relationship between the child victim and the father perpetrator of violence (Rossman 2002; Edleson 2002). The focus of research tends to remain on the
impact of the event of domestic violence rather than on the parent-child relationship dynamics (Eisikovits & Winstok 2002). In the population of separated families in dispute over contact arrangements, there is a scarcity of research on the interaction between the relationship dynamics of violent fathers and the safety and adjustment of children (Mullender et al 2000; Harne 2004). One study conducted in the United States of America addressed this issue and revealed that while violent fathers may be less involved in children’s caretaking, when they are present in the children’s lives they can react negatively to children’s behaviours by adopting punitive responses (Holden & Ritchie 1991).

A study conducted by Ptacek (1999) on the process of obtaining restraining orders in the lower criminal courts in Massachusetts provides some insight into the negative relationship dynamics where there are violent fathers that can persist following family dissolution. Ptacek’s (1999) research revealed the existence of patterns of retaliatory violence by violent fathers against mothers where children were often used as weapons against their mothers, and where violent fathers used coercion by threats of violence against mothers in relation to post-separation parenting arrangements.

One of the more subtle types of indirect violent parenting practices used by violent fathers, often not recognised by professionals working in the field (Bancroft & Silverman 2002), is the undermining of the mother-child relationship by fathers criticising and denigrating mothers in front of the children (Mullender et al 2002). This has been found to be damaging for children as it can lead to feelings of insecurity in the children’s relationships with their mothers. It is also of particular concern, as children themselves have identified that support from their mothers is invaluable in their own recovery from exposure to violence (Mullender et al 2002).

A qualitative research study recently conducted in the United Kingdom by Harne (2004) investigated the fathering practices of a small sample of twenty domestically violent men in intact and in separated family situations, often where father-child contact was still occurring. Harne’s (2004) findings show that the majority of fathers studied failed to recognise or understand their children’s needs and feelings, particularly in response to the father’s violent behaviours. Father-child contact was found to be a means by which violent fathers sought to satisfy their own emotional needs and to continue to exercise patriarchal power and control within families. This study confirmed what other researchers have found
that children are often subjected to their father’s emotional and physical abuse while on contact visits and that the violent fathers under-rate, rationalise or deny their violent and deliberately abusive behaviours. Disturbingly, a finding from Harne’s (2004) study was that these violent behaviours were most evident in the population of separated fathers who had contact with their children.

It is acknowledged that there are substantial limitations to the current knowledge in the specific area of fathering practices of violent men and in the area of researching the perspectives of the children on this issue (Radford & Hester 2002). However, a consistent picture has emerged from the available contemporary research into separated families where exposure to domestic violence is an issue, that following family dissolution and where contact occurs between violent fathers and their children, there can be a range of unacceptable risks, including children’s exposure to direct and indirect violence (Hester & Radford 1996; Rodgers & Pryor 1998; Chetwin, Knaggs & Young 1999; Sturge & Glasser 2000; Brown et al 2001; Jaffe et al 2002; Kaye et al 2003). The knowledge about the perpetuation of dominance and control by violent fathers as a means of victimisation of mothers and children following family breakdown is relevant for developing understandings about fathering practices of violent men. However, where the hegemonic socio-legal discourse focuses on the importance of ‘father presence’ for children’s post-separation wellbeing these issues are denied, ignored, excused or marginalised and the questions on fathering practices of violent men remain unanswered (Jaffe et al 2003; Harne 2004).

3.2.4 Children’s own accounts of exposure to domestic violence

...It affected me a lot. It gets me all muddled and weird...I think it has frozen me up a bit inside [8 year old boy].


A significant limitation in the development of knowledge about the exposure of children from separation to domestic violence is that the vast majority of conventional research on divorce and separation to date has been ‘about’ children and not ‘with’ children (Pryor & Rodgers 2001; Smart, Neale & Wade 2001). The dominant normative discourses on childhood, discussed in Chapter 1, have defined which areas of research have traditionally been regarded as ‘appropriate’ for children’s participation. Emotionally laden topics, such as domestic violence, are generally perceived to be damaging for children and children
have been largely excluded from research in this field (Campbell 2004). Research has relied on the perceptions of parents and other significant adults who pay little attention to how children conceptualise and construct the acts of violence that they experience (Levendosky, Lynch & Graham-Bermann 2000; Jouriles et al 2002; Mullender et al 2002). This has led to the development of stereotypes about children’s experiences and responses to domestic violence (Alderson 1995).

A comparatively small number of studies in the contemporary Western world that have investigated the impact of and children’s exposure to domestic violence have sought the perspectives of the children themselves (Jaffe et al 1990; Abrahams 1994; Higgins 1994; Maxwell 1995; Epstein & Keep 1995; McGee 2000; Mullender et al 2002; Irwin et al 2002). In child inclusive studies the age groups and actual numbers of children studied varies, but the findings show overall consistency. Children’s own accounts reveal that they are more aware than parents believe them to be of the actual violent events, as well as the extent and repetition of violence within the home, and children have reported on their exposure to a full range of types of violence post-separation (Jaffe et al 1990; Abrahams 1994; McGee 2000; Mullender et al 2002). Children’s own reports on their exposure to violence include: observing the intimidation, denigration and psychological control over their mothers; witnessing their father’s property damage; hearing or observing the threats to kill or seriously harm their mothers or other family members, including the children themselves and their pets; being directly hurt from child physical or sexual abuse, from the father’s use of weapons or from trying to intervene in the violence; being used by the father as the focus of ‘conflict’ between the parents, or to participate in the violence; knowing about but not observing the violence; observing the aftermath of the violence including injuries to the mother; or not being aware of the violence in the home (Maxwell 1995; Irwin et al 2002; Mullender et al 2002).

Each child’s reaction at the time of the violence has been found by child inclusive research to be individual and complex. Children’s reactions can range from feeling helpless and hiding, feeling responsible and trying to keep their family together, to older children intervening to protect their mothers from danger (Mullender et al 2002). Almost universal reactions in children from their exposure to domestic violence are confusion, fear and anxiety that continue to be present for each child once the violence has been established in the home (Abrahams 1994; Maxwell 1995; McGee 2000; Greenwald, O’Brien & Nadkarni...
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2000; Grych et al 2000; Mullender et al 2002). These findings support clinical observations that children’s reactions to domestic violence do not simply relate to the most recent violent episode (McIntosh 2000). Children respond to a complex range of traumatising experiences that relate to the dynamics of violent relationships and these can leave children in a state of low level fear (Perry 2000). For some children their fear and anxiety are constant as the security of being at home is replaced by living in a dangerous place where they and their primary caregivers are at risk (Jaffe & Geffner 1997).

Importantly, the studies referred to above have provided consistent information about what children from domestic violence situations perceive to be their strongest needs. This information is significant for how determinations are made in the best interest of the child, particularly where the violence continues following family dissolution and the children experience further instability, loss and fear in their lives. Children exposed to domestic violence have identified their needs for safety, support, continuity of familiar structures in their lives and ongoing support from their mothers and siblings (Blanchard 1993; Mullender et al 2002; Irwin et al 2002). This information is consistent with overall research accounts of the significant protective factors for children that help establish equilibrium to aid recovery following a major crisis in their lives (Katsikas, Petretic-Jackson & Knowles 1996; Hester & Radford 1996; Jaffe & Geffner 1997; Murch 2005).

However, children from domestic violence situations have been found not to have strong support systems within their extended families, or from the community (Irwin et al 2002) or peer groups, with the exception of some older girls who may have close peer relationships (Mullender et al 2002). Children in these studies have also stated their wish to be believed as reliable witnesses to their own experiences of violence and to be included in discussing decisions about responding to the violence and in deciding their family’s future (McGee 2000; Irwin et al 2002; Mullender et al 2002). Research on children’s resilience has found that children’s coping capacity is enhanced when children’s views are respected and their autonomy is supported (Grotberg 1997). Where child victims of domestic violence are not heard or taken seriously by adult caregivers and decision-makers they feel powerless and their distress is aggravated (McGee 2000).

Child inclusive research shows that children are exposed to a pattern of violence that is unique in each case, and each child has an individual set of reactions and adaptive responses to the violence (Abrahams 1994; Mullender et al 2002). Children’s reports about
their own experiences of domestic violence, their reactions and their over-riding needs for safety, protection and recognition all support concerns that have been raised by a number of authors about how, in practice under the pro-contact culture of family law in Australia, the ‘child focused’ legal standard of the ‘best interests’ of the child misconstructs, minimises or denies children’s exposure to domestic violence (Kaye & Tolmie 1998; Brown et al 1998; Shea Hart 2000; Rhoades et al 2000). Information from the child inclusive studies creates a strong imperative to involve children from separation who have been exposed to domestic violence in the further generation of knowledge, understanding and in decision-making about their own best interests. The disadvantaged status of child victims of violence needs to change (Partnerships Against Domestic Violence 1999). To prevent the stigmatisation and the ongoing marginalisation of child victims of domestic violence children need to be given opportunities to be believed. They need support and assistance in the difficult process of making sense of and adapting to the confusing and frightening experiences of their own exposure to domestic violence (Laing 2000b).

3.3 Difficulties conceptualising children’s exposure to violence in the context of family law

Family court systems throughout the Western world, including Australia, experience difficulties in conceptualising and managing the complex inter-relationship between domestic violence, child abuse and other forms of violence within the home (Jaffe, Lemon & Poisson 2003). The failure within Australian family law to differentiate the special needs of children who have been exposed to domestic violence from those who have not experienced domestic violence (Shea Hart 2004) can be attributed, at least in part, to the evolution of separate streams of knowledge in relation to children of separation and divorce, and children exposed to domestic violence (Jaffe & Geffner 1998; Kelly 2000). It is a relatively new construction of knowledge by research that children from separation who have been exposed to different forms of violence have different needs compared to children for whom it is appropriate to prioritise the children’s ongoing relationships with both parents by having the parents “put aside their differences ‘for the sake of the children’” (Laing 2000b, p.19). Also, the failure by family law jurisdictions to recognise the co-occurrence of domestic violence and direct child abuse and its impact upon children comes from the complex jurisdictional divides between family law and child welfare and from the lack of integration between the different knowledge from the fields of child abuse and of domestic violence (Bagshaw & Chung 2000b; Tomison 2000; Kelly 2000).
Studies in Australia and overseas, including the United Kingdom, have identified many complex dynamics in the management of parenting disputes where there is an inter-relationship between children’s exposure to domestic violence and child abuse (Hester & Radford 1996; Thoennes & Pearson 1988; Brown et al 2001). These studies show poor outcomes for children who have been involved in protracted legal processes where poor interagency coordination and an overall lack of focus upon the needs of the children have destabilised the children’s lives. The jurisdictional divisions under Australia’s Constitution for the management of post-separation parenting disputes and for managing child protection issues create difficulties, specifically in relation to the involvement of two different courts and in drawing the diverse jurisdictional streams together (Brown et al 2001). This needs to be overcome in order to fully disclose the range of violence to which a child has been exposed and to address the best interests of the child (Rendell et al 2000; Brown et al 2001; Kaye et al 2003).

A solid indicator of progress by the FCA in conceptualising and dealing with the problem of direct child abuse in cases before the FCA is seen by the introduction of Project Magellan that provides coordinated and timely management of such cases across a number of registries. However, to date, no such steps have been implemented within the FCA for cases where children are exposed to domestic violence, with the exception of the Family Court of Western Australia’s Project Columbus (Kerin, Murphy & Pike 2003; Shea Hart 2004).

These issues suggest that the complex range of domestic violence found in families who contest parenting arrangements before the court has not been conceptualised by the FCA in the same way as children’s exposure to direct abuse. This is also apparent in overseas family law jurisdictions including the United States of America (Jaffe & Geffner 1998). Where children’s exposure to domestic violence continues to be conceptualised differently from their exposure to direct forms of violence the safety of women and children remains compromised (Irwin et al 2002). In order to intervene successfully in the best interests of the child in the area of family law in Australia, children from domestic violence situations need to be conceptualised as being primary victims of abuse (Higgins & McCabe 1998). Only then can the multiple risk factors for each child be identified and reduced, and the multiple protective factors be recognised and supported by the legal and social science professionals involved (Hughes, Graham-Bermann & Gruber 2002).
3.4 The politicised context of domestic violence in the jurisdiction of family law

*Law reform creates a space, a process, an opportunity for addressing violence, but by no means guarantees the outcome.*

Laing (2000a, p.5) quoting Stubbs (1994)

From a poststructuralist perspective it is important to recognise that legal systems are complex networks with telling practices, where rules of membership construct the power relations that are, in part, dependent upon the dominant discourses of the era (Threadgold 1994). Reflected in the politicised field of family law is the controversial nature of the study of domestic violence (Jaffe et al 2003). What is ‘known’ is a socially constructed ‘reality’ (Dreyfus & Rabinow 1982) and the dominant discourses used by the media, politicians and interests groups define ‘truths’ and influence the acceptance of ‘knowledge’ about domestic violence and children’s exposure to violence. Dominant discourses in the contemporary Western world have coalesced and transformed the meanings of fatherhood, violence and the rights of the child (Morgan 2002). These discourses hide what violent fathers do (Mullender et al 2002; Harne 2004). As discussed in Chapter 2, this is evident in the legislative framework of the Reform Act that institutionalised the operation of the reconstituted family. The adoption of such ideology focuses on achieving specific political agendas to ensure economic and social stability (Silva & Smart 1999) and marginalises the special needs of children who have been exposed to domestic violence.

Australian research shows how effective the politicised ideology of ‘traditional’ family structures and values has been in informing the dangerously ineffectual responses by the FCA in decisions that are made in disputed parenting cases where domestic violence is an issue (Dewar & Parker 1999; Rhoades et al 2000; Rendell et al 2000; Kaye et al 2003). Research conducted in the United Kingdom demonstrates that Australia is not alone in having succumbed to the dominant ideology that dissuades notions of the family as a dangerous place (Hester & Radford 1996; Johnston 1999; Harne 2004).

Within family law the accepted ‘common sense’ understandings about the needs of children following separation that readjust the normative role relationships in the post-separation family do not take into consideration the issues of power relations, including violence, and gendered inequality (Dunn 2000). The commonly accepted knowledge in family law jurisdictions about domestic violence is based on selective information and
assumptions that are formed by ignoring particular information, focusing on the rhetoric of rights, or misreading research findings about outcomes for children (Tapp & Taylor 2001). The dominant ‘truths’ that support the power regimes (Otto 1999) are particularly effective when the knowledge and technologies construct official positions that the system is working in the interests of the people and when the process of regulation is not transparent (Danaher, Schirato & Webb 2000). This is evident in the dominant legal discourses supporting the ‘rights’ of children that are subject to a legal and cultural heritage which fails to make transparent the regulation of children and families in our society (Funder 1996). The court’s sanctioning of the dominant discourse on the ‘right of the child to contact’, that masks the ‘rights’ of fathers (Rhoades et al 2000), in effect regulates the resident mother’s requirement to comply with the normative expectations of cooperation, negotiation and support of the father-child contact.

The dominant discourses that prevail in Australian family law effectively discourage investigation into the complex dynamics of violence to which individual adult and child victims are exposed. The dominant discourses on interparental ‘conflict’ (Family Violence Committee 2003) and on children’s inherent need for ongoing relationships with their fathers, discussed in Chapter 2, provide a focus on the need to resolve disputes between the adults. Where legal and social science professionals do not question such powerful and misleading discourses, children and women continue to be negatively affected by the use of the language that redefines, marginalises or denies their experiences of violence (Brown et al 2001).

3.4.1 The influence of male hegemony

The operation of male hegemony in Australian family law demonstrates Foucault’s conceptualisation, in his discussion of the Panopticon, of society’s intention and capacity to watch over and control human life (Dreyfus & Rabinow 1982; McHoul & Grace 1993). Traditionally the law has relied on male hegemony as a part of disciplinary power to treat women as dependents of men and with different capacities to men (Graycar & Morgan 1990). The taken for granted nature of the ‘man/woman’ and the ‘adult/child’ binaries are influential in legal systems in understanding the subjectivities of perpetrators of violence and adult and child victims of domestic violence. The normalising power regimes, underpinned by the repressive hierarchical linguistic dichotomies (Mills 1999; Otto 1999; Mason 2002), have serious implications in cases where the experiences of child victims of
domestic violence are denied as their experiences are seen to belong to the designated ‘adult’ world (Rendell 1999).

Hegemonic discourses regulate normative assumptions about gendered behaviours. These are evident in separated families where discourses construct violence as a natural part of the progression of marital disharmony (Jaffe & Geffner 1998) and are evident in the jurisdiction of family law in Australia where violent fathers are perceived as ‘good enough’ parents to their children (Rendell et al 2000). Under the influence of male hegemony, Fathers’ Rights groups have reconstructed the victim/perpetrator roles and influenced beliefs held within family law jurisdictions about who is a violent parent in post-separation parenting relationships and who should be believed (Kaye & Tolmie 1998). The Australian family law jurisdiction provides a venue for claims that men and women are equally violent in intimate heterosexual relationship. Such claims are based on limited research studies that fail to address the history, context, motivation and consequences of the violence (Bagshaw & Chung 2000a). The reconstruction of the victim/perpetrator denies the historically established pattern that occurs, particularly in intimate relationships, where males seek ownership over female partners and their children (Dobash & Dobash 1992). It denies the knowledge that violence most commonly occurs with men abusing their female partners, that violence perpetrated by men is usually more severe, and that women experience fear and intimidation and commonly only use violence in retaliation or self defence (New South Wales Child Protection Council 1996; Dobash & Dobash 1998; Bagshaw & Chung 2000a).

In family law jurisdictions, including Australia, there is widespread distrust amongst legal and social science professionals of the victims’ accounts of violence (Jaffe et al 2003; Kaye et al 2003). Judges are precariously placed in having to determine the credibility of allegations of domestic violence and are open to claims by alleged male perpetrators of bias against them (Nicholson 2001b; Jaffe, Lemon & Poisson 2003). Male hegemony, in effect, reframes the issue of domestic violence as a weapon used by mothers who ‘exaggerate’ their fears of further violence and who ‘make false allegations’ of child abuse against the fathers (Brown 1998; Kaye & Tolmie 1998) in order to prevent fathers having contact with their children (Williams, Boggess & Carter 2002; Kaye et al 2003; Harne 2004). In the Australian jurisdiction of family law this reconstruction regulates and controls the activities of the mother victims of domestic violence who feel inhibited in
disclosing the full range of violence to which their children have been exposed (Kaye et al 2003). Understanding the regulatory power of male hegemony may provide insight into one of the significant findings of the study by Brown et al (1998) that in cases of direct child abuse that came before the FCA, allegations about violence and abuse towards the children were slow to emerge in the court context. This occurred despite the Reform Act’s family violence provisions, referred to in Chapter 2, and the deterioration in the wellbeing of some of the children. The influence of male hegemony results in pressuring mothers to cooperate to reach agreements about parenting arrangements that support ongoing father-child relationships and to deny the violence (Hester & Radford 1996; Jaffe & Geffner 1997; Seuffert 1999; Kaye et al 2003). This form of regulation has been shown to influence the number of dangerous reconciliations which, according to mothers, occur in an effort to protect the children who would otherwise be alone on contact visits with the perpetrator of violence (Rendell et al 2000).

3.4.2 Practice implications

Judges and service providers must rely on the most appropriate research to address the real problems rather than on a mindlessly idealized notion of shared parenting…

Jaffe, Poisson and Cunningham (2002, p.200)

The acceptance within family law jurisdictions of reconstructions of domestic violence demonstrates how it is often overlooked that the construction of ‘truths’, based on privileged knowledge, contributes to how power is exercised within society (Danaher, Schirato & Webb 2000). In Australian family law domestic violence remains a marginalised issue (Rendell et al 2000; Family Violence Committee 2003). Within the context of family law in Australia the unquestioned acceptance of politicised ‘truths’ perpetuates society’s historical denial and avoidance of addressing the issue of domestic violence. This can inhibit necessary social change in relation to domestic violence (Dobash & Dobash 1990). It contributes to the failure of policy and practice initiatives in Australia to positively influence mainstream service provision in the delivery of adequate interventions and appropriate decisions for children exposed to domestic violence (Irwin et al 2002).

Australian family law relies on society’s traditional beliefs that the nuclear family is a source of nurture and protection and children’s exposure to domestic violence can, therefore, be regarded as a private matter for the family to deal with (Bagshaw & Chung
Chapter 3: Children’s exposure to domestic violence

2000b). A politicised agenda that under-rates or denies the issue of domestic violence places children in the most vulnerable positions where simplistic solutions are imposed (Jaffe, Poisson & Cunningham 2002). Due to the dominant beliefs underpinning the reconstruction of domestic violence, it is difficult for professionals and society in general to accept that children exposed to domestic violence exist in the midst of hostility where there are “winners and losers, perpetrators and victims, predators and predated” (Eisikovits & Winstok 2002, p.206). Legal practitioners, who are “the main gatekeepers to family justice” (Murch 2005, p.12) appear to have accepted dominant beliefs that under-rate domestic violence as an issue in family law matters. Since the introduction of the Reform Act, at the stage of interim hearings, there is a widely held non-legally based presumption of contact, so legal practitioners commonly do not recommend contesting contact, even in cases where domestic violence is alleged (Rhoades et al 2000). This is of concern as interim decisions may be in place for a considerable period of time and the development of a status quo influences final determinations made by the Court (Charlesworth, Turner & Foreman 2000).

The accepted reconstructions of domestic violence hide the operation of gendered power relationships and the presence of domestic violence and rationalise a non-interventionist approach (Graycar & Morgan 2002). The FCA is reviewing its Family Violence Policy and a number of important recommendations have been made to the Chief Justice’s Consultative Council about the FCA’s adoption of a more comprehensive definition of domestic violence, the development within the court of better knowledge about domestic violence and the development of a different case management process (Family Violence Committee 2003). However, any visible signs of progress in implementation of these changes have been slow to emerge. The failure to adequately address these issues in a timely way has potentially serious implications for how women’s and children’s need for safety are recognised and managed in practice within the Australian family law jurisdiction.

Women and their children may be re-victimised by a legal system which fails to recognise the impact of domestic violence on children and young people and so fails to make safety central to decision making about contact and residence.

Laing (2000b, p.20)
3.5 Chapter summary

This chapter provided an overview of the contemporary knowledge about the negative impact upon children from their exposure to domestic violence (Edleson 2002) and the increased risks for these children following family dissolution. It focused attention on information from Australian and international research and a small number of child inclusive research studies that are important to consider when making determinations in the ‘best interests’ of children.

The discussion highlighted the complex interface between jurisdictional divides, definitional difficulties and the controversial nature of domestic violence in the politicised family law arena that tend to mask the high rate of children’s exposure to multiple forms of violence. In this comparatively new field of study the combination of the pro-contact orthodoxy, poor understandings by professionals of the effects on children from exposure to domestic violence and limited research in some key areas, including the parenting practices of violent fathers, all contribute to problems in how the child victims’ special needs for care, protection and assistance in coping with trauma from exposure to domestic violence are conceptualised (Jouriles, McDonald, Norwood & Ezell 2002).

From a feminist poststructuralist perspective children who have been exposed to domestic violence need to be included in the development of understandings about what factors lead to detrimental outcomes for children from separated families who have been exposed to different forms of violence in the home. In order to better address the special needs of children exposed to domestic violence from separated families it is essential to develop understandings of the underlying assumptions and agendas that, in the Australian family law jurisdiction, reconstruct what children have been exposed to and what their needs are.
Chapter 4: Methodological approach to the research

4.0 Introduction

If the readability of a legacy were given, natural, transparent, univocal, if it did not call for and at the same time defy interpretation, we would never have anything to inherit from it.

Spinks (2001, p.21) quoting Derrida

In the following sections of this chapter the conceptual and theoretical foundations used for this research project are outlined and discussed. New understandings about multiple, socially constructed realities can be achieved through the application of research methodologies that begin to recontextualise the production of knowledge by seeking to understand the complex interacting factors that lead to dominant but, at times, variable and contradictory discourses that create understandings (Danaher, Schirato & Webb 2000). The quest of this study was to use discourse analysis to identify and examine how values, beliefs and knowledges are applied by judges from the Adelaide registry of the Family Court of Australia (FCA) in the construction of determinations said to be in the ‘best interests’ of children who had been exposed to domestic violence in cases where contact was in dispute. The primary focus is on the significant active role that language plays in constraining and developing knowledge, personhood and the socio-political culture (McHoul & Grace 1993; Pardeck, Murphy & Choi 1994).

The major part of this study is founded on qualitative research, relying on a feminist poststructuralist theoretical framework and incorporates the significant construction of the knowledge-power relationship in the production of ‘knowledge’ and ‘truth’ conceptualised by the French philosopher Michel Foucault (Danaher, Schirato & Webb 2000). This was considered to be an important approach for understanding the power of discourse in defining and regulating normative behaviours of individuals (mothers, fathers and children), professions (the judiciary), institutions (the Adelaide registry) and society (the post-separation family) at particular times in history following the introduction of the Family Law Reform Act 1995 (the Reform Act), and how this contributes to the oppression of marginalised groups (child victims of domestic violence).
4.1 A methodological challenge to positivism

What is in question is no longer the universal structure of all knowledge but a recontextualisation of those instances of discourse that articulate what we can think, say and do.

Spinks (2002, p.21)

Since the 1960s there has been growing awareness within the social sciences of postmodernist research that starkly contrasts the epistemological foundations of the dominant empiricist approach which upholds the cannons of traditional science. Postmodernism has introduced a different perspective that challenges the foundational beliefs based on instrumental rationality of the Enlightenment era that have been held by scientists and philosophers for several hundred years (Donovan 1997). In investigating the contemporary construction of the ‘best interests’ of the child within the system of family law where there is a heavy reliance on positivism and the scientific order of reason, it is essential to move beyond modernist, conventional paradigms. Modernist paradigms favour ‘scientific’ approaches to investigation, hide fundamental arguments and limit the production of understandings (Strauss & Corbin 1990; Tesh 1994). Postmodernism has created important challenges to the positivist methodological conventions within the social sciences and provides creative approaches which lead to different understandings of issues of social significance.

Qualitative research does not seek to produce one correct, objective account or universal truth, but focuses on complexity and difference (Erickson 1986). This is distinctly different to modernist and structuralist approaches to research which sustain conventional beliefs about the existence of universality and homogeneity and the existence of a substantial reality (Hartsock 1996). Under the modernist paradigm science is understood as being able to examine and measure social processes and establish social ‘facts’, based on standards of proof that are then accepted as value free and being able to produce unequivocal conclusions (Guba 1989; Howing et al 1989; Lennon & Whitford 1994; Mason 2002). Modernist knowledge is regarded as objective, generalisable and is universalised to make predictions within established categories of the objects of the research (Potter & Wetherell 1989; Hartsock 1996). Modernist understandings have been extremely influential in informing a range of psychological and sociological theories about the ‘natural order’ of things, including the formation of personhood, gender relationships and normative family structures.
4.1.1 Deconstructive approaches

For those committed to the production of empirical knowledge the introduction of deconstructive approaches has led to an epistemological rift (Mason 2002). Under postmodernist and poststructuralist paradigms the production of knowledge is closely aligned to power and is understood as being a socially constructed outcome that is subject to the socio-historical context. ‘Truth’ is understood to be relative to specific, particular ways of perceiving the world at a particular point in time (Foucault 1980).

The constitutive functions of the use of language have effectively been hidden by modernist approaches to research. Deconstructive approaches, including social constructionism, challenge the production of given truths and recognises language as a primary way of maintaining knowledge. Language is understood as systematised in the adoption of shared meanings as categories or recurring patterns of interactions that when adopted by institutions become seen as objective truths (Berger & Luckmann 1966). Under the conceptual framework of postmodernism, poststructuralism and social constructionism a central focus is on understanding the conditions under which particular discourses gain dominance (Otto 1999).

4.1.1.1 Poststructuralism

Poststructuralism, which is closely related to postmodernism, focuses on how language establishes and reinforces the way events, concepts, identities and relationships are constituted to form ‘truths’. These ‘truths’ are used to support powerful interests and to disguise the complexity of issues. Poststructuralism provides an important paradigm for examining the legal systems involved in making judgments. This provides a framework for identifying the limited, frequently repeated statements which form the discursive realities that reinforce traditional understandings about the ‘true’ nature of culture and of the self (Danaher, Schirato & Webb 2000; Slembrouck 2002). Poststructuralism provides a way of developing understandings about how particular views are privileged and others are marginalised (Otto 1999). Using this framework provides understanding that the unequal distribution of social knowledge empowers social institutions and professionals, such as the judiciary, who hold positions of influence to legitimise socially constructed realities that then appear to be ‘natural’ or ‘normal’.
Poststructuralism challenges the tendency of modernists to categorise, generalise, and establish universalised ‘truths’, and create invisible ‘scientific’ frameworks which shape understandings about what constitutes ‘normality’ (Kuhn 1990). Poststructuralism actively accepts indeterminacy, paradox, ambiguity and contradiction as embodied in multi-faceted socially constructed realities (Donovan 1997; Mason 2002). From this theoretical position, in order to more fully understand the social constructions of the ‘best interests’ of the child, it is essential to move away from research approaches that positivists reinforce as the only ways to produce worthwhile findings (Mason 2002). It requires a movement towards a research approach that questions and examines the underlying assumptions and knowledges assumed to be ‘true’ within the field of study. As discussed in the following section, this requires a reflexive approach where the researcher acknowledges that any methodology has embedded value positions which, together with the perceptions of the researcher, create the cognitive map that guides the research terrain (Phillips 1996).

4.1.1.2 Reflexivity and discursive consciousness

*What can be known and the individual who comes to know it are fused into a coherent whole.*

Guba (1990, p.26)

The concept of reflexivity encompasses the reconstruction of meanings through the process of interpretation (Garfinkel 1967). From a poststructuralist perspective, part of the research paradigm involves critical reflection on the research process and the impact that the researcher has on the research account as these effect how knowledge is produced (Harne 2004). Understanding the value of reflexive practice, that challenges notions of the natural evolution of ‘facts’ coming from research findings, builds the quality of qualitative research (Cizek 1996; Marshall & Rossman 1995). Feminism and poststructuralism value self-reflexivity in identifying one’s subjectivity and cultural specificity (Walkerdine 1988). A number of authors have stated the importance of spending time in methodically applying practices addressing the subjectivity of the researcher and making transparent any personal influences that may affect subsequent interpretations (Steir 1991; Lather 1996; Mauthner & Doucet 1998).

Consistent with Foucault’s thinking, the constraints and the institutional and historical factors impacting upon and producing the researcher are also significant to the process of
producing the research project (Foucault 1972; 1980). The study of texts produces new texts that are not immune to the socio-political processes being studied and it would be problematic to concentrate only on the production of the texts of others (Potter & Wetherell 1989; Lee 2000). Researchers’ perspectives are formed as a part of socially constructed knowledge that permeates the interpretation of the findings (Howing et al 1989; Game & Metcalfe 1996; Alldred 1998) and “…are necessarily personal, experiential, and political…” (Fossey et al 2002, p.730). As the interpretation of textual data is intended to be a non-judgmental approach that allows different understandings to emerge and consider a range of possibilities (Heslop 1997), this informed me of the need to look closely at the research agenda, the aims of the research, who the researcher is and who the audience is (Threadgold 1997).

Reflexive practice was critical to this study as discourse analysis produces texts often intended to produce social change (Lee 2000). In the production of research findings in the study of human oppression the researcher makes representations that may influence the social and political world of people (Lee 2000). There are serious ethical dilemmas when seeking to make statements about knowledge relating to marginalised groups, such as children whose experiences have been made visible through adult perspectives (Alldred 1998). There are complex, interacting variables stemming from the authority of the researcher, the texts themselves and the constructed perceptions of social scientists of which the discourse analyst must be aware (Lee 2000). It is important to avoid merely moving knowledge about the human condition from one discipline to another, thereby reinforcing the “triumphant discourse of power” (Hartsock 1996, p.45). Being aware of the power of discourse in the production of knowledge is a part of reflexivity and responsibility within the research process (Lee 2000; Slembrouck 2002).

4.2 Feminist epistemology

Feminist epistemology was considered to be a relevant conceptual basis to adopt for this study as it is at the point of judicial decision-making in family law that social and political interests directly interact with the private lives of women and child victims of domestic violence to define the ‘best interests’ of the child. Feminist scholarship provides the foundation of feminist epistemology. It has evolved as a multidisciplinary field that continues to make significant contributions to the growth of knowledge about the functioning and the maleness of legal systems and the impact of patriarchy on the lives of
Feminist writers have identified the application of non-transparent universalising principles of gender-neutral rules within legal processes and institutions where a gendered hierarchy persists (Dunn 2000). Feminist scholars have directed attention to the authority invested in judges and questioned legal processes and outcomes across a variety of jurisdictions (Graycar & Morgan 2002). Feminist scholarship has extensively analysed and articulated structural inequalities and injustices for women and highlighted false claims and hidden processes supporting the dominant interests of men in legal systems that occur across the contemporary Western world (Weitzman 1985; Dunn 2000; Graycar & Morgan 2002).

Feminist theorists have critically appraised systems of patriarchal knowledge that have been sustained through culturally specific patterns of male dominance (Mason 2002). Feminist scholars have identified hegemonic patriarchal constructions that have developed as bodies of knowledge under the domination and the legitimisation of the male perspective (Spender 1982). They have exposed masculinist knowledges situated within the fields of social theory, medicine and psychology that have been incorporated within powerful institutions (Butler 1990), including the law. Feminist scholars have drawn attention to the ‘traditional’ constructions of motherhood, fatherhood and childhood that have become increasingly the focus of public, social science and political attention over the past few decades (Lupton & Barclay 1997).

Feminist theorists have raised awareness of domestic violence as a serious social problem involving the victimisation of women in contemporary Western societies and continue to make significant contributions to the research of this issue. Feminist epistemology focuses on the gendered nature of domestic violence. Issues of importance include understanding the role of the family as an historically situated social institution and the importance of hearing, understanding and validating the experience of women victims of violence (Bograd 1990; Mason 2002). Focusing on the complexities of family life where domestic violence is an issue is important to develop awareness of the relationship between gender, power and violence (Featherstone & Trinder 1997).

Feminist epistemology provides an understanding that in order to end the social entrapment of victims of domestic violence it is essential to pay close attention to how legal institutions respond to and perpetuate inequalities between the male perpetrators of domestic violence and the women and child victims (Ptacek 1999). The focus of second
wave feminist theorising on gender and the law has led to understandings about how women’s and children’s lived experiences of violence, and or abuse, are subject to the process of reductionism under the prioritised stated legal principles of rational argument, gender equality and objective decision-making (Taylor 2001). Feminism has made a valuable contribution in demonstrating how masculinist, traditional thinking provides a framework for removing responsibility for acts of violence from the male perpetrator and transferring it on to the woman victim (Mason 2002). Feminism views the legal systems’ reductionist processes as hallmarks of a system of patriarchy and as rationalisations for prejudicial attitudes towards women and children. Feminist scholars have exposed the law’s indifference to the plight of victims of domestic violence (Pleck 1987; Ptacek 1999). All of these issues have found fertile ground in numerous feminist critiques of a range of legal processes that have aimed at achieving better outcomes from the courts for victims of different forms of violence (Graycar & Morgan 2002). Such critiques include Ptacek’s (1999) study in the United States of America on judicial responses to the issue of domestic violence, and Taylor’s (2001) study on Victorian County Court trials in child sexual abuse cases.

4.2.1 A feminist poststructuralist framework

In this section the relevance of the epistemology of feminist poststructuralism to the key areas of interest in this study is presented. Tension between modernist feminist and feminist poststructuralist approaches is discussed. This thesis draws on feminist poststructuralist conceptual thinking in an attempt to contribute to understanding how the social and discursive constructions of childhood, children’s experiences of domestic violence and the gendered constructions of post-separation family life reflect patterned institutional discourses. These discourses legally and socially position adults and children, and it needs to be understood how these constructions influence judicial determinations made in the name of the ‘best interests’ of the child in the contemporary culture of the Adelaide registry of the FCA.

4.2.1.1 A dissident feminist perspective

There is a division between modernist feminists and those who adhere to poststructuralist thinking. Modernist feminists perceive that poststructuralism creates problems by challenging established ‘truths’ and in questioning essential subject categories and,
therefore, creating a distance from the lived experiences of women’s disadvantage and victimisation (MacKinnon 1987; Heckman 1999). When applied to legal systems, poststructuralist discourse analysis has been criticised by modernist feminists for reducing legal narratives to an account of different perspectives, which is seen as a way of hiding the lack of equality amongst the participants (MacKinnon 1996).

A number of feminist scholars express concern about Foucault’s influence on postmodern and poststructural thinking, as the French philosopher failed to recognise the relationship between power and gender. This oversight is understood by modernist feminists as being significant and is seen to undermine feminist knowledge about the abuse of men over women (McNay 1992; Grimshaw 1993; Giddens 1992). The basis for the concerns of modernist feminists is the perception that poststructural thinking further marginalizes the oppressed and poses a threat to the political agenda of feminists (MacKinnon 1987; Sands & Nuccio 1992; Duncan 1994).

4.2.1.2 Discursive and power relations

It is important to recognise that feminist poststructuralism shares the common aim with feminist theorists of addressing the power relations within society that disadvantage woman and marginalised others (Weedon 1987; Mason 2002). There are different foundational understandings between modernist and poststructuralist feminist theories about how power operates. Modernist feminist scholars understand power as a state of domination where individuals and groups are consistently unable to exercise power and control in their lives (Allen 1996). Feminist poststructuralist theory has created a conceptual framework that focuses attention on the interaction of power and knowledge in the construction and ongoing reliance upon structural patriarchal systems (McNeil 1993; Mason 2002). Poststructuralism challenges conventional ways of thinking by seeking to understand the different sites of power and processes employed to shape the world of advantaged and disadvantaged people (Bagshaw 2001).

From a poststructuralist perspective it is important to identify the processes by which inequalities are generated and sustained (Fox 1988). The French philosopher Foucault has contributed understanding that power in itself is not responsible for oppression and that there are general networks of free flowing unstable patterns of power that move through all levels of society (Foucault 1982; Slembrouck 2002). According to Allen (1996), although
not explicitly stated, Foucault did, however, recognise that power is not equal as patterns of domination can evolve from the integration of power relations that operate at the individual level.

Using this Foucauldian concept the issue for poststructuralists is not to focus on and overcome centralised power, but to address how truths are produced and to bring to the fore transformative knowledges that challenge the constructed binaries inherent in modernism (Otto 1999). Feminist poststructuralism seeks to identify problems in social discourses that contribute to oppression and to the blocking of policy change (Denzin & Lincoln 1994). Feminist scholars who value the understanding of the role of discourse and power relations in the development of subjectivities and in the construction of dominant realities have challenged the essentialised subjectivities and established binaries of modernism (Mason 2002). This thinking has formed the basis for studies by poststructuralist feminist scholars and involves the deconstruction of legal narratives in relation to a range of issues before the courts where women have been disadvantaged (Taylor 2001). A comprehensive overview of such studies is provided by Graycar and Morgan (2002). Feminist poststructuralists have created in their writings and research a more comprehensive understanding and critique of how the production of power relations contributes to oppression of women and other marginalised groups in our society. Examples of this include: research conducted by Butler (1993) into the production of ‘sex’ as an entity created by cultural discourse; a critique on women’s self-regulation under patriarchy (Bartky 1990); and Mason’s (2002) work on constructed hierarchies of difference and the perpetuation of violence.

4.2.1.3 Categories of difference

Poststructuralism adds an important dimension to understanding how the relationship between power and oppression operates. As Mason (2002) points out, it is important to look at oppression and at what it produces. Feminist poststructuralism seeks to deconstruct the discursive positioning of people into dominant or subordinate relationships through the meaning imposed by the creation of binary positions (Derrida 1981; Mason 2002). Ongoing subjugation is enabled through discursive constructions of difference or ‘otherness’ (Hester, Kelly & Radford 1996). This understanding brings into focus the sites of power and the hierarchical relationships that occur within cultural linguistic practices. It is helpful in identifying the constructed, normalised truths in relation to domestic violence.
that deny the role of patriarchy in perpetuating the cycle of violence (Bagshaw & Chung 2000a).

**Discourse and identity**

Inherent in feminist poststructuralist theory is the focus on complexity and diversity within a cultural and historical context. This represents a paradigm shift away from modernist, humanist, essentialising constructions of the self (Barthes 1985; Otto 1999). Poststructuralism points to the formation of people’s identities by the continuous and changing discursive interaction of knowledge systems, individual experience, and the social practices of socially positioned individuals (Otto 1999; Mason 2002). The power of discourse is understood to create and reinforce normative practices within particular times in history. Feminist poststructuralist thinking informs that in Western societies the social meaning of gender is formed by everyday linguistic practices around which subjectivity is formulated (Connell 2002; Lupton & Barclay 1997). The common discursive practices are significant, pervasive and active in definitively describing the category to which the person is seen to belong and in reproducing certain social and traditional gendered role relationships within society (Potter & Wetherell 1989). This is influential in establishing the ideological cultural meanings of fatherhood, motherhood and childhood such that they emerge as objects of knowledge that can be known, thought about and evaluated against their performance in their defined roles (Lupton & Barclay 1997).

Through the deconstruction of essentialised categories of the human subject feminist poststructuralist thinking adds another dimension to understanding how the patriarchal stereotypes of motherhood, fatherhood and childhood are reinvented and sustained as hierarchically ordered categories of difference that reinforce subjugation and superiority (Mason 2002). Feminist poststructuralists take the perspective that these are diverse groupings with inherent individual complex differences and with no fixed role or identity interests (Hartsock 1996). This is an important contribution to moving feminist legal theorists’ arguments away from a modernist approach that reinforces dichotomy, universalises difference and employs the rhetoric and stereotypes of women’s roles in marriage and as mothers (Smart 1989). The application of this understanding also makes the ‘naturalised’ subjugated role of children as incompetent ‘others’ in contemporary Western society more transparent and provides insight into the marginalisation of children in the context of family law in Australia.
Male hegemony

Feminist poststructural theory draws attention to the powers of oppression associated with the formation and imposition of definitions and categories that reflect the reality of men, against whom all others are measured (Butler 1990; Graycar & Morgan 2002). Connell (1995) describes a ‘gender order’ reflecting constructed and prescriptive normative gender relationships defined by a historical pattern of hierarchical relationships between men and women.

Male hegemony and domestic violence

As discussed in Chapter 3, domestic violence is a significant issue of social and individual concern. The distortion of understandings of the acts of violence, perpetuated by patriarchy, has been drawn to society’s attention through the ongoing contributions of feminist structuralist thinkers (Taylor 2001). However, structuralist feminist research has relied on essentialism and the categorisation of gender roles with an inherent inequality. It is limited to investigating acts of violence upon victims and does not address the construction of victim and perpetrator subjectivities.

Poststructuralism recognises the importance of making the experience of violence visible, but also draws attention to the masked, underlying concepts that create situated perspectives on and responses to violence that are reflected in male hegemonic discourse (Butler 1993; Mason 2002). Language operating within its own regulatory systems has determining effects (Mills 1999) as it enables and constrains what can be known at any given time and who will be believed (McHoul & Grace 1993). Persuasive male hegemonic discourses form responses by institutions, including the law, to the issue of domestic violence and serve as a justification for disadvantaging women and children (Ptacek 1999). This has been demonstrated by a range of feminist poststructuralist research studies which reveal the subjectifying, totalising impact of male hegemony upon the victims of domestic violence. Some of these studies have addressed the following areas: the professional normalising discourses on women victims of domestic violence (Dobash & Dobash 1992); legal discourses disguising responsibility of the perpetrators of domestic violence (McCarthy 1994); and legal discourses of romantic love in cases of domestic violence that reject complex personhood (Seuffert 1999).
Focusing attention on the role of male hegemony in the establishment and perpetuation of modernist dualistic understanding of gender and role relationships allows important understandings to emerge that help to address the issue of violent crimes against women and child victims. Mason (2002) theorises that there is an intrinsic link between violence and the established “hierarchical constructions of difference” (Mason 2002, p.63). Within these categories of difference the disparities of power are neutralised, rationalised and hidden from view (Connell 1995; Dunn 2000). By drawing upon the significant insights of different feminist theorists, all of whom agree that violence is oppressive, inflicts harm, and dominates and constrains how subjects feel about themselves (Mason 2002) and by incorporating Foucault’s philosophical thinking on how well established patterns of subjugation are sustained by male hegemony, it can be seen that “violence is an instrument of power” (Mason 2002, p.11).

4.3 The transformative thinking of Michel Foucault

*The most powerful discourses in our society have firm institutional bases, in the law, for example...and in the organization of the family...*

Weedon (1987, p.109)

As the following sections illustrate, “for Foucault knowledge is power” (Bagshaw 2001, p.208). Foucault addresses the background contexts for the development of power relations and the power of discourse in the creation and perpetuation of knowledge systems and cultural beliefs, and social and institutional practices (Allen 1996; McHoul & Grace 1993). Power is understood as flowing unevenly through all social processes via discursive networks (Gordon 1980). Power relations operate through the discursive networks of those in authority who determine what is deemed to be ‘knowledge’, as based on the ideology of the era, and determine who to believe (Danaher, Schirato & Webb 2000).

4.3.1 Gender and family roles

Foucault made a significant contribution to the development of understanding about the ongoing relationship between subjectivity, history and truth (Rabinow 1997). Foucault challenged assumptions about the existence of a pre-discursive self and the independent selfhood of subjects (Danaher, Schirato & Webb 2000). Foucault’s accounts of homosexual and prisoner populations demonstrate the power of medicine, law and the social sciences in producing ‘scientific’ ‘truths’ which socially construct identities that are
accepted by social apparatuses (Foucault 1989; McHoul & Grace 1993). According to Foucault (1977) people remain visible as part of particular typologies. The productive and repressive discursive practice that construct subjectivities are often taken for granted, are assumed to have validity (Otto 1999) and define how people will be managed (Slembrouck 2002). This understanding forms the link between normalising emerging ‘truths’ at different times in history, people’s gender identity and defined role positions within the family and society, which are embedded in the historical traditions of the era (McHoul & Grace 1993).

Foucault challenged the ‘natural’ gender order through providing the insight that power acts primarily to create self regulating subjects (Danaher, Schirato & Webb 2000). The constitution of the subject is controlled by discursive disciplinary practices within which power relationships operate (Threadgold 2000). Language is endowed with ideology, and in its constitutive role language contributes to the creation of relations within society and within institutions (Fairclough 1995). This process defines and regulates the human body and what is ‘acceptable’ behaviour (Danaher, Schirato & Webb 2000).

4.3.2 Disciplinary power

*Each society has its own regime of truth. Its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true.*

(Foucault 1980, p.131)

A key understanding of the operation of power in our modern Western society lies in relation to the role of discourse in the development of institutionalised power ‘technologies’, where rituals of power take place (Dreyfus & Rabinow 1982). Foucault (1980) described disciplinary power as the primary source of social control. According to Foucault, the core of institutionalised power is the knowledge-power nexus that establishes key normalising discursive practices and processes (Rabinow 1984; McHoul & Grace 1993).

Discourses are actively established and operate as a means through which value judgments are made about what is ‘true’ or ‘false’, the way things are to be validated and who holds positions of authority to judge what is true (Foucault 1980). Foucault recognised that discourses are organised to exclude opposing information (Seuffert 1999). At particular points in history certain knowledge is privileged and the official discourses act as ‘truths’
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(Danaher, Shirato & Webb 2000). Within institutional processes and practices these create ‘technologies’ of power (McHoul & Grace 1993). Foucault’s metaphorical application of the Panopticon focuses attention on the role of institutions in utilising disciplinary power, based on historically specific regimes of knowledge, to define, legitimate and oversee people and their experiences within society (Foucault 1977; Dreyfus & Rabinow 1982). When sanctioned by institutionalised power bases, social regulation operates through the processes of disciplinary power (Andersen 1988). Institutions, including the law, are not the sources of power but provide centralised structures for the exercise of dominant regimes of ‘truth’ that emerge from ‘scientific’ and institutional discourses.

Institutionalised power techniques involve a complex process of normalising judgments that maintain existing power relations (Dreyfus & Rabinow 1982). The significant inter-relationship between the social sciences and the rise of various institutions (Andersen 1988) is evident in the law’s reliance on ‘scientific’, ‘rational’, ‘neutral’ and ‘objective’ ‘truths’ that are extremely difficult to challenge (Smart 1995; Otto 1999). The law’s reliance on ‘scientific’ ‘truth’ ensures people and their actions are consistent with the hierarchies of power that relate to gender, class and age (Weedon 1987). In the operation of the ‘technologies’ of power in legal institutions, legal decisions are based, not on objective facts, but on subjective impressions that can disadvantage those who depart from perceived normative, acceptable behaviour (Mason 2002). This is evident in the increasingly disciplinary nature of legal power where processes produce prescriptive behaviour and expectations about performance in normative socially constructed roles and relationships within families (Weedon 1987; Otto 1999).

4.3.3 ‘Technicians’ of ‘technologies’ of power

Judges are the embodiment of institutionalised power and hold centralised positions where discursively constructed knowledge can widen the control of the state (Andersen 1988). Judges have the authoritative voice of judicial discourse to reproduce accepted constructions of knowledge and ‘truth’ by what they say, as well as what they do not say. There is not an equal relationship between all social discourses. What people in positions of power say, becomes accepted as ‘true’ knowledge, while discourses of marginalised people remain ignored or discounted (Foucault 1980). In Australian family law the role of judicial discretion means judges have a central and privileged role in creating the law through what they say in their determinations (Pether & Threadgold 2000). In this way it
can be seen that judges are positioned as the ‘technicians’ of disciplinary power within the court system.

Disciplinary practices used by institutions, such as schedules, surveillance and other restrictive practices, sustain power relations (Foucault 1977). These become absorbed in everyday life and ‘normalise’ or ‘correct’ society (Otto 1999). Judicial determinations rely on the ritual of examination where contemporary forms of power and knowledge are brought together (Dreyfus & Rabinow 1982). The central, everyday processes of the institutionalised power techniques used by judges in contemporary legal institutions include calling ‘expert’ witnesses to provide evidence, deciding what constitutes admissible evidence and requiring the production of affidavits as record keeping. Within such processes, nominated ‘experts’ examine the subject of the discourse, pass judgment on what has been said and advise how the subject should be managed (Weedon 1987; Andersen 1988).

Foucault’s concept of power as being relational, operating between and through individuals and moving through all levels of society, means that judges who are not divorced from the social context and historical time in which they live, are also subject to the process of self-regulation and to the power of discourse. Where discourse is enacted within institutions and social contexts, it is those systems that determine the evolution of which discourses are circulated (Foucault 1980). This includes which knowledge is privileged and which modes of speaking and writing are available within the legal profession and judicial culture, at particular points in history. What can be said is governed by the formative rules of discourse that order perceptions, not as the result of natural processes, but as cultural and psychological constructions designed to make things happen (Potter & Wetherell 1989). According to Foucault (1988), speakers of ‘scientific truths’ firstly have to conform to the circumstances of the discourse before speaking the discourse. Therefore, judges are influenced by the assumptions, values and beliefs that underpin the knowledge that they both use and construct (Scheurich & Young 1997). Judges are constructed as social subjects whose role identity is enabled by discursive formations that prevail over human agency and become embedded in the process of becoming a judge (Slembrouck 2002).
4.4 Discourse analysis

*Silence and secrecy are a shelter for power...It is only by looking at discourse in operation, in a specific historical context, that it is possible to see whose interests it serves at a particular moment.*

Weedon (1987, p.111)

Discourse analysis is a vast and variable practice (Fairclough 1989) used broadly in research across disciplines relating to the social and cognitive use of language (Coulthard 1977). The diversity of discourse analysis as a mode of research has created many challenges. Differing theoretical paradigms intersect and raise questions about the research agendas, the methods and the contexts of inquiry. These are based on the distinct histories and the transformation of knowledges of each discipline (Crichton & Barrett 2005).

Poststructuralism has centrally located research using discourse analysis, across a hybrid field of inquiry within the social sciences as a process for adding new breadth of understanding (Potter & Wetherell 1989; Lee 2000; Slembrouck 2002). This has created a movement away from the traditional perception of the spoken and written word as merely expressions, transparent representations and communications.

Discourse analysis is increasingly being recognised as a way to facilitate social change through identifying the dominant systems of thoughts, ideas and knowledge that continue to be instrumental in shaping the subject positions of marginalised people (Nakata 1998). Legal institutions are sites of contest (Weedon 1987) and by using discourse analysis to analyse written judgments, a window is created into the micro-culture of the judicial regimes of ‘truth’ that construct ‘how things are’. The constructions of knowledge of people in positions of power, such as judges, needs to be scrutinised to make transparent the reliance upon accepted stereotypical thinking that can be embedded as ‘common sense’ and, therefore, remains unstated (Dunn 2000). The analysis of discourses provides an understanding that has “much explanatory power” about competing interests that are supported by various discourses, and about the effects of silencing other discourses (Weedon 1987, p.117). This study sought to identify the assumptions, beliefs and values underpinning the competing discourses relied upon by the judges, in the judgments analysed, and relies on the poststructuralist concept of discourse analysis as a process of identifying the practice of what can be said (McHoul & Grace 1993). This not only addresses descriptions of the ‘how’ but also offers explanations of the ‘why’ of linguistic
practice (Candlin 1987). It is also consistent with the philosophy of Foucault who recognised discourse as a practice rather than simply a structure that people use to construct realities of the objects and events that are spoken about (Threadgold 2000).

Foucault’s premise is that discourse is active and is identifiable as a set of ideas, opinions and intellectual constructs that enable or constrain the production of realities and behaviour (Lupton & Barclay 1997). Foucault (1972) described discourse as encompassing all bodies of knowledge that include speech and written texts which have meaning and effect. Discourses formed within particular contexts do not exist alone and are systematically arranged as groups of statements with commonality, coherence, compete with each other and are regulated by rules (McHoul & Grace 1993; Mills 1999). Through analysing discourses, the transformative nature of knowledge can be identified in competing discourses that come to prominence. This is the reflexive nature of the written and spoken word (Potter & Wetherell 1989).

**4.4.1 Textual analysis**

From a Foucauldian perspective written legal judgments are a significant part of governmentality as they have strong reproductive power due to the authority and privilege of their authors in relation to ‘truth’ and the establishment of precedents. The act of producing a written judgment is a discursive practice related to a specific context (Andersen 1988) and it reflects normative social, cultural and institutional discourses (Coffey & Atkinson 1996). In the FCA the legal context renders authority to the judgments that are produced. They provide ‘truth’ about the ‘best interests’ of the child in contested cases.

\[ To \, govern \, in \, this \, sense, \, is \, to \, structure \, the \, possible \, field \, of \, action \, of \, others. \]

(Dreyfus & Rabinow 1982, p.221)

The process of discourse analysis is critical and reflexive, but not descriptive. Discourse analysis of written texts looks at how themes emerge from within the text to reveal what the discourse is actively doing to accomplish the particular goals of the writer (Potter & Wetherell 1989). An important focus for discourse analysis is to identify the normalising discourses of disciplinary power and who possesses and utilises the knowledge that is used to judge another (McHoul & Grace 1993). As at any time in history there are multiple discourses, but only some gain prominence (Foucault 1978) it is important to identify what
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‘is’ said as well as what ‘is not’ said within a specific context and period in history. Through the analysis of written judgments the development of a different reading of social and historical conditions is produced. This contributes to a social critique through the deconstruction of the process of choice exercised by judges in the renewal, formulation and confirmation of the dominant discourses of the time. The texts that judges produce in the form of written judgments have social and political implications and reflect the discursive constitution of subjects relevant to the time they were constructed (Weedon 1987). It is important to identify the discursive connections between statements about subjects who are constructed as belonging to categories. The categorisation of subjects may lead to inferences that privilege certain knowledges and expectations about the members of that category and influence how they are positioned in a hierarchy of judgment (Potter & Wetherell 1989).

Significant features of discourse analysis for this thesis include: the analysis of existing, naturally occurring examples of language; focusing on units of written texts that are larger than single words or sentences and that are understood as part of the whole text; seeing the power of language as an influence on social action; placing textual accounts within the context within which they are used and interpreted; and focusing on the analysis of the inter-relationship between the discourse and the context. In this research analysis is achieved by a process of deconstruction that examines what is said, and not said, in the written texts, and identification of patterns of regularity and variability that exist within particular contexts. This assists in understanding the organisation of meaning (Foucault 1972). The process of deconstruction focuses on the power/knowledge relationship in order to make more transparent the socio-political influences and the hidden meanings that take place in the normalising practices of institutions that construct the dominant problematisations and truths (Sands & Nuccio 1992; McHoul & Grace 1993; Slembrouck 2002).

4.4.2 Limitations to discourse analysis

As previously stated, discourse analysis is a rapidly expanding field across disciplines. There is a need to address the interdisciplinary nature of discourse analysis as this has led to criticisms by professionals from different fields that are based on poor understandings of the different knowledge foundations and of the approaches used (Lee 2000). This is particularly important to address when researching areas where democratic processes
appear to be problematic (Hartsock 1996). Discourse analysis that addresses the crucial role of discourse in the reproduction of oppression is a complex process that requires linking the text, social cognition, culture and society. This is essentially a multidisciplinary approach that is not always possible to achieve (van Dijk 1998).

In discourse analysis the text is not simply categorised as pieces of language for hypothesis testing that describe and neutrally reflect ‘reality’. Within a poststructuralist approach to discourse analysis it is understood that categories are themselves not fixed entities and that categories are subject to varying discourses, depending upon the context within which they are used. However, it is difficult in discourse analysis to avoid relying on categories as they describe the collectives of the society in which we live.

Any discourse analysis of texts should not be seen as definitive, as texts may have many meanings relating to the knowledge systems of those who produce, as well as those who receive those texts (Lupton 1994). A challenge for the analyst is to avoid creating one coherent account that can be substantiated by drawing on particular pieces of the text and ignoring others (Potter & Wetherell 1989). In attempting to move past the objectifying effects of meta-narratives by the application of poststructuralist thinking in discourse analysis, it is difficult to avoid the production of new meta-languages.

The active participation of the analyst in the interpretation of the function of discourse produces an inherent difficulty in making a determination about “when a particular feature is relevant to the specification of a particular context and what degree of specification is required” (Brown & Yule 1983, p.50). The issue of context can create additional complexity for the analysis as the situations in which texts are produced may reflect subtle differences in order to achieve different outcomes.

Mapping such a terrain requires a new kind of geography and a different sort of map - one that will allow simultaneity and difference, parallels and overlaps...

Threadgold (2000, p.41)

4.5 Chapter summary

This chapter has provided information about the conceptual theoretical foundation used for this research study. The different approaches of modernism and poststructuralism are discussed. Information is provided about the contributions feminist poststructuralist
thinking makes to the development of knowledge about how discursive power relationships contribute to the oppression and disadvantage of women in society and in legal contexts. Attention is drawn to the value for this study of adopting a feminist poststructuralist perspective combined with the transformative thinking of the French philosopher Michel Foucault.

Information is provided on Foucault’s (1977) understanding of the knowledge-power relationship and the active role of discourse in the construction of ‘truths’ and the establishment of subjectivities that define acceptable behaviours at particular points in history. Foucault’s concept of ‘technologies’ of power is important for understanding the processes used by legal systems in the establishment of hierarchies of difference that regulate and control members of our society. This methodology contributes to the feminist agenda for addressing the inter-relationship between power and disadvantage in society.

The relevance of applying discourse analysis based on feminist poststructuralist thinking for this study is discussed. Understanding that the construction of the problem influences how it will be managed (Ptacek 1999) provides a sound rationale for utilising discourse analysis in examining how judges construct the ‘best interests’ of the child in cases where domestic violence is an issue. Discourse analysis challenges the modernist processes of constructing dominant ‘truths’ utilised in courts of law (Potter & Wetherell 1998). This chapter has provided an overview of the increasingly used variable practice of discourse analysis that addresses the strengths, complexities and weaknesses of utilising such a process and discusses the importance of analysing written texts in order to uncover the dominant themes embodied in the texts.

The following chapter provides detailed information on the methods used to conduct the research for this thesis.
Chapter 5  The process of researching the ‘best interests’ principle

Chapter 5 discusses the procedures and techniques used in this research project for the collection, exploration and analysis of the research data.

5.1 Rationale for the research methods

...documentary methods are a very useful tool of social research.

Sarantakos (1998, p.277)

This retrospective, non-experimental, non-intrusive study utilised unpublished written judgments from disputed contact cases where domestic violence was an issue and that reached the stage of final hearing at the Adelaide registry of the Family Court of Australia (FCA). It was undertaken in two stages. As no reliable statistics are kept by the FCA on this case population a small statistical analysis was undertaken as the first stage of the research. The statistical analysis was considered an important part of providing contextualising information for the in-depth qualitative analysis that was the prime focus of this research. An in-depth qualitative textual analysis of judgments on the construction of the best interests of the child in a sample of these cases was undertaken as the second stage of the research.

By restricting the study to unpublished First Instance judgments, it was possible to analyse the common practice of how judges at one registry use their discretionary powers to construct the needs and interests of children in contested contact cases where domestic violence was an issue. Written judgments are an important accurate and authentic historical record of the dominant, competing and silent discursive themes that, in practice, underpin the judicial constructions of the ‘best interests’ of the child at a particular point in history. First Instance judgments are complete transcripts containing the full narrative account provided as a written record by each judge in each case. They provided a solid, undistorted basis for analysis (Shimahara 1990; Maxwell 1992).

Under the legislation unpublished First Instance judgments are not made available to members of the public without specific approval being granted by the FCA for legitimate reasons (Section 121 subsection 9(f) Family Law Act 1975) (FLA), such as conducting this
Chapter 5: The process of researching the ‘best interests’ principle

research. The fact that the judgments analysed are not open to public scrutiny could be seen as a limitation of this study. However, it is evident that unpublished First Instance judgments are a largely untapped source of information. In two prior content analysis studies of judgments from the FCA, referred to in Chapter 1, the study by Moloney (2002) relied on published appeal cases and the study by Berns (1991) is unclear about the sampling process of the judgments analysed.

The importance of focusing research on groups who exercise social power is important from a feminist perspective (Harne 2004). Judges hold powerful and widely discretionary positions (Dickey 1997). The analysis of the type of information contained in written judgments is essential for the identification of potential biases and lack of knowledge that contribute to the disadvantaged status of children who have been exposed to domestic violence and who are the subjects of judicial determinations within the jurisdiction of family law in Australia. Having been able to access data from the unpublished judgments, which is an under-researched area, has provided an accurate source of judges’ commonsense knowledges, as expressed in their routine everyday practices. It has also added to the potential emancipatory aspect of this research project.

An assumption of this research is that, despite the legislative requirements of the Family Law Reform Act 1995 (the Reform Act) for determining the best interests of the child (discussed in Chapter 2), there are individual differences in how judges, through their own perceptual lenses, construct their own realities and truths. While this study acknowledges the importance of identifying difference, the aim of this study was not to target individual judges but to understand how the judiciary as an institution, within one registry of the FCA and since the introduction of the Reform Act, appear to have constructed the best interests of the child within the judgments analysed.

Approval to undertake this research was granted by the FCA via their Research Committee and by the University of South Australia’s Human Research Ethics Committee. The data collection at the Adelaide registry, a major registry of the FCA with no known differences in its client base from other major registries in Australia, commenced in 2002 and was collated by the end of 2003.
Chapter 5: The process of researching the ‘best interests’ principle

5.2 The research process

5.2.1 Stage 1 – Process for achieving a quantitative snapshot

5.2.1.1 Data collection and sampling

A small quantitative analysis was undertaken involving a search of all unpublished First Instance judgments in disputed parenting cases that reached a final hearing at the Adelaide registry between the years 1991–2001 inclusive (N=785). The eleven year period spans five and a half years either side of the introduction of the Reform Act in June 1996, thereby providing a useful picture of any significant statistical changes following the introduction of the Reform Act. From these cases the number of pre and post Reform Act contact disputes where domestic violence was an issue was identified (N=183). The second step in the quantitative analysis required a thorough reading of all the judgments to identify and exclude those where the matter was adjourned part heard, the application related to practice and procedure, the issue was contravention of an existing order, where both biological parents were not parties to the proceedings, and where the judges had not accepted that domestic violence was an issue. The purposive sampling to identify all judgments that were specifically relevant to the focus of the research (Patton 1990) (Appendix 5.2, part a) resulted in the identification of a total of 109 judgments.

The library of the Adelaide registry provided a complete record of all systematically catalogued paper copies of First Instance judgments over the years required for this study. In addition, the electronic databases, ‘Lotus Notes’ and the ‘Intranet’ used internally by the FCA from 1996, provided access to electronically recorded judgments. A replicable screening process of all electronically recoded judgments using the Boolean descriptors ‘contact and (violence or abuse)’ was used with limited success. The electronic search only yielded seventy-six judgments. Not all judgments that described the behaviours of domestic violence had used the words ‘violence’ or ‘abuse’ and not all completed judgments had been entered onto the database. A second search was then initiated using the paper copies of judgments catalogued in the Adelaide registry library. To reach this stage in the sampling process over 4,000 pages of text were read to identify cases that met the criteria for inclusion.

The library paper copy cataloguing of all judgments ceased at the end of 2001, and it appeared at the time of the data collection that the electronic databases held an incomplete
record of all delivered judgments from 2001 onwards, which set the boundary to the years researched in this study. All cases within the sample years were available in written paper copy form, providing complete, comprehensive and reliable information which added to the trustworthiness of the data needed for the analysis stage (Fossey, Harvey, McDermott & Davidson 2002). To include incomplete data from beyond 2001 would have compromised what has been referred to by Marshall and Rossman (1995 p.143) as the “soundness” of the findings.

5.2.1.2 Data analysis

A comparative statistical analysis of the categories of judgments made prior to the Reform Act (1st January 1991 to 10th June 1996) and post Reform Act (11th June 1996 to 31st December 2001) was undertaken in two stages. The first stage calculated the number of contact disputed cases proceeding to a full defended hearing at the Adelaide registry. A comparative analysis between the pre and post Reform Act categories of judgments where domestic violence was an issue was made.

The second stage of the statistical analysis was based on the purposefully selected sample of 109 judgments. During the process of purposeful sampling, features emerged which appeared to be relevant to understanding the complexity of this population of cases before the Court. Based on written notes taken at the time of reading the judgments, later organised into tables stored on the computer, a range of features from the purposefully selected pre and post Reform Act samples were categorised for statistical calculation. The total numbers per variable were calculated and the percentage difference between the pre and post Reform Act categories determined to provide a picture of the changes in these categories following the introduction of the Reform Act. These quantitative analysis findings are discussed in Chapter 7.

5.2.2 Stage 2 – Process for achieving a qualitative analysis

The second level of analysis undertaken for this study was qualitative and provides the main focus of the research. It involved an in-depth discourse analysis of twenty post Reform Act judgments from the Adelaide registry that were derived using stratified random sampling (discussed in a following section) from the purposefully selected sample of judgments used for the quantitative analysis.
Originally the aim of this study was to conduct a comparative content analysis of the narrative themes that emerged from both the pre and post Reform Act samples drawn from a total of two registries of the FCA. Interest in this shifted away from the wider approach to a narrower focus on a single registry and onto the examination of the more contemporary textual accounts from the post Reform Act sample of judgments. This occurred primarily as a result of two influences. After achieving a pre and post Reform Act sample for qualitative analysis (N=40) from the Adelaide registry, and having commenced the focused and repeated reading of the judgments, the richness and complexity of the data began to emerge. This improved my understanding of the value of conducting an in-depth analysis consistent with qualitative research where representativeness relates to the quality and not the quantity of the sample (Sarantakos 1998). The second influence was that, according to the library service of the FCA, there would have been practical constraints in accessing a reliable sample of judgments from some interstate registries due to an incomplete record of paper copies of judgments.

5.2.2.1 Timeframe

As the method must suit the aims (Sherman & Webb 1990), the findings of the discourse analysis of the textual accounts of judges were achieved through establishing a focused avenue for uncovering the judicial discourses about the best interests of the child as constructed in one specific location (Adelaide registry) and within a targeted timeframe (11th June 1996 to 31st December 2001 inclusive). This timeframe captures five and a half years following the introduction of the significant legislative changes of the Reform Act discussed in Chapter 2.

In looking at the judicial constructions of the best interests of the child it was considered important to apply Foucault’s theorising, discussed in Chapter 4, that the power of discourse creates normative ideologies at particular times in history which in turn regulate people within society (Marshall & Rossman 1995; Henrique et al 1998). A five and a half year timeframe was considered sufficient to identify the knowledges that formed the basis for the established institutional attitudes (Shimahara 1990) and “the material existence of ideological beliefs” (Lather 1996, p.544) of the era. This time span was considered to be long enough to reveal any changing norms and primary assumptions (Scheurich & Young 1997). However, as no context of research can inform a complete or generalisable truth
(Featherstone & Trinder 1997) it is acknowledged that there are limitations to the time span used for this research.

5.2.2.2 Sampling

In analysing how judges constructed the best interests of the child, this study required the selection of “information rich cases for study in depth” (Caulley 1994, p.7). The selection of texts reflecting the core interest of the research was crucial to the validity of the analysis process and to the testing of developing ideas that emerged from the data (Maxwell 1992). The sample of judgments was not chosen by the researcher to support a particular belief or to test a hypothesis but to allow the knowledge to emerge from the data. Purposeful sampling used to achieve the final samples for the quantitative analysis was further applied to exclude all cases where the final judgment had been delivered pre Reform Act. From this process of elimination a total number of sixty-six post Reform Act judgments were identified and it is from this group that the sample of twenty judgments analysed for this research was drawn (Appendix 5.2, part b).

Stratified random sampling was used to achieve the final sample profile. This method is often applied in qualitative research to identify variation within the population being studied and to focus on the crucial phenomena (Maxwell 1992; Sarantakos 1998). The purposefully selected sample was divided according to the year that each judgment was made. The stratification into groups per year was an acknowledgment of the researcher’s awareness of the changing socio-political environment (Marshall & Rossman 1995) and was done to improve the accuracy and representativeness of the findings (Sarantakos 1998). The percentage of the total cases in the post Reform Act sample that occurred in each calendar year was calculated. A proportionate random sample was then drawn from each year. This was achieved by using the website ‘Research Randomiser’ that utilises a Java Script random number generator. The individual samples were merged to compile the final sample of twenty judgments. The proportional representation within the sample increased the dependability of this study as it minimised any undue influence of the results by unknown events occurring in any one year, and more accurately reflected the actual pattern and range of cases that received a final judicial determination in each year. The aim was to use a transparent process, free from researcher bias, and one that could be replicated and be transferable to a second population if necessary (Marshall & Rossman 1995).
Due to the length and richness of the texts the target sample of twenty judgments was considered sufficient to explore and to provide a basis for a critique of the judicial constructions of the ‘best interests’ of the child. A modernist perspective, referred to in Chapter 4, that relies on positivism would perceive the small sample size as a limitation in the interpretation of the findings about the judicial construction of the child’s best interests. It is acknowledged that other themes may have emerged about the judicial construction of the ‘best interests’ of the child if a larger sample or a sample taken from another registry had been used. However, consistent with the application of qualitative sampling, the sample size is relatively small to facilitate in-depth analysis, where the generalisability of the findings is limited to analytical generalisations (Sarantakos 1998; Cizek 1996). From a poststructuralist perspective an in-depth discourse analysis using a small sample of judgments adds another piece to the equation in understanding how children’s ‘best interests’ are constructed by judges.

Following the selection of the sample for analysis, the judgments were scrutinised to identify whether or not there was a proportionate representation of judges. During the sample years and out of the five judicial positions at the Adelaide registry, the judges occupied their positions for different periods of time with the retirement and appointment of three judges. This changing population of judges would contribute to the variation in the number of judgments made by each judge in the final sample (Appendix 5.1). Out of a total of eight judges who presided at the Adelaide registry for periods during the years from which the sample judgments were taken, all but one judge, who sadly suffered from a fatal illness, are represented. The twenty judgments that formed the final sample were delivered by three female and four male judges.

5.2.2.3 Confidentiality

Ensuring confidentiality of the research subjects is a requirement under the Australian family law legislation (Section 121 FLA 1975). This prohibits the publication of any identifying client information in relation to Family Court proceedings. Ethical considerations and the ethics protocols stipulated by the FCA and the University of South Australia Human Research Ethics Committee, ensured that a priority of this research was to code the judgments and the names of the judges at the time of the data collection, thus ensuring anonymity of the clients and judges.
The judgments used for the discourse analysis were assigned a number and where quotations are used in this thesis to illustrate the discourses, the names of adults and children have been changed to initials that do not relate to their actual names. Their status in the family is noted in brackets directly after the coded initials.

Much consideration was given to coding the names of the judges. This coding was achieved as quickly as possible as self-reflexive practice informed me of the need to prevent any biased interpretations arising from the analysis of the texts arising from my identification of the judges. This was a possibility as I may have held certain expectations originating from my prior working relationships with the individual judges. I chose to use the names of colours as the code. My intention was to be respectful to the judges and to not symbolically distance the judges as individual beings by using, what I perceive to be, sterile coding reflected in the use of numbers for coding people. The name of each colour was randomly selected for each judge to ensure that the code would not indicate the gender of the judge, as this could lead to speculation about the judge’s identity.

5.2.2.4 Organising the data

The judgments obtained from the electronic databases were saved to a computer disc. The judgments available only by paper copy were electronically scanned, checked for errors occurring during the transcription process and saved to a disc. A systematic approach to data collection, storage and retrieval, which is important in the analysis of texts (Sarantakos 1998; Fossey et al. 2002) was assisted through the use of the qualitative software computer package NVivo (QSR 2002). Paper copies of case summaries I had written following repeated readings of the judgments were stored in a secure place.

Data was organised around themes that reflected the essence of judicial statements that emerged from reading the judgments. It was important to code relevant statements that showed the influence of different social actors (social science/legal professionals, mothers, fathers etc), as well as the content of the judgments (Coffey & Atkinson 1996). Relevance of the statements was determined from an inter-contextual perspective (Crichton & Barrett 2005). This process sought to identify statements reflecting the micro-level of each individual judge’s values through the chosen pattern of expression, the meso-level that reflected institutionalised beliefs, and the macro-level that reflected social and cultural values.
Chapter 5: The process of researching the ‘best interests’ principle

A progressive process

In order to maximise the quality of the research I followed a process based on rigor and a systematic approach outlined by Strauss (1987). To avoid researcher bias, which is a possibility in the classifying process of discourse analysis (Sarantakos 1998), coding and classifying the data was undertaken as part of a progressive process. This involved grouping, comparing and classifying the segments of the texts during and after undertaking multiple and complete readings of the judgments. I developed case summaries and reviewed my own notations attached to the texts during the readings. These revealed my own reactions, impressions, reflections and interpretations. Then I commenced the process of conceptualising the recurrent themes and the underlying themes embedded in the texts. Before conceptualisations of the themes that emerged from my readings of the texts were structured into category headings and subheadings, these were discussed in detail with my principal supervisor. The criteria for placing data under each category were also clarified and refined over time.

The main unit themes when using the computerised data analysis program NVivo (QSR 2002) are called ‘tree nodes’ and the related sub-categories are called ‘free nodes’; ‘sibling nodes’ and ‘child nodes’. The categories from the texts were organized under these ‘nodes’ and entered into NVivo (QSR 2002) to organise the data for analysis. Highlighting of the texts was used to reflect the prominence of the statements in the judgments and to identify ambiguity. After further readings of the judgments new categories emerged over time and were added to the database. A total of eleven ‘tree nodes’ each with a number of sub-categories emerged (Appendix 5.3). These reflected the major themes arising from the literature review and prior research on childhood, domestic violence, motherhood, fatherhood and post-separation family life, and the social positioning of adults, children and professionals in the legal system.

5.2.2.5 Analysis of the texts

The aim of qualitative research, where there are no set processes for analysis (Fossey et al 2002), is to record the complexities of and inter-relationships within situational contexts. Using feminist poststructuralist methodology as a foundation for the research meant that it was important in the process of analysis to pay attention to theoretical and personal interests (Willis 1980), to refine the research questions and any hypotheses over time.
Chapter 5: The process of researching the ‘best interests’ principle

(Marshall & Rossman 1995) and to maximise the trustworthiness of the findings (Maxwell 1992; Caulley 1994; Marshall & Rossman 1995).

Rigorous and prolonged engagement is a central part of poststructuralist research (Heslop 1997). I had a prolonged and repetitive engagement with the texts over many months when analysing the sample of judgments. This was in order to gain the fullest possible knowledge of the textual accounts (Willis 1980) used for the analysis and the production of a collective, theoretically interpretative story characterised by dominant, competing and intersecting themes (Richardson 1988). The fullest possible knowledge was achieved through an ongoing, circular process of reviewing the data, exploring the meanings and synthesising the information, and reflecting on my own interpretations as I read and re-read the textual accounts. The aim was “not verification of a predetermined idea, but discovery that leads to new insights” (Sherman & Webb 1990, p.5). This required the application of the conceptual and theoretical skills of the researcher. Such an approach has been described as “theory building” (Fossey et al 2002, p.728). An important part of the process was engaging in an ongoing and purposeful exposure of the researcher’s own accounts of preliminary findings that reflect the researcher’s imposed conceptual schemes (Schatzman & Strauss 1973). This encouraged the cyclical process of revisiting the texts and reviewing my own interpretations.

Through the process of re-examination of the text to identify the meaning imposed on the text (Sarantakos 1998), a better understanding was sought of what underpins the ‘best interests’ principle in the judgments analysed. An important focus of this research was to identify the dominant discourses contained within the judgments analysed that established and re-established dominant ‘truths’ about the needs and interests of children who have been exposed to domestic violence. What judges say and the conveyance of their attitudes have significant impact upon the victims of violence (Ptacek 1999). It was, therefore, important to examine habitual or repetitive statements that indicated the ways the judicial relational understandings of gender, power and violence were produced, and how children were positioned by judges as social subjects in the determinations of their best interests.

Poststructuralism seeks to identify various forms of thought and action that construct power/knowledge relations (Heslop 1997). This is achieved through searching for other examples, alternative explanations, and by identifying ambiguity (Marshall & Rossman 1995). The quest to identify any existing competing discourses within judgments that
demonstrated progressive understandings about the best interests of children in the cases analysed was particularly interesting. From actively searching for variation and ensuring that I had made sense of any ambiguity, a complex web of discursive constructions emerged. It became apparent how difficult it was for competing discourses to successfully challenge the dominant discourses that worked together to sustain each other. As part of the cyclic process of analysis the research questions were reviewed and other questions arose from the data to guide the research. It is from this cyclical process of analysis that the interpretative notions about what assumptions and beliefs informed the judicial constructions of the best interests of the child, and the over-riding philosophy of the operation of patriarchy eventually emerged.

5.2.3 Trustworthiness of the interpretative findings

*Validity is not a commodity that can be purchased with techniques...Rather, validity is like integrity, character, and quality, to be assessed relative to purposes and circumstances.*

Maxwell (1992, p.281)

In qualitative research each study has its own unique qualities. Therefore, it is difficult to set strict criteria for judging validity. There are a range of opinions about what constitutes trustworthiness of information analysis (Marshall & Rossman 1995; Shimahara 1990; Maxwell 1992) and the value that should be placed on this concept in qualitative research (Wolcott 1990). The varying views support the importance of transparency in the research design, sampling, data collection and the process of analysis, as all have implications for the trustworthiness of the presented findings (Fossey et al 2002). Another commonly identified criterion for measuring trustworthiness in qualitative research is prolonged engagement in the area being studied (Shimahara 1990; Wolcott 1990; Caulley 1994; Marshall & Rossman 1995). Prior sections of this chapter have provided information on how each of these issues were dealt with in this study.

Another strategy used in the analytic process for this study conforms to the identified criterion of peer review as a process that enhances analytic trustworthiness in qualitative research (Shimahara 1990; Wolcott 1990; Caulley 1994). Feedback about the reliability of the coding categories and my interpretations of the data were routinely tested through consultation with my supervisor and with peers in a number of venues. I gave presentations of the data analysis at various stages to peer review groups, and to the University of South Australia’s Conflict Management Research Group, and participated in the computer
program qualitative software support group. Small group peer supervision was a productive strategy for critiquing and appraising my analysis. The members of one peer group shared with me their expertise in the areas of childhood, violence and family dissolution, and shared an interest in discourse analysis. The presentation and discussion processes helped in preventing the development of preoccupation with any one consistent theme, encouraged the search for difference (Glasser & Strauss 1967), and affirmed the accuracy of my identification of both the dominant and competing discourses contained within the texts.

How the data is presented is also important in establishing the trustworthiness of the analysis. The interpretative findings on the dominant discourses used by the judges are supported in this thesis by the use of quotations from the actual texts. The quotations support the interpretations and the naming of the underlying values and beliefs. This form of data representation provides precision, adds to the credibility of the analysis findings (Maxwell 1992; Fossey et al 2002), portrays a sense of ‘reality’ and generates awareness of the complexities embedded within the narrative accounts (Eisner 1997).

5.2.4 Self-reflexivity – digging in the trenches

Self-reflexive practice requires space in which to become aware of conscious understandings and adopted positions and to develop understanding of what lies behind these (Deikman 1982). From the observation of the self, through contemplation and discussion with colleagues, I addressed difficulties encountered during the course of undertaking this research. On each occasion when I felt I was ‘digging in the trenches’ I needed to consider which strategies to adopt to productively manage the challenges. One of the challenges was that my management position within the FCA was made redundant. Initially I was concerned about how to access the data and the up-to-date literature that had been readily accessible to me through the library service of the FCA as an employee of the court. I initiated successful negotiations with the FCA to overcome these difficulties. In addressing these concerns and a number of other difficulties I encountered during the research process I came to the realisation that the timing of the redundancy of my management position was a beneficial step for the research process. Becoming an ‘outsider’ to the FCA provided a path to openness and a new perceptual lens through which I could view the research project. Working in a different environment, forming a different professional network and providing consultancy to the national non-government
sector in planning for future service delivery for separated families, helped me to distance myself from conformity to the powerful generalised beliefs held by social science and legal professionals with whom I had prior close working relationships within the FCA.

*Man’s anxiety in leaving embeddedness is the one most powerful antagonist of his world - openness. It wants to confine him in the embeddedness of the familiar so that he will not experience the awe and wonder of the infinitely new and unknown.*

Donovan (1997, p.144) quoting Ernest Schachtel

The research topic also provided its own challenge. Examining the judicial construction of children’s ‘best interests’ confronted an aspect of the legitimised legal process of family law in Australia as being the keeper of ‘truth’ (Graycar & Morgan 2002) and questioned claims of judicial objectivity. Despite this focus being consistent with feminist research across a number of fields (Seuffert 1999; Graycar & Morgan 2002) the research project was seen by some professionals in the field, and by some academics, as a controversial project that was ‘treading on hallowed ground’. Response to these reactions required clarifying the research agenda, combined with courage, persistence and patience in explaining the non-judgmental approach of discourse analysis. It became important to communicate that I was not seeking to ‘judge’ the judges, but to make transparent the otherwise invisible factors that underpin the judicial constructions of the best interests of the child.

Another challenge was in addressing a constraining process imposed by the FCA on the methods I sought to use for this research. My initial research proposal included interviewing judges as way of gathering information from a number of sources. Triangulation was a method I sought to use to improve the trustworthiness of the data in resolving the issue of variability of accounts (Caulley 1994). Unfortunately, the FCA elected to determine which judges I would be permitted to interview. I perceived this to be a biased process that was not worth pursuing. I then relied on Potter and Wetherell’s (1989) perspective on triangulation to provide me with some reassurance that it is futile to attempt to collect different sources of discourse as a way of establishing certainty.

There were practical problems encountered in the data collection. Extensive delays were experienced in accessing the scanner located at the Adelaide registry which was required to transcribe the paper copies of judgments onto a computer database. When a substitute scanner was made available it was only able to successfully process small amounts of data.
at any one time. However, with persistence and with help from the IT personnel, who
dedicated their own time to assist me, the process was successfully completed, albeit over
an extended period.

The most challenging situation I encountered involved the attitude of resistance from two
people who held influential positions within the administration of the Adelaide registry. As
I was no longer employed by the FCA a rigid protocol for my attendance to collect the data
at the Adelaide registry was imposed. I fully complied with this without question. However, on one occasion I was subjected to verbal harassment and intimidation for using
a photocopier that I had been given permission to use for copying the required judgments.
On other occasions prior colleagues were chastised by one of the senior persons for having
welcomed me with normal social courtesy when I arrived to collect the data. As prior
colleagues were distressed by what they observed as ‘unfair’ treatment of me and an
‘unsupportive’ approach to my research by these two people, I adopted a strategy of
collecting the data as quickly and efficiently as I could to minimise the time spent at the
registry. I also made myself as invisible as possible, only making my presence known to
those who officially needed to grant permission for my attendance at the registry on a day-
by-day basis. I did this to protect my former colleagues from further distress and
chastisement.

During my presence at the registry for the data collection I kept a positive focus and a
sense of humor as a lighthearted way of coping with the situation. Significantly, I reminded
myself and any prior colleagues who had stated concerns at various times about the way I
was being treated, that at no stage were any of the judges or their associates involved in
any of the negativity, and at no stage did I perceive resistance from the judges in regard to
my research. This prevented me from generalising any negative feelings towards the FCA
that could have contaminated the data analysis. I also focused on the positive support that
was generously provided by a number of individuals in the registry who made every effort
to help overcome the obstacles. Their generous support added to my motivation to make a
positive contribution to how children’s matters are managed by the FCA via this research
project.

The imposed constraints and the other challenges I faced during the research process
contributed to my focused and positive approach. The provision by my principal supervisor
of regular meetings with a small group of colleagues was an important source of support
and provided a venue where, because of the close and trusting relationships, open discussion led to shared experiences, the development of insight and the positive resolution of difficulties encountered in the research process.

5.3 Chapter summary

Chapter 5 discussed the research methods used for this study. The research involved two stages using different approaches. Stage 1 involved a small quantitative analysis to provide a statistical map to help contextualise Stage 2 of the research which utilised a qualitative in-depth discourse analysis. The rationale for the data collection and analysis process has been described. A cyclical process of analysis was utilised to enhance the quality and trustworthiness of the findings. This process commenced from the first engagement with the data. Consistent with qualitative analysis, there was ongoing engagement with the texts from which the hypotheses and interpretations emerged and changed according to the information that emerged. Use of the computer software program NVivo (QSR 2002) assisted in the management of the data. Self-reflexive practice was an integral component of the research process. The challenges I encountered during the research process and the strategies employed to manage these were described.

Chapters 6, 7 and 8 will provide information on the findings from the analysis of the judicial constructions of children’s ‘best interests’. A complex web of discourses on children’s competencies and needs, parenting and gendered roles, the separated family unit, and children’s exposure to domestic violence emerged from the texts. Using discourse analysis it was possible to discern a broad picture of the dominant underlying beliefs and values that guided judges from the Adelaide registry through the complexities and uncertainties of each case, and that positioned judges when making their determinations about what constitutes the ‘best interests’ of the child. The analysis identified the way in which certain discourses were repeated and relied upon by the judges and whose voices were privileged and whose were marginalised. From the judges’ narrative accounts I identified a complex interplay of multiple discourses supported by dominant ideologies that informed and justified the operation of patriarchy in the name of the children’s ‘best interests’. This discussion commences with Chapter 6 which explores how judges constructed childhood in the judgments analysed.
Chapter 5: The process of researching the ‘best interests’ principle
Chapter 6: The judicial construction of childhood

6.0 Introduction

This chapter explores the narrative constructions of childhood by judges in the judgments analysed. This was considered to be one of the fundamental concepts that inform the judicial formulations of children’s needs and interests. In the collection of judgments used for this research there were a number of narratives, or ‘markers’ (Bagshaw 2004) that denoted what constitutes ‘normal’ childhood and ‘normal’ childhood experiences within the family. These markers appeared to coalesce and reinforce the normative assumption that children are incompetent, unreliable ‘others’. This assumption justified the marginalisation of the voice of the child and the privileging of adult perspectives. Narratives were also identified that supported children as different from the established norm of childhood, and provided information about what it took for their wishes to be considered and given some weight in the judicial determinations of the children’s own best interests.

6.1 Dominant discourses on childhood

6.1.1 Normal – childhood incompetence

The words of the child are inherently suspect. They are the victim of ‘parental alienation’...or do not know their own best interests, or are not in a position to know them.

Roche (1999, p.71)

From a Foucauldian perspective, children are objectified and regulated by the state in terms of what are considered to be correct developmental behaviours, and what is condoned as being an acceptable family context within which to be raised. Roche (1999), referring to the jurisdiction of family law in the United Kingdom states that the law supports a culture of disrespect for children and relies on protectionism that leads to the victimisation and demonising of children. These concerns were raised in Chapter 1 and further explored in Chapter 2 in relation to the Australian context of family law. In the collection of judgments analysed these issues were reflected in the analysis of the judicial construction of childhood. This view was consistently formulated through the judicial statements about what weight should be given to the child’s stated wishes in relation to contact arrangements. It was clear that normative assumptions about children’s (in)competence to...
articulate reliable wishes were heavily relied upon by judges and that these assumptions were supported by a number of intersecting discourses.

In all judgments analysed (N=20) discursive themes were present that questioned children’s competence to express valid wishes, and/or negated the reliability of the children’s wishes. In eight of the judgments analysed, the judges’ final determinations rejected the children’s wishes. In four judgments no evidence was before the Court as to the children’s wishes, and in eight judgments the judges’ final determinations gave acceptance, or qualified acceptance, to the wishes of the children. In the majority of the judgments the children at some stage in the proceedings had their wishes discounted. The judges primarily relied on the normative discursive construction of childhood incompetence based on psychological discourse that, according to Dreyfus and Rabinow (1982), classifies, defines and pathologises childhood as a category different to adulthood. As discussed in Chapter 1, this essentialist construction denies the multiplicity of childhood identity. It implies that all children need adult guidance and need to comply with adult directions that support normative expectations about post-separation family relationships as being ‘loving’ and ongoing.

As the following discussion of the findings of this research show, there were repeated statements about the age and stage of development of children, that defined them as ‘less than’ adult and that emphasised the unreliability and the ingenuineness of the children’s wishes. Other dominant narrative themes reflected children as being dependant, subject to influence and as being incapable of being consistent in expressing their perspectives and wishes. These discourses interacted to form a ‘truth’ that, in the majority of judgments analysed, justified the minimisation or rejection of the perspectives and the wishes of the children. Competing discourses that challenged the dominant constructions of childhood incompetence were present in some judgments, but the findings revealed that acceptance of these discourses required the judges to justify over-riding the normative discourses on childhood.

6.1.1.1 Children’s age and stage of development

In fifteen judgments (Cases 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 39 and 40) the judges portrayed the children, at some stage in the proceedings, as being incompetent to reliably express their wishes, due to age and stage of development, or to recount with any
credibility their lived experiences. The dominant discourses revealed how easy it was for ‘young’ children to be denied the opportunity to have their perspectives heard or to dismiss their accounts and their stated wishes. In four judgments (Cases 21, 25, 29 and 39) where the children’s age range was 2–5 years, no evidence was before the Court in regard to the children’s wishes or perspectives. From the discourse used by the judges it was accepted without question that there was no need to seek the views of these ‘young’ children. As the following quotation illustrates in Case 39, a 2 year old child was excluded from a process of being ‘consulted’ about any ‘wishes’ as the child was understood by the judge to be ‘not old enough’.

Case 39

(a) Any wishes expressed by the child and any factors, including such as the child's maturity or level of understanding, that the Court thinks are relevant to the weight it should give to the child's wishes.

...Y [child] is not old enough to have been consulted about expressing his wishes and to that extent this subsection plays little part in my [judge] determination. [Paragraphs 177] [emphasis added]

An adult focus

How much children manage to say, and how much notice adults take of what they say in any type of legal case, is open to question...As long as it is assumed that children are less likely to know for themselves where their best interests lie then adults are to know for them...

(Roche 1999, p.65)

This analysis revealed that the dominant discourses on children’s age and stage of development demonstrated a strong adult focus that was sanctioned by the Court. In the judgments where children were excluded from an interview process the judges made statements based on an assumption that selective evidence from the parents and other adults, including professionals whose opinions were privileged, constituted the ‘truth’ in relation to the children’s needs and interests. This was of concern as the absence of the children’s perspectives on their own lived experiences of exposure to violence and on their relationships with each parent, including the violent parent(s), left a void in how their best interests were determined.
Chapter 6: The judicial construction of childhood

Case examples where children were seen by a social scientist for an assessment interview also revealed a strong adult focus, supported by psychological constructions that defined normative beliefs about childhood incompetence due to age and stage of development. For example, in Case 35 the child was seen ‘for a brief interview’ by a counsellor because of the child’s status as determined solely by being ‘only 6 years and 9 months’ of age. The child was described by the judge drawing on information from the counsellor’s report, as having limited capacity to provide reliable information. Assumptions about the child’s incompetence were reinforced by the judge who did not question the counsellor’s choice not to undertake an in-depth interview with the child, nor the competence of the counsellor to engage with and ascertain the needs and wishes of a child of that age.

<table>
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<th>Case 35</th>
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<td>B [child] at the time of the interview in 1999 was only 6 years 9 months and there was only a brief interview. M [child] was able to recall some memories of her father but appeared rather tentative in describing him. [Paragraph 127] [emphasis added]</td>
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Professional normalising discourse

As discussed in Chapter 4, professional discourses systematically produce and confirm the normalisation of the objects referred to (Law 1999). In the judgments analysed, normalising discourses about psychological and behavioural differences and the developmental capacities of young children served to justify the exclusion or minimisation of children’s involvement in the decision-making process. Theories of child development that fail to consider individual differences and ambiguities (Sclater & Piper 1999) referred to in Chapter 1, were clearly influential in the judge’s acceptance of children’s age as meaning children’s incompetence. In the judgments where children’s wishes had not been sought, the accepted assumptions normalised the lack of information from the children and their exclusion from participation in the decision-making process. Where children had been interviewed these theories inhibited the acceptance of information directly obtained from the individual children. The issue of the father’s effect on the child as a violent parent was effectively marginalised by retaining a focus on the normalising discourse on the childhood incompetence. For example, in Case 32 a psychologist prepared seven reports for the Court in which the 7 year old child was consistently constructed as incompetent and unreliable. The child’s distress at contact handover was minimised by the psychologist as was the
issue of the father’s violence. As the following quotation illustrates the psychologist relied on generalised knowledge and used ‘scientific’ terminology to portray the child as incompetent to express his needs and wishes due to his stage of cognitive development. This was accepted by the judge.

**Case 32**

*I [judge] accept Ms U’s [psychologist] opinion in her oral evidence that K [child] does not have enough abstract reasoning or cognitive ability to appreciate the consequences in making a decision about rejecting his father.* [Paragraph 239] [emphasis added]

### 6.1.1.2 Children are unreliable and inconsistent

In eleven judgments (Cases 23, 27, 29, 31, 33, 34, 35, 36, 38, 39 and 40) children were portrayed by judges, at some stage in proceedings, as changing their minds, making contradictory statements or as being emotionally unreliable in stating their wishes. Psychological discourses informed the judges’ perceptions of children as being inherently unreliable. As discussed in Chapter 4, male hegemony in legal systems defines and reinforces the dominant position of men and the subordinate position of women and children (Otto 1999). In the judgments analysed this emerged as a clear influence in categorising children as ‘unreliable’ beings. The commonly used language in legal systems of ‘rational’/‘irrational’, and ‘reason’/’emotion’ (Graycar & Morgan 2002) formed the markers against which children’s reliability was calibrated. In the judgments analysed the male hegemonic value of ‘reliability’ silenced the views of children who did not meet this standard. As discussed in Chapters 1 and 4, such categorisation fails to recognise that children, like adults, operate as ‘multiple selves’, and define themselves and behave according to their situations and in relation to others (Fine 1994). This poststructuralist understanding challenges the essentialising discourse about what constitutes rational, coherent and valid evidence that courts require in order to accept the evidence (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission 1997).

The following statement provides an example of one of the dominant underlying assumptions emerging from the judgments analysed that identified children as lacking the capacity to rationally and reliably know their own minds. The quotation refers to a child who was aged 4 years at the time of allegedly making inconsistent wishes statements. At
the time of the full defended hearing the child was aged 6 years. The significance for the judge of having ‘independent expert evidence’ about the child rather than placing ‘weight on any wish expressed’ by the ‘unreliable’ child came to the fore in the following statement made by the judge.

**Case 36**

*U [child] allegedly said that he wanted to live with him [father] and that he later told his mother the same thing...*[Paragraph 436]*

*In this case there is no independent expert evidence of U’s [child] wishes, and in all the circumstances I [judge] agree that I [judge] should not place any weight on any wish expressed by U [child]. [Paragraph 438] [emphasis added]*

**Psychological discourse: children are unreliable**

The opinions of ‘expert’ witnesses, predominately psychologists, about the capacity and reliability of children to provide sound wishes, were consistently privileged by the judges. What was absent in the discursive construction of children’s unreliability in expressing their wishes and perspectives was that children are likely to be selective in what they say in interview situations as children are aware of the power imbalance between themselves and an interviewer (Punch 2002). Also, as Smart (2002) points out there is a need for all the professionals involved to respect the child’s different values and changing perspectives on what is important to them (Smart 2002). For example, in Case 31 the child, aged 6 years, was portrayed by a psychologist as being incompetent to express sound wishes due to her emotional state, defined by her being ‘withdrawn’, ‘hesitant’ and inconsistent. The father had admitted being violent, but the judge had not accepted the mother’s concerns that the child had been adversely affected by exposure to the father’s violence. There were references in the judgment to the child’s sexualised behaviour. The dominant judicial narrative was about inconsistencies in the child’s allegations about the father’s sexual abuse, the child not having repeated the allegations at every opportunity provided to do so, and the child having made ’significant denials’ and ‘retracted’ the allegations. These statements constructed the child’s ‘unreliability’ as being linked to the child’s incapacity to make sound wishes in relation to father-child contact. It appeared from the judge’s comments that the evaluation by the psychologist of the child’s lack of competence to express reliable wishes, and the psychologist’s inability to ascertain what the child wanted,
did not take into account the important factor that the child was a victim of domestic violence. As discussed in Chapter 3, in order to contextualise variable statements made by children who have been exposed to domestic violence it is important to consider that these children often have confused feelings and can display a range of disabling symptoms that affect their personality, their functioning and their perceptions (Jaffé, Lemon & Poisson 2003). This understanding was not reflected in the discourse in relation to this child’s reliability in this judgment, nor in the majority of the judgments analysed.

**Case 31**

...this is not a case where the wishes of K [child], such as they are, will play a major role in my [judge] decision. [Paragraph 679] [emphasis added]

In evidence-in-chief Ms U [psychologist] was asked what weight should be attached to the wishes expressed by K [child]. She [psychologist] said that she did not feel that she yet had a measure of her [child] wishes. Although she [child] was more outgoing during the second assessment, she [child] still was not as forthcoming as many children of her age. Accordingly, she [psychologist] did not have an understanding of K's [child] statements to offer to me [judge]. [Paragraph 770] [emphasis added]

**6.1.1.3 Children are dependent beings, subject to influence**

In thirteen judgments a dominant discourse on children being incompetent to reliably express their own wishes was supported by a narrative on children being unduly and inappropriately influenced by one parent against the other parent. In the majority of judgments mothers were blamed by the judges for this. In relation to the issue of children’s wishes about contact with their fathers, judges in eleven judgments (Cases 22, 23, 24, 28, 30, 31, 32, 34, 37, 38 and 40) commented on the children being negatively influenced by their mothers to reject their fathers. In only one judgment (Case 36) the child was seen to have been influenced against the mother by the father, and in one judgment (Case 27) both parents were blamed for influencing the child against each other.

In the judgments analysed, children’s wishes were assumed to have been distorted by active and deliberate coercion, primarily by mothers, to believe that the ‘alienated’ parent, primarily the father, was a bad person. In many judgments there were repeated statements that named the issue of ‘parental alienation’ or inferred its existence. This demonstrated that the concept of Parental Alienation Syndrome (PAS), that defines the ‘alienating’ parent as the single source of the problem (Johnston 2004), had clearly permeated the
Court. Johnston (2004) states that allegations of PAS are a common legal strategy in cases where children refuse contact with a parent that is adopted by the non-resident parent. The simplistic construction of PAS fails to distinguish children’s normative reactions and reasonable responses to exposure to violence and abuse from children being subjected to coercion by an alienating parent (Johnston 2004). In none of the judgments analysed did the Court acknowledge that PAS is an unsubstantiated theory that has gained uncritical acceptance within family law jurisdictions across the Western world (Jaffe, Lemon & Poisson 2003).

In the judgments analysed there was a heavy reliance by psychologists and some psychiatrists and social workers on the concept of PAS that was used as the prime explanation for children not wanting to see their fathers. Johnston (2004) has identified a risk for children who have been constructed as dependent beings subject to the influence of a parent. The risk to the child who is constructed as being ‘alienated’ from one parent by the other parent is that the child will feel “overwhelmingly helpless, unheard, not believed, and dismissed as being no more than a puppet of the other parent when she expresses strong feelings and fears about access” (Johnston 2004, p.227).

The dominant discourse on dependent children being subject to influence from ‘parental alienation’ successfully masked the construction of children as victims of violence who may have had their own reasons to avoid contact with their fathers. The social science and legal professionals who used the ‘parental alienation’ discourse could be seen as allies of the pro-contact ideology within the politicised context of Australian family law, discussed in Chapters 2 and 3. For example, in Case 32 the 7 year old child was constructed by the psychologist and the judge as being subject to the negative influence of the mother’s ‘hostile attitude’ to the father. The judge used the same terminology to describe the mother’s and the child’s ‘anger and hostility’ towards the father, thereby indicating how negatively influenced the child was by the mother in this ‘intractable’ case. There had been prior consent agreements made by the parents for contact and orders for father-child contact, all of which had failed to change the child’s described ‘distress’ in relation to contact. The ‘possibility of a physical fracas at handover’ was acknowledged by the judge, but the issue of domestic violence was not considered as a possible reason for the child’s ‘anger’ towards the father. In one of many attempts to overcome the child’s ‘alienation’ from the father an increase in contact was ordered. The child was unable to cope and
experienced ‘such high levels of distress’ that the father returned the child to the mother. This response of the child to the father was consistent with the child’s wish for no contact with the father. This raises questions about the construction of the child as being incompetent and being ‘much influenced by the mother’, that is stated in the following quotation.

**Case 32**


### 6.1.1.4 Intersecting discourses construct childhood incompetence

In fifteen judgments (Cases 22, 23, 24, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38, 39 and 40) there were multiple discursive themes that intersected to powerfully support the dominant construction of children’s incompetence. In eight of these judgments psychologists and a small number of social workers and psychiatrists strongly reinforced dominant discourses on children as being immature, unreliable and open to parental influence. These views were accepted without question by the judges. The power of intersecting dominant discourses to over-ride the issues of children’s safety and the expressions of their own interests is illustrated by the following case example.

In Case 34, the three children aged 5, 6 and 7 years were portrayed by a psychologist as incompetent to express valid wishes due to their ages and stages of development, and as being subject to influence of their ‘hostile’ mother. The youngest child who had displayed behavioural problems was described by the judge as ‘only five years old’, ‘lacking experience’, and ‘acting under instructions’. In this case there was evidence accepted by the judge that both parents had been violent. This included physical assaults made by each parent towards the other parent and a number of threats made by the father to kill the mother. The child protection authorities were involved in assessing allegations of the mother’s abuse of one of the children. Despite the presence of evidence that ‘implicates the mother in the physical abuse’ of this child, a finding of child abuse was not made by the judge. The child protection counsellor expressed concern about the neglect of the children while in the father’s and stepmother’s care. Two of the children had disclosed to the child
protection counsellor that they were ‘hungry’ and that one child had ‘stolen food at school’ because they were not being fed by the father and stepmother. The discursive intersection of dominant discourses on children being incompetent contributed to the rejection by the judge of the allegations of child abuse and neglect made by the children about the parents and as the following quotation illustrates, these dominant discourses helped inform the judge’s conclusion to ‘treat with caution any wishes expressed by the children’.

**Case 34**

The judge’s reference to 5 year old child’s interview with a psychologist.

*The interview however is one typical of a young child being interviewed and could be described as rambling and disjointed due to U’s [child] age.* [Paragraph 191] [emphasis added]

Statement made by the psychologist about the 6 year old child.

*D [child], on the other hand, seems emotionally fragile and open to undue adult influence.* [Paragraph 244] [emphasis added]

Conclusion reached by the judge about the reliability of the wishes of the three children.

*I [judge] agree with Ms L’s [psychologist] conclusion at the end of her report that the children D [child] and N [child] appear to have a knowledge of events which they would be too young to recall.* [Paragraph 292] [emphasis added]

*...In view of the background circumstances in this matter and the ages of the children I [judge] treat with caution any wishes expressed by the children.* [Paragraph 456] [emphasis added]

### 6.1.1.5 Patriarchal agendas

The highly discretionary nature of decision-making in the Family Court of Australia, together with the fuzziness of the concept of the ‘best interests’ principle, discussed in Chapters 1 and 2, provide a fertile ground for masquerading adult issues and agendas as serving the needs of children. In the judgments analysed the dominant intersecting discourses on childhood incompetence rationalised the dismissal of children’s wishes and perspectives and a patriarchal agenda filled the void.

One of the recurring themes in the judgments analysed that illustrates this discursive pattern was the intersection of the discourse on childhood incompetence with a discourse on children ‘wanting’ a relationship with their fathers. This construction reflected patriarchal ideology and provided little scope to critically examine the contradictions
between the interpretations and assumptions made by adults (parents, psychologists, psychiatrists and social workers) about children naturally wanting contact with the fathers and the ‘incompetent’ children’s stated wishes for no contact with their fathers. The dominant discourse on fathers as being ‘loving’ supported notions that a positive father-child relationship either had existed in the past, currently existed, or could be ‘facilitated’ by contact.

What was marginalised in the majority of the judgments was what the children said about wanting nothing to do with the father who had created ‘fear’ and ‘distress’ in their lives. What was privileged was the agenda of achieving father presence. For example, in Case 32 the father had pleaded guilty to assaulting the mother, had an ‘Offender History’ and a history of drug abuse. The 7 year old child showed ‘hostility’ and ‘fear’ at contact handovers. A dominant discourse on the child’s need and desire for a ‘loving relationship’ with the father was used on a number of occasions by the judge. Concern was expressed by the judge that the mother had created a ‘tragic’ situation for the child by not supporting father-child contact. The psychologist stated that should contact cease the child ‘will want to re-establish’ the father-child relationship in the future. This assumption was accepted by the judge.

**Case 32: Psychologist’s opinion**

...by the time when he [child] is older, say by the age of 10, he will want to re-establish a relationship with his father. [Paragraph 127] [emphasis added]

Dominant assumptions about children wanting and needing father presence were also clearly evident in judgments where the wishes of the children had not been sought. For example, in Case 29 the counsellor who did not interview the child because the child was ‘only some 4½ years of age’, informed the Court of interpretations of the child’s needs that were based on interviews conducted with the parents and a single session of observed father-child interactions that occurred in a controlled environment. Despite the history of violence and alcoholism by the father that was acknowledged by the judge and the lack of information from the child’s perspective about the child’s lived experiences of the father’s ‘abusive and aggressive’ behaviours, suggestions were made by the counsellor that were accepted by the judge that the child ‘enjoys time’ with the father and ‘wishes to see’ the father.
Case 29

Not surprisingly, given that D [child] is only some 4 ½ years of age, no direct evidence as to D’s [child] wishes was given during the course of the proceedings. The Court Counsellor Mr N [counsellor]…suggests that D [child] wishes to see her father and enjoys time with him. [Paragraphs 60-61] [emphasis added]

As the following quotation illustrates the assumption that children naturally want to know about their father and ‘in the future’ may seek ‘to have contact’ with their father was evident in five of the six judgments where any form of direct contact with the father was denied by the Court (Cases 22, 23, 24, 25 and 26). An imperative was stated in these judgments for the mothers to support and not hinder this assumed predicted wish of the children when it emerged in the future.

Case 25

It is likely that she [child] will want to know about her father at some time in the future, and it is possible that she may wish to have contact with him. [Paragraph 235] [emphasis added]

6.1.2 A ‘right of passage’ to childhood competence

Rayner (1996) who has critiqued the positioning of children as incompetent beings under Australian law, has described children needing to pass through a “right of passage” in order to achieve the necessary status to be heard (Rayner 1996, p.35). The findings of the discourse analysis of the judgments in this study are consistent with Rayner’s perception. In a minority of the judgments analysed, where the dominant ‘truths’ about the unreliability of children and their wishes were challenged this led to some acceptance by the judges of childhood competence.

The following sections reveal complex discursive connections that appeared in these judgments to redefine children’s subject positions. Subject positions can be enduring, as appeared to be the case in the predominant positioning of children as incompetent ‘others’ with low status in the judicial hierarchy of evidence; but as Davies and Harre (1990) point out, subject positions can be transient. Such sites of resistance to the normalising power of dominant discourses are an inscribed part of discursive practices. However, as the narratives that challenged the dominant discourses on childhood incompetence revealed, contradictions are not equal in their power of influence and are not always successful
(Holloway 1998). Challenging the dominant discourses that portray children as vulnerable, incompetent and of low status is difficult, as these notions have strong emotional appeal to adults who formulate particular visions of childhood and who have political investments in the outcomes (Sclater & Piper 1999).

The findings revealed concerning issues. In the majority of the judgments where the children’s ‘right of passage’ reconstructed them as competent beings this occurred over a number of years of litigation (range 2 to 8 years) and often involved the denial or trivialising of their exposure to domestic violence. The children were subjected to a number of family report assessments (range 2 to 11) and a range of ‘therapeutic’ interventions that included medication, counselling or therapy, often with the stated aim of facilitating the child’s contact with the violent parent. Of particular concern was that children who asserted themselves in opposition to adult imposed solutions were placed in a ‘Catch 22’ situation in order to be heard. This ‘Catch 22’ phenomenon is discussed in a following section

6.1.2.1 Wishes of children given weight by the judges

In eight judgments (Cases 22, 23, 26, 33, 35, 37, 38 and 40) the children’s wishes for no contact with their fathers were finally given weight by the judges. Within each of these judgments the judicial narratives reflected underlying assumptions of childhood incompetence that had to be dissuaded for any credibility to be given to the children’s experiences and wishes. In the majority of judgments, where a transformation of the construction of children as competent beings occurred, a number of discourses had to intersect in order to successfully challenge the normalising discourse. From the judgments analysed children had to demonstrate their maturity, the genuineness of their wishes and the consistency of their wishes over time, as evaluated by an ‘expert’ psychologist, social worker or psychiatrist. For example, in Case 23 the judge acknowledged the father’s violence towards the mother and the stepchildren, referred to the 11 year old child’s behavioural and learning problems, and to the child’s ‘apparent fear’ of the father. The child had been assessed three times at different stages in proceedings by a child psychiatrist who perceived that the child was competent enough to make a genuine wish for no contact with the father. However, at the stage of final hearing the 11 year old child continued to be constructed as incompetent by the judge who referred to the child as being ‘still quite young’. For this child’s wishes to be accepted by the judge as being reliable the
child had to be successfully reconstructed as ‘quite mature’, ‘fairly self assured’ and as having ‘unchanged’ wishes. This occurred only after the judge viewed the video taped evidence of the child’s interview with the child psychiatrist. The judge’s earlier statements about the dependent child having been influenced by the mother were finally overturned and the child’s wishes for no contact with the violent father were given weight by the judge.

Case 23

I [judge] take into account that M [child] is still quite young; but I [judge] had the advantage of viewing Exhibit C1, which was the video of the interview of M [child] by Dr X [child psychiatrist]. I formed the view from what I saw of the video, that M [child] sounded quite mature and fairly self assured. His [child] views at this stage seem unchangeable. [Paragraph 194] [emphasis added]

There is no doubt from his [child psychiatrist] evidence, and I [judge] find accordingly, that M [child] has no wish to see his father at all. He [child] did originally have some ambivalence about his father... [Paragraph 243] [emphasis added]

Qualified acceptance of children’s wishes

In the judgments analysed, unqualified acceptance by psychologists and psychiatrists of children’s wishes for no contact with their fathers was rare, and in the case of judges was not evident. Where a psychologist or psychiatrist accepted the wishes of a child it was common for there to be competing discourses used by the same professional and other professionals within the same judgments. This vacillation provided discursive space for the judges to selectively use dominant discourses on childhood incompetence to compete with, or over-ride, any discourses on childhood competence. This process reinforced the dominant normative assumptions about children’s need for a relationship with their fathers. For example, in Case 33 the judge referred to a ‘qualified, experienced’ psychologist who had assessed the children (twins aged 8 years). The psychologist recognised and gave evidence to the Court about the children’s consistently stated wishes for no contact with the father. However, the same psychologist had in a prior report referred to the ‘reciprocated love’ between the children and both parents, as well as having referred to the violence (direct and indirect) perpetrated by both parents. This provided ambiguity in the discursive space about the reliability of children’s wishes for no father-child contact and what constituted the child’s best interests. The judge stated that the children’s wishes were ‘not particularly strong’ and were, therefore, not the ‘determining factor’. The judge, in
this case, privileged the generalised perception that the children felt ‘happy’ while in the ‘home of the father’. However, the judge finally gave qualified weight to the children’s wishes. Case law was used by the judge to justify giving qualified weight to the children’s wishes ‘as only one important factor rather than a determining factor’.

**Case 33**

The wishes of the children in this case are not particularly strong… They [children] appear happy and contented at the home of the father. Q [child] and S [child] are now eight having been seven when they were interviewed in April this year. Whilst they are old enough for considerable weight to be given to their wishes, their wishes must be seen in context and treated as only one important factor rather than a determining factor. This approach was confirmed by the Full Court recently in R & R: Children’s Wishes 2000 FLC 93 000. [Paragraph 471] [emphasis added]

**Reliance on case law to justify acceptance of childhood competence**

Kordos (2000), states that the judicial reliance on case law in relation to the issue of childhood competence is commonplace. In three of the judgments analysed (Cases 33, 35 and 38) the judges made substantial references to case law in order to justify a departure from the normative understanding of children as incompetent beings. The extent of the references to case law in these judgments indicated that where judges accepted children’s wishes for no contact this had to be clearly justified. The judicial references to case law addressed the factors of the age and maturity of the children and the reliability of the children’s stated wishes as defined by strength and consistency over time. For example, in Case 35 the judge relied on case law from Australia and the United Kingdom to justify giving ‘serious consideration’ to the wishes of the teenage children, aged 17 and 14 years ‘in particular’, but gave less weight to the child aged 8 years for no contact with their violent father.
Case 35

At the same time a United Kingdom case, the decision of Lord Justice Butler-Schloss in RP (a Minor) Education (1992), 1 FLR 316, at page 321 said:

“The Courts over the last few years have become increasingly aware of the importance of listening to the views of older children and taking into account what children say. Not necessarily agreeing with what they want nor indeed, doing what they want but paying proper respect to older children who are of an age and maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults and particularly the Courts.” [Paragraphs 148-150] [emphasis added]

In the case of H v W itself, Fogarty and Kay JJ said at page 81, 947:

“As a matter of practical day to day experience, the problem in this area usually relates to the ascertainment of the wishes of the child and their interpretation and assessment in the face of conflicting evidence. Against that background the Court will attach varying degrees of weight to a child’s stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the Court and their longer term implications. Ultimately the overall welfare of the child is the determinant.”...

In the case before me M [child] is nearly 17, L [child] is 14…I [judge] have found no indication that anyone has been brain-washing the children…the basis of their concern about the husband’s behaviour has not changed…their attitude has been consistent…I [judge] therefore need to give serious consideration to the wishes of M [child] and L [child] in particular. [Paragraphs 160-161] [emphasis added]

No such extensive justification was made in any of the judgments analysed where the children’s wishes for no contact with a violent parent were discounted by the judges. In this way what was not said by the judges was a clear indication of how the dominant underlying assumptions about childhood (in)competence, the accepted place of children at the bottom of the hierarchy of evidence credibility, and the expectations that children should have father-child contact had become accepted normative beliefs held by judges.

6.1.2.2 Children’s ‘Catch 22’ situations

Children are understood…because of their present immature and socially unfinished condition, as problems and victims of, or nuisances to, the everyday running of the (adult) social order.

Alanen (1994, p.27)
Discourse reflects how people position an object in a hierarchy of judgment and discourse analysis looks for what the discourse is actively doing (Potter & Wetherell 1989). From the analysis of the judgments dominant discourses emerged that positioned children who did not conform to their normatively defined subject positions as ‘problem’ beings. These children challenged what Foucault (1972) refers to as the power relations that define who remains in dominant and subordinate positions.

In nine judgments (Cases 22, 23, 24, 26, 27, 30, 32, 35 and 40) children were placed in a ‘Catch 22’ situation. In their ‘no win’ situations the children had all expressed and behaviourally demonstrated their concerns about their own wellbeing if they complied with contact arrangements with their violent fathers. In order to protect themselves from what they perceived to be further harm the children had to persist in their attempts to be heard about their own wishes, needs and interests. In this process the children were problematised or pathologised by the discourses used by psychologists, psychiatrists and judges. This created children’s ‘Catch 22’ situations. Chapter 7 provides more evidence of the child problematising and child pathologising terminology used in the judgments to redefine the responses of children to their exposure to violence.

Harre (1985) describes children who do not know their ‘proper place’ as not adopting forms of self expression that are acceptable in particular contexts. The children in the judgments who were in ‘Catch 22’ situations did not comply with the dominant expectations of the judges and psychologists and psychiatrists as being subservient, dependent, compliant children. These children resisted the adult imposed contact and/or intervention processes aimed at the normalisation and correction of their behaviour and thinking. Throughout the judgments there were a range of judicial discourses, informed by psychologists and psychiatrists, that defined the children as being ‘non-compliant’ and ‘difficult’, as displaying inappropriately active behaviours, as exercising inappropriate ‘power and control over people’ and/or as being psychologically/emotionally unwell.

In four judgments (Cases 24, 27, 30 and 32) where the children pursued the path of persistence and resistance their ‘Catch 22’ situations were ongoing. In these cases the children were not successful in having their subjectivity reformulated as competent beings and, therefore, remained at the bottom of the hierarchy of evidence credibility. In three of these judgments the children’s wishes for no contact with their fathers were rejected by the judges. This appeared to be based on the ongoing dominant discursive construction of the
children being unreliable in their expression of wishes for no father-child contact and being subject to the influence of the implacably ‘hostile’ mothers. In these judgments competing discourses on childhood competence did not come to the fore. In one judgment (Case 24), while the child’s wish for no contact with the father was reflected in the judge’s final order this was not made on the basis that the child had successfully emerged as a competent being, but was made on the basis of the inability of the mother to cope with father-child contact.

**Children's changed subject position**

In five judgments (Cases 22, 23, 26, 35 and 40) children who were placed in a ‘Catch 22’ situation were finally reconstructed by psychologists, psychiatrists and judges as being ‘sufficiently competent’ to make ‘genuine’ wishes in relation to contact. These children had to survive the child problematising or pathologising discourses and the interventions imposed to correct their perceived problems, before a discourse on childhood competence emerged to reflect the changed perspectives of the psychologists or psychiatrists about the children’s competence.

In order to provide an overall picture of the complexity of the intersecting discourses that related to children’s ‘Catch 22’ situations, the discourses from one judgement (Case 40) are used in the following sections to illustrate some of the dominant themes present in the judgments analysed. Judges’ statements reflected child blaming, judicial sympathy for professionals working with these children, and children having to demonstrate consistency, persistence and competence over time to overcome their problematised identity in order to have their wishes accepted by the judges.

**Discourse on child-blaming**

The images of children as ‘distressed’ victims of violence, discussed in Chapter 7, were replaced by discourses that supported notions of the children as being deviant beings. Discourses in the judgments involving the ‘stubborn’ problem children implied that they actively connived to sabotage any attempts at father-child contact. The children were perceived to have ‘remained steadfast’ in their ‘refusal’ to cooperate, to have ‘adopted the notion’ of the ‘father as a bad person’, and to be ‘complicit’ with the ‘alienating’ mothers in undermining the fathering relationships.
The presence of an intersecting dominant discourse on fathers as being ‘loving’ and a discourse on judicial sympathy for the fathers who ‘suffered’ ‘pain of the loss’ of contact with the child, supported a child-blaming discourse which described children as ‘difficult’ and actively ‘hostile’ beings. This discursive construction served as a rationalisation for dismissing the children’s perspectives and wishes wherever these challenged the patriarchal ideology. The child-blaming discourse had little to do with recognising the needs and rights of the children and it legitimised the power of the father perpetrators of violence. For example, in Case 40 the two children, aged 11 and 13 years had persisted over three years of litigation with their wishes for no contact with their violent father. The strength of their statements and the demonstration of their behaviours consistent with their wishes, increased over time. One psychologist referred to the children as ‘disrespectful’ and ‘self centred’. Another psychologist referred to the children as having ‘enormous control and power over people’ that was ‘inappropriate’. As the following quotations illustrate, these constructions were accepted by the judge, who referred to one of the children’s ‘lack of co-operation’ and to the ‘resistance’ from both children. The children’s exposure to an ongoing number of episodes of direct and indirect violence perpetrated by their father, that were described in detail in the judgment, were not portrayed as the cause of the children’s resistance to the father-child relationships and were not linked to their behavioural and emotional presentations.

**Case 40**

Dr C [psychologist] states:-

“One of the disappointing outcomes for me [psychologist] of this recent contact with the children was the extent to which they appeared to be disrespectful of their father and self centred.” [Paragraphs 119-120] [emphasis added]

I [psychologist] have seen them change from absolutely delightful children in the early stages of our association to children who now show frequent episodes of petulance and rudeness and in my opinion the model being provided by their mother has been instrumental in allowing them to have enormous control and power over people in situations that is inappropriate for children of their ages. [Paragraph 461] [emphasis added]

*Given the wife’s disregard for the previous orders of this Court and the lack of cooperation that can now be expected from M [child] and to a lesser extent, N [child], any orders that I [judge] make in favour of the husband appear likely to encounter significant resistance from the wife and the children.* [Paragraph 606] [emphasis added]
Chapter 6: The judicial construction of childhood

Discourse on sympathy for professionals

A theme emerged from the judgments on the judge’s acceptance of professionals’ opinions about the ‘difficult’ children and on their sympathy for the professionals who had the ‘onerous’ or ‘emotionally gruelling’ task of working with the children and taking ‘initiatives’ in attempting to make progress in the children’s acceptance of contact with their fathers. The acceptance by the judges of the professional discourses about ‘petulant’ children reinforced and legitimised the child-blaming concept of ‘out of control’, ‘disrespectful’ children who were responsible for causing problems for the professionals. For example, in Case 40 the judge made the following statements that showed sympathy for the psychologists and not for the children whose wishes for no father-child contact had been repeatedly discounted.

Case 40

*Despite an interview between the husband and the children which Dr C [psychologist] described as “an emotionally gruelling interview”, Dr C [psychologist] made a number of findings.* [Paragraph 136] [emphasis added]

*In December 1999 Ms I [psychologist], with some assistance from Ms N [psychologist], assumed the unenviable task of interviewing M [child] and N [child] and making recommendations on issues of contact with their father.* [Paragraph 185] [emphasis added]

The professionals involved in these cases used value laden language that was accepted and reinforced by the judges, thereby contributing significantly to the children’s subjugation and prolonging the children’s ‘Catch 22’ situations. Taylor’s (1998, p.12) perception that “it is not so much the child’s lack of competence that creates problems but rather the adult’s lack of competence in all too many situations” is worthy of consideration in how these children’s ‘Catch 22’ situations were created and perpetuated by the professionals involved.

Discourse on consistency

Case 40 demonstrates how strongly and consistently children had to support their stated wishes in order to be heard. In this case the children were the subjects of eleven assessment reports for the Court. The judge’s language reflects acknowledgement of the strength of the
children’s feelings towards the father but also reflects the judge’s disapproval of the ‘the vehemence of their feelings’.

### Case 40

The judge’s comments and reference to one of the psychologist’s reports.

Ms I’s [psychologist] fifth report where Ms I [psychologist] states:-

“Regarding any future visits planned with Mr X [father]. N [child] reported that she hoped not. When asked what her father could do differently, N [child] insisted that no matter what he [father] did she did not like him being around...Regarding how she was feeling in her life, N [child] reported that every day she did not have to see Mr X [father] she would place herself at a 8 or 9/10, but on the day she had to see him was - 1,000, because she just hated him and wished he would disappear off the face of the Earth.” [Paragraphs 224-226] [emphasis added]

It was during this round of interviews that both children presented letters to their father through Ms I [psychologist]...Both M’s [child] letter (Exhibit 9) and N’s [child] letter (Exhibit 11) are disturbing as to the vehemence of their feelings but extremely clear as to their expressed wishes in relation to residence and contact.

THE LETTER

**DAD, You are a very mean person doing this to me [child]. Why can’t you give me a break. I love mum and I hate you. And I never want to see you again in my whole life.** [Paragraphs 533-536] [emphasis added]

The judge quoting a psychologist

“...Both M [child] and N [child] remain steadfast in their reluctance to attend contact visits, and present this view at every opportunity.” [Paragraph 212] [emphasis added]

### Discourse on maturity

Towards the end of each of the five judgments where the children’s ‘Catch 22’ situations were resolved by having their wishes finally accepted, the judicial discourses changed to support the reconstruction of the children as being ‘mature’ and ‘stable’. The children were described as displaying ‘strength’, ‘consistency’ and ‘genuineness’ of their wishes for no contact with their fathers. The emergence of these competing discourses that redefined the children’s subjectivities demonstrated that for these children to succeed in having their wishes given weight, and for their perspectives of their lived experiences to be accepted by the judges, the children had to demonstrate that they had moved beyond the firm barrier of chronological age as well as overcoming their identity as ‘problem’ beings. Even teenage
victims of domestic violence who challenged the dominant idealised post-separation ideology by resisting ongoing contact with the fathers had to prove their competence and demonstrate maturity before they were taken seriously by psychologists and psychiatrists, and before their wishes were given weight by the judges.

For example, in Case 40 the 13 year old adolescent throughout the judgment was perceived by the judge as having been ‘contaminated by the wife’s actions and influences’. Based on the final assessment of one of the psychologists who reported a changed opinion on the development of the adolescent, the judge accepted that the adolescent had made ‘substantial, significant and encouraging advances in his own emotional development and emotional health’. This was supported by a statement about the adolescent’s improved ‘maturity’ provided by the school teacher. As will be further discussed in Chapter 7, these positive changes in the children’s development occurred after the cessation of their contact with their violent fathers. In Case 40, the acceptance of the reconstruction of the adolescent’s competence was evident in the judge’s reference to the status of the adolescent as ‘a young man’. This was a dramatic reconstruction made by the judge of this adolescent’s identity.

Case 40

The fact that I [judge] should give considerable weight to M’s [child] wishes given the level of maturity that he now seems to have developed, was confirmed by the evidence of M’s [child] school teacher Mr B [teacher]. [Paragraph 262] [emphasis added]

Their [children] publicly stated and oft repeated wishes are to reside with their mother and to have no contact with their father. It is important to note that M’s [13 year old adolescent] wishes are expressed by a young man whom his teacher and Ms I [psychologist] perceive as now being mature, happy, relaxed and content with his lot. [Paragraph 643] [emphasis added]

6.2 Contradictory discourse on childhood

6.2.1 Normal – children as competent beings

In one out of the twenty judgments analysed for this study (Case 22) a contradictory discourse on the construction of childhood competence was consistently and clearly stated by three professionals – a psychologist, psychiatrist and child representative. In this case the children aged 12, 10 and 7 years, were portrayed by these professionals as competent to express reliable wishes in relation to no contact with their father. A prior psychologist had
relied on the normative construction of childhood incompetence, but this was successfully over-ridden by the discourses used by the three other professionals.

**Case 22**

*Dr. P [psychologist] considered the children's maturity or understanding level was commensurate with their respective ages. More weight would be given to the progressively older children due to such progressive maturity. However, all three children were stated to be clearly considering their definite responses. Dr. P [psychologist] considered they expressed their own views independently... The child representative submitted there was no valid reason to disregard the children’s wishes for no physical contact. [Paragraph 221] [emphasis added]*

There were no outstandingly different characteristics discernable in this case from the narratives in the judgment that would account for the different discursive constructions of childhood competence when compared to the other case characteristics from all the other judgments. It appeared from the discourses used by these professionals that they each held similar beliefs and knowledge that underpinned their clearly stated discursive constructions about childhood competence and the significance of the children’s exposure to domestic violence. Acceptance by these professionals of the children as competent beings influenced the response of centralising the issue of the children’s exposure to the father’s violence. The children’s ‘fear’, ‘stress’ and behavioural problems were acknowledged by these professionals and were understood as being directly linked to the children’s exposure to the father’s violent behaviours that were clearly named as ‘violence’. The clarity, strength and detail of the professional discourses about the children’s needs and wishes and their relationship to their experiences of violence were, compared to all other cases, remarkably evident. These constructions challenged normative assumptions about father-child contact being ‘positive’ and serving the children’s best interests. As the following quotation illustrates this was clearly stated by a psychologist.

**Case 22** Psychologist’s statement quoted by the judge

"At the outset I [psychologist] must make it clear that I see no hope of having these children make positive contact with their father in the near future. The mother and children have expressed impelling reasons for withdrawing from associating with Mr. E [father]. They all fear him and have extreme disrespect for him. This is not only as an effect from the father’s attack on the uncle but stems from years of reported intermittent violence and unhappiness within their home. The children and mother view the father's behaviour as incomprehensible, his attacks often occurring without warning or apparent reason". [Paragraph 155] [emphasis added]
The consistency of the discourse on childhood competence was supported by the child representative who ‘submitted there was no valid reason to disregard the children’s wishes for no physical contact with the husband’. This made it difficult for the judge, who used qualifying language on the children’s competence, to continue to rely on the normative assumptions of childhood and to continue to use the language of ‘conflict’ as the explanation for the children’s wishes for no contact with the violent father.

This exceptional judgment, where the intersecting discourses of a small group of privileged professionals overturned the dominant discourse on childhood, demonstrated Foucault’s concept of power as a flowing process that moves through all levels of society (Slembrouck 2002). From a poststructuralist perspective this demonstrated the action of one of the sites of power that shape the world of advantaged and disadvantaged people (Bagshaw 2001), and it demonstrated what Danaher, Schirato and Webb (2000) refer to as the possibility of transformation of marginalised discourses into new dominant knowledges.

6.3 The evidence hierarchy of professionals

Dominant discourses on childhood are used to achieve strategic outcomes and to determine whose voices count (Slembrouck 2002). The dominant discourses on childhood that constructed children as incompetent and the competing discourses that reconstructed some children as competent, raised questions in this research about whose evidence in the judgments analysed was trusted and privileged by the judges to inform the decisions made about the best interests of the children. Davis and Harre (1990) used the concept of ‘discursive positioning’, where the use of discourse establishes a particular version of the world and locates subjects within relationship to the discourse. This concept was used to uncover a discursively constructed hierarchy of evidence credibility in the judgments analysed. This analysis revealed a complex system of competing discourses related to whose ‘reality’ and which ‘truth’ was given weight by the judges.

A system of inclusion and exclusion (Henriques et al 1998) was apparent in the discursive construction by judges of which professionals and professional practices were credible. Holloway’s (1998) perception of the powerful role of psychological discourse in producing specific constructions about individual children as objects of its theorising was apparent in the judgments analysed, as was the power of the status of psychology and medicine as
scientific practices. There was a judicial reliance on legitimised knowledge systems that were sustained by “the comforting authority of science” (Venn 1998, p.122).

Table 6.1 provides examples of terms used by judges in the judgments analysed to classify the credibility of professionals who provided evidence to the Court. Terms were used to support the privileged position of certain psychologists and, occasionally, social workers and psychiatrists in the evidence hierarchy. Terms that conveyed the lack of credibility placed other professionals, mostly child protection counsellors, at the bottom of the hierarchy of professional evidence credibility. Table 6.1 also provides examples of terminology used by judges that referred to what was considered by the judges to be acceptable and unacceptable professional practice methods.

Table 6.1: Judicial discourses on professional credibility in the evidence hierarchy

<table>
<thead>
<tr>
<th>Privileged professionals at the top of the evidence hierarchy</th>
<th>Professionals at the bottom of the evidence hierarchy</th>
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<tbody>
<tr>
<td><strong>Positive characteristics</strong></td>
<td><strong>Negative characteristics</strong></td>
</tr>
<tr>
<td>‘mature’</td>
<td>‘inexperienced’</td>
</tr>
<tr>
<td>‘experienced and self possessed witness of truth’</td>
<td>‘unconvincing’</td>
</tr>
<tr>
<td>‘well respected’</td>
<td>‘relatively inexperienced’</td>
</tr>
<tr>
<td>‘impressive witness’</td>
<td>‘not aware’</td>
</tr>
<tr>
<td>‘vital witness’</td>
<td>‘inept’</td>
</tr>
<tr>
<td>‘important witness’</td>
<td>‘overly harsh on the father’</td>
</tr>
<tr>
<td>‘considerable experience’</td>
<td>‘extraordinary comment’</td>
</tr>
<tr>
<td>‘many years experience’</td>
<td>‘startling evidence’</td>
</tr>
<tr>
<td>‘qualifications and experience’</td>
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<tr>
<td>‘very experienced’</td>
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<tr>
<td>‘in depth knowledge’</td>
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<tr>
<td>‘particular skills and qualifications’</td>
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<tr>
<td>‘pre-eminent expert in child matters’</td>
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<tr>
<td>‘competent’</td>
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<tr>
<td>‘highly qualified’</td>
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<tr>
<td>‘credibility’</td>
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<tr>
<td>‘qualifications, expertise and experience’</td>
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<tr>
<td>‘expert’</td>
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<tr>
<td>‘enviable reputation in this court’</td>
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<table>
<thead>
<tr>
<th>Acceptable method</th>
<th>Unacceptable method</th>
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<tbody>
<tr>
<td>“thorough and professional”</td>
<td>“acted in a therapeutic and investigative role”</td>
</tr>
<tr>
<td>“insight”</td>
<td>“methodology not satisfactory”</td>
</tr>
<tr>
<td>“able to justify opinion”</td>
<td>“provocative and suggestive action”</td>
</tr>
<tr>
<td>“expert assessment”</td>
<td>“leading questions”</td>
</tr>
<tr>
<td>“accuracy”</td>
<td>“limited details”</td>
</tr>
<tr>
<td>“careful methodology”</td>
<td>“no notes”</td>
</tr>
<tr>
<td>“sound”</td>
<td>“not read the existing file”</td>
</tr>
<tr>
<td>“impartial”</td>
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<tr>
<td>“common sense approach”</td>
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<tr>
<td>“impressive evidence”</td>
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<tr>
<td>“not successfully challenged evidence”</td>
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</tbody>
</table>
Privileged professionals at the top of the evidence hierarchy

- ‘able to justify opinions’
- ‘direct and professional evidence’
- ‘dealt with the husband sensibly and compassionately’

Professionals at the bottom of the evidence hierarchy

Judicial acceptance of evidence

- ‘no hesitation in accepting the opinion’
- ‘accept the opinion’
- ‘give considerable weight to the evidence’
- ‘accept in its entirety’

Judicial rejection of evidence

- ‘reservations about this practice’
- ‘such an unsatisfactory nature’
- ‘evidence cannot be considered reliable’
- ‘treated with caution’
- ‘unable to make any findings whatsoever’
- ‘tainted the results’
- ‘subject to severe criticism’

Discursively positioning particular professionals within the hierarchy of evidence credibility had implications for the acceptance of the children’s wishes by the judges in the judgments analysed. Overall the opinions of psychologists were seen as ‘sound’ and ‘impartial’ and were strongly endorsed by the judges. This made it difficult for opposing discourses used by other adults and the children to be heard and given weight in the decision-making process, unless these discourses were adopted by the privileged professionals. This is demonstrated by the following findings on the discursive reconstruction of childhood competence.

### 6.3.1 The role of professional discourse in reconstructing childhood competence

As discussed in previous sections, for children to be accepted as competent beings by the Court the psychologists, social workers and psychiatrists needed to successfully challenge the dominant assumptions about age defining competency. These professionals had to convince the Court, via the reports and cross examination, that the generalised assumptions about childhood dependence, vulnerability to influence, immaturity, inconsistency and unreliability were not relevant to the individual child in each specific case at the time of the Court hearing. Prior constructions of the children as incompetent beings had to be over-ridden. For this challenging process to succeed the professionals had to be accepted by the judges as ‘competent’ and ‘experienced’ professionals. Their assessments had to be seen by the judges as having been undertaken ‘fairly’ and ‘thoroughly’ using ‘acceptable’ methods such as ‘standard tests’.

While the judges acknowledged that some children over time had changed and become ‘mature’ and ‘stable’, a close examination of the texts revealed that it was the judges’ faith
in the opinions of privileged professionals, who had finally accepted children’s wishes and perspectives, and not faith in the children themselves that influenced the judges’ acceptance of the children’s wishes. For example, in Case 26 the child, aged 9 years, had been the subject of repeated litigation over a six year period. During this period the child had been abducted by the father. The child had undergone multiple assessments by the child protection authorities, by a psychologist who provided four reports for the Court, and by a psychiatrist who provided two reports for the Court. The judge gave weight to the wishes of the child for no contact with the father following an updated assessment that revealed a changed opinion of the psychologist, who was described by the judge as having ‘considerable experience’. Previously the psychologist had constructed the child as being influenced against the father by the mother and had described the child’s emotional instability by using a number of terms including, ‘sad’, ‘withdrawn’, ‘tearful’ and ‘anxious’. The reliability of the child’s wish for no contact with the violent father was re-evaluated by the psychologist when the child appeared to be more ‘settled’, thus implying the child was more rational. The child’s wish for no father-child contact was finally perceived by the psychologist to be ‘consistent’. As the following quotation illustrates, it was the judge’s confidence in the ‘expert’ opinions of the psychologist and psychiatrist that appeared to be the significant influence in the judge giving weight to the child’s wishes.

Case 26

Ms J [psychologist] impressed as having approached her task fairly and thoroughly. She [psychologist] has considerable experience. Her [psychologist] assessments and conclusions were not successfully challenged. [Paragraph 339] [emphasis added]

Accepting, as I [judge] do, that children are often placed in a situation of conflicting loyalties, I [judge] have given careful consideration to the wishes expressed by K [child] to both Ms I [psychologist] and Dr C [psychiatrist]. My [judge] findings and confidence in their [psychologist and psychiatrist] evidence are such that I [judge] am convinced that K [child] is currently expressing a genuine wish not to have contact with his father. [Paragraph 359] [emphasis added]

6.4 Chapter summary

This chapter has identified and discussed the dominant judicial and professional discourses on childhood. The dominant judicial discourses reflect a set of assumptions used to guide the decision-making process. These were based on traditional theories of child development that normalise and generalise adultist assumptions about children’s
competence. The right of children to have their wishes heard and considered was constrained by the judges’ reliance on psychological discourses that primarily defined children as incompetent, unreliable, dependent beings who were vulnerable to the influence of their ‘alienating’ mothers. These discourses reflected commonsense understandings that supported patriarchal ideology. An examination of contradictory discourses revealed that it required persistence and the intersection of competing discourses used by privileged professionals to establish an opposing view. In some judgments young children were deprived of any opportunity to inform the Court of their own perspectives. In these cases dominant normative assumptions about the needs and wishes of the children were uncritically relied on by the judges and the social science professionals who provided evidence to the Court.

In the construction of childhood and children’s credibility in expressing their wishes about contact arrangements, the judges relied on the opinions of privileged professionals, mainly psychologists, who were placed at the top of a hierarchy of evidence credibility. These professionals reinforced the construction of categories of difference between adults and children and between compliant and ‘difficult’ children. Where children’s wishes were accepted by the judges, competing discourses on childhood competence were adopted by the privileged professionals and influenced the judges’ decisions to give mainly qualified weight to the children’s wishes.

In the process of regulation of the existing social order (Rabinow 1984) children who challenged their normative subject position were placed in ‘Catch 22’ situations. For these children the ‘no win’ situation was in regard to father-child contact. If these children complied with the adult imposed contact arrangements and the interventions imposed to facilitate contact, their ‘distress’ and ‘fear’ would have been ignored by the adults involved in the decision-making process. In order for the children’s wishes for no contact with the violent fathers to be accepted the children had to persist with verbally and behaviourally expressing their concerns. In the process these children were defined as resistant, deviant or problem beings. In some judgments they were eventually redefined as competent beings who were seen as ‘consistent’, sufficiently ‘mature’ and able to make ‘genuine’ wishes statements.
Chapter 7: The judicial construction of children’s exposure to domestic violence

7.1 Quantitative data

The following quantitative data provides a statistical picture of how significant the issue of domestic violence is to the population of contested contact cases that reach the stage of final hearing within the Adelaide registry of the Family Court of Australia (FCA). These findings have been reported in a published journal article (Shea Hart 2004). The first stage of the comparative statistical analysis of cases from the pre and post Reform Act samples that covers an eleven year period (January 1991 to December 2001) spanning five and a half years either side of the introduction of the Reform Act in July 1996, showed a thirty two percent increase from pre to post Reform Act in the number of cases where contact was disputed that reached the stage of final hearing. In these cases where domestic violence was an issue the analysis showed a significant increase of one hundred and thirty three percent in the number of those cases over that timeframe.

The second stage of the statistical analysis is based on the purposefully selected pre and post Reform Act samples of all disputed contact cases that reached the stage of a final judicial determination, where both natural parents were parties to proceedings, and where the judges acknowledged that at least one act of domestic violence had occurred (N= 109). Appendix 7.1 provides a statistical summary of the following information. The analysis revealed that the full range of violence was referred to in the judgments and that there was a significant increase of fifty three percent in the number of these cases from pre Reform Act to post Reform Act. The data showed that the fathers were more often the perpetrators of violence (eighty four percent of cases pre Reform Act; seventy nine percent of cases post Reform Act). In cases where both parents were found to have been violent (sixteen percent of cases pre Reform Act; twenty one percent of cases post Reform Act) the vast majority were cases where the fathers used more severe violence. This is consistent with contemporary research findings on the perpetrators of domestic violence (Bagshaw & Chung 2000a).

In the post Reform Act sample there was an increase in references to violence continuing post-separation (fifty six percent of cases pre Reform Act; sixty two percent of cases post
Reform Act) that included such things as breaches of a domestic violence restraining order, stalking the mother when the child was present and informing the child of threats to harm the mother. This is also consistent with other Australian domestic violence research findings (Kaye, Stubbs & Tolmie 2003). It was not uncommon for mothers to have reported to the Court that the children had been exposed to their father’s violence. In fifty three percent of cases pre Reform Act and fifty percent of cases post Reform Act the children were involved in interventions (assessment, counselling, therapy, and/or medication).

In both the pre and post Reform Act sample populations there were significant numbers of cases with allegations of direct child abuse (physical, sexual, emotional, and/or neglect). In the pre Reform Act sample there were sixty percent and in the post Reform Act sample there were seventy three percent of such cases. Fathers were the alleged perpetrators of direct child abuse in the majority of cases (pre Reform Act eighty eight percent of cases; post reform Act eighty five percent of cases) and the majority of allegations were made against the contact applicant (pre Reform Act eighty eight percent; post Reform Act eighty one percent).

The post Reform Act sample shows an increase in the rate of repeated litigation from forty percent of cases pre Reform Act to fifty three percent of cases post Reform Act. The statistics show an insignificant decrease in the proportion of cases where consent agreements in relation to contact arrangements had been made at some stage in both the pre Reform Act and post Reform Act cases (seventy four percent of cases pre Reform Act and seventy percent of cases post Reform Act). There was a small increase in the rate of contact being ordered by the judges that occurred in the majority of cases from both the pre Reform Act and post Reform Act cases (seventy two percent of cases pre Reform Act and seventy four percent of cases post Reform Act).

Given the amendments under the Reform Act (subsection 68F(20(g), (i) and (j) FLRA 1995) that specifically aim to ensure safety from unacceptable risk of family violence for children and their carers, it is significant that the proportion of these cases where contact was ordered remains little changed between the pre and post Reform Act case samples. The rate of repeated litigation over parenting issues and the time span over which the repeated litigation occurred (ranging from two to eight years in both pre and post Reform Act cases) suggests that where consent agreements were unworkable and the parents
Chapter 7: The judicial construction of children’s exposure to domestic violence

entered the litigation pathway, the children faced an uncertain and stressful future. The high rate of litigation draws attention to the repetitive and complex nature of coercion and control in contested parenting cases where domestic violence is an issue (Hester & Radford 1996; Jaffe, Lemon & Poisson 2003).

Since the introduction of the Reform Act in 1996, the increase in the number of the cases where domestic violence was acknowledged by the judges as an issue indicates that domestic violence has become a more transparent issue before the Court and is more open to judicial scrutiny. While this provides an increased opportunity for judges to frame their final determinations on the best interests of the child by taking into account the children’s exposure to domestic violence, the following qualitative analysis of twenty post Reform Act judgments revealed what a complex process this was. The findings from the statistical analysis support the existence of a pro-contact culture in the family law jurisdiction, from which cases where domestic violence is an issue are not exempt. The right of the child to contact with both parents has become a powerful influence in how judicial discretion is used when determining the best interests of the child. It is within this context that judges construct the best interests of children who come from families where domestic violence is an issue. As the following qualitative analysis reveals, in the judgments analysed the special needs of these children were largely overshadowed by entrenched patriarchal ideology within the Court.

7.2 Qualitative findings

Culturally and historically based patriarchal power relations are reinforced and made justifiable by social institutions (Dobash & Dobash 1992; MacKinnon 1989). According to Foucault, the cultural practices of the day decide what are recognised as significant issues worthy of focus and investigation (Dreyfus & Rabinow 1982). It was, therefore, considered important to identify in this study how the judges in the Adelaide registry constructed the issue of children’s exposure to domestic violence and what the significance of this was in the judicial determinations of children’s best interests. In order to establish the issues considered by the judges to be important, and the issues that were marginalised or ignored, the dominant judicial discourses used to support, change, or disregard children’s exposure to domestic violence were identified.
As specific knowledges have a role in the "transformation of various regimes of power and truth" (Dreyfus & Rabinow 1982, p117). It was, therefore, also important in this study to identify the dominant knowledges relied on by the judges and the role that privileged professionals played in reinforcing dominant ‘truths’ about the ‘best interests’ of children and the issue of domestic violence.

### 7.2.1 Judicial discourse on domestic violence

> Minimizing domestic violence by calling it ‘conflict’ or ‘poor communication’ is a disservice to victims, perpetrators, and children exposed to violence.

Jaffè, Lemon and Poisson (2003, p.154)

Chapter 1 refers to the importance of recognising how domestic violence is understood as this directly impacts upon how children’s experiences of violence and its impact on their wellbeing are perceived (Radford 2001). The dominant themes on the construction of domestic violence that emerged from the twenty judgments analysed were consistent with what Jaffè, Lemon and Poisson (2003) have identified as fairly standard explanations provided in contested contact and residence cases in contemporary Western countries. These standard explanations serve to minimise the significance of violence, fail to acknowledge the disadvantaged status of adult and child victims of violence, and ignore or trivialise its impact on children.

The dominant themes in the judgments analysed included: that violence was an isolated ‘incident’ that was not serious, and if it was serious it related to an ‘episode’ or ‘act’ from the past and was, therefore, not always relevant to the judicial determinations of the child’s ‘best interests’; descriptions of violent behaviours were named as ‘conflict’ that occurred ‘between’ the parents; and that violence had primarily an adult focus. The connections between the co-occurrence of domestic violence and child abuse and the potentially more serious consequences and risks for the children (Laing 2000b; Edleson 2002; Irwin, Waugh & Wilkinson 2002) discussed in Chapter 3, were often overlooked. Where ‘aggression’ and ‘violence’ were named in the judgments a mutualising discourse was often used. A discourse on violence having occurred ‘between the parties’ was present in twelve judgments (Cases 21, 23, 26, 27, 29, 31, 32, 33, 34, 36, 39 and 40). The understanding that retaliatory violence used by the victims of domestic violence is markedly different to the primary perpetration of violence (Jaffè, Lemon & Poisson 2003; Bagshaw & Chung 2000a) was not reflected in the judgments analysed.
Table 7.1 provides examples of the judicial terminology used in the judgments analysed. Events or behaviours involving people and or property were described in ways that indicated these were violent behaviours, as defined by broad definitions of domestic violence, but were not named as such.

Table 7.1: Language used by judges to reframe the issue of violence

<table>
<thead>
<tr>
<th>Mutualised violence</th>
<th>Single, isolated violent events</th>
<th>Trivialised violence</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘conflict’</td>
<td>‘an incident’</td>
<td>‘petty antagonisms’</td>
</tr>
<tr>
<td>‘extreme conflict’</td>
<td>‘an encounter’</td>
<td>‘childish sniping’</td>
</tr>
<tr>
<td>‘bitter conflict’</td>
<td>‘an altercation’</td>
<td>‘angry outbursts’</td>
</tr>
<tr>
<td>‘arguments’</td>
<td>‘a row’</td>
<td>‘uncaring behaviour’</td>
</tr>
<tr>
<td>‘disputes’</td>
<td>‘a scene’</td>
<td>‘unwise behaviour’</td>
</tr>
<tr>
<td>‘bitter feud’</td>
<td>‘a disagreement’</td>
<td>‘unreasonable behaviour’</td>
</tr>
<tr>
<td>‘hostility between the parties’</td>
<td>‘an extraordinary event’</td>
<td>‘inappropriate behaviour’</td>
</tr>
<tr>
<td>‘fiery marriage’</td>
<td>‘an ugly incident’</td>
<td>‘puerile self absorbed behaviour’</td>
</tr>
<tr>
<td>‘turbulent relationship’</td>
<td></td>
<td>‘unfortunate incident’</td>
</tr>
<tr>
<td>‘antagonism’</td>
<td></td>
<td>‘poor conduct’</td>
</tr>
<tr>
<td>‘state of war between the parties’</td>
<td></td>
<td>‘pushing shoving’</td>
</tr>
<tr>
<td>‘enmity between the parties’</td>
<td></td>
<td>‘the spectacle’</td>
</tr>
<tr>
<td>‘tension between the parties’</td>
<td></td>
<td>‘volatile affair’</td>
</tr>
<tr>
<td>‘active denigration by both parents’</td>
<td></td>
<td>‘tension’</td>
</tr>
<tr>
<td>‘animosity between the parties’</td>
<td></td>
<td>‘discord’</td>
</tr>
<tr>
<td>‘turbulent relationship’</td>
<td></td>
<td>‘inappropriate attitude’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘improper actions’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘unsuitable discipline’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘annoyance’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘bizarre behaviour’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘spoiling for a fight’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘short fuse’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘never assault’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘physical fracas’</td>
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<tr>
<td></td>
<td></td>
<td>‘altercation’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘failure to behave sensibly’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘unpleasant atmosphere’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘disparaging comments’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘scuffle’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>‘melee’</td>
</tr>
</tbody>
</table>

7.2.2 Children’s exposure to domestic violence

The dominant judicial discourses used in relation to children’s exposure to domestic violence in the judgments analysed created a complex and variable picture of what violence the children had been exposed to and what effects, if any, this had on the children’s wellbeing. The findings address the dominant themes that emerged from this analysis. Because of the complexity of the narratives within the judgments the following sections cannot provide information on all the discursive constructions made by the judges in the cases analysed.
As the following sections illustrate, in the majority of judgments analysed vacillating and qualifying discourses on children’s exposure to domestic violence were used by the judges. The opinions of privileged professionals, particularly psychologists and psychiatrists, were heavily relied on by the judges in the construction of how the issue of children’s exposure to domestic violence interacted discursively with the powerful dominant normative constructions of childhood, children’s interests and post-separation family life. Overall, the range of dominant discourses redefined what children had been exposed to, reconstructed children’s problems, downplayed the relevance of domestic violence for children’s wellbeing, and focused attention on normatively defined issues for children of separation and divorce.

### 7.2.2.1 Children as witnesses to domestic violence

In all twenty judgments analysed the fathers had, on at least one occasion, perpetrated behaviour that was consistent with broad definitions of domestic violence and the majority of the described, but not named, violent ‘incidents’ were perpetrated by the fathers. In ten out of the twenty judgments analysed (Cases 21, 22, 23, 28, 30, 34, 35, 36, 37 and 40), the judges acknowledged the children as being exposed to some form of described or named violent behaviour on at least one occasion. In eight of these judgments (Cases 22, 23, 28, 30, 34, 36, 37 and 40) the judges, on at least one occasion, acknowledged that the children were ‘present’ at or had ‘witnessed’ a ‘violent’ event. For example, in Case 30 the father had a history of drug abuse and of physical violence towards the mother. The judge made one clear statement that acknowledged the 4 year old child’s exposure to the father’s physical violence towards the pregnant mother.

**Case 30**

*There was an incident in which I [judge] am satisfied that the father violently pushed the mother and that K [child] witnessed the incident.* [Paragraph 63] [emphasis added]

In six of the eight judgments where the children were acknowledged by the judges as being present at a ‘violent’ incident, the children were exposed to violence perpetrated by their fathers. In one case, Case 34, the child was named as having witnessed the mother’s violence and in one case, Case 36, it was acknowledged that the child had witnessed both the mother’s and stepfather’s violence towards the father. The child-focused discourse on
children as witnesses to violence indicated an awareness of the judges in these cases of the significance of acknowledging children’s exposure to an ‘incidence’ of domestic violence. In four of these judgments (Cases 22, 23, 36 and 37) details were provided of a number of domestic violence incidents where the children were said by the judges to have been present. In these judgments the statements acknowledging the child as a ‘witness to violence’ were usually accompanied by a statement about the negative reactions of the child such as experiencing ‘upset’ or ‘fear’. These reactions, that were primarily linked to the time of the ‘incident’ appeared to be understood as short term effects on the children.

**Inconsistent discourse on children as witnesses to violence**

In the majority of judgments the judges used a range of terminology to refer to what was otherwise described as violence. This vacillating use of terminology within the individual judgments created ambiguity in relation to what the judges understood the children had witnessed. For example, in Case 40 the 11 and 13 year old children had repeatedly informed psychologists of their ‘fear’ and ‘distress’ in relation to their exposure to their father’s behaviour. One psychologist, whose opinion was accepted by the judge at one stage in proceedings, reframed the exposure of 13 year old adolescent to the father’s violence as being exposure to ‘angry outbursts’ that served as ‘a blocking agent to constructive contact’. The children’s exposure to ‘those 22 incidents’ of ‘violent or intimidating behaviour’ by the father were named as ‘violence’ by the judge on some occasions, but on other occasions were reframed by the judge as exposure to the father’s ‘at best unwise and uncaring’ ‘occasions of conduct’ and as ‘a lack of capacity by the husband…to remain child focused’. As the following quotation illustrates, while the distress of the children was acknowledged, the trivialising discourse that reframed the violence prevented consistent naming of the violence to which the children had been exposed.

**Case 40**

*However, the children also mentioned a number of incidents to which clearly they were a party and which clearly distressed them. They were occasions of conduct or behaviour by the husband which were at best unwise and uncaring as to the children’s emotions. At worst, they demonstrated a lack of capacity by the husband at that time to control his behaviours and*
remain child focussed. Those incidents...included putting a hole in a door at the former matrimonial home property, breaking a telephone, wresting a mobile telephone from M’s [child] grasp, tipping M [child] upside down in a sleeping bag and dropping him on the bed and “abducting” the children from their school. [Paragraph 209] [emphasis added]

In three judgments (Cases 21, 35 and 36) the judges, on at least one occasion, stated uncertainty about whether or not, the children had witnessed domestic violence. In each of these judgments the discourse that children ‘may have witnessed’ violence competed with another discourse on children as having witnessed domestic violence. The judicial uncertainty about the presence of the child at one or a number of incidents was based on information provided to the Court that was ‘unclear from the evidence’. The underlying assumption that the children may not have been witnesses to the domestic violence did not reflect the findings from child inclusive studies on children’s exposure to domestic violence, that children are more aware of domestic violence than adults believe them to be (McGee 2000). This lack of knowledge about children’s awareness of violent episodes appeared to contribute to judicial uncertainty about whether the children in two of these judgments (Cases 21 and 35) were affected, and if so how they were affected. For example, in Case 21 the judge was uncertain about whether or not the 3 and 5 year old children were ‘aware of, or understood’ the violence of the father. Descriptions of the father’s violence included a history of property damage, physical assault and covering the mother in lighter fluid. The judge in this case also relied on information that the ‘children had not mentioned any violent conduct…to any person’. This failed to take into account that most children experience difficulties in disclosing their exposure to violence (Herman 1992).

Case 21

I [judge] do not, of course, overlook the fact that the children may have witnessed some of these incidents... [Paragraph 27] [emphasis added]

Invisible child witnesses to domestic violence

While in ten of the twenty judgments analysed the judges acknowledged that the children were present at an incident of described or named violence on at least one occasion, in the majority of judgments (Cases 21, 23, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 38, 39 and 40) the dominant discourse in relation to domestic violence reflected an adult focus. The descriptions of ‘incidents’ of violence primarily focused on ‘the relationship between the
mother and the father’ on what was alleged or accepted as having occurred between the adults. The dominant adult focus suggests a lack of awareness of the potentially adverse impact on children from exposure to domestic violence, or suggests the judges believed that parents have a right to control their children by physical and verbal domination. It was unclear from the majority of descriptions of the violent incidents whether or not the children were present. Either no statement was made about the children or there was lack of clarity about the presence of the children. If it was indicated that a child was present during a violent incident the focus was often on the effect on the adults and the child remained an invisible victim. For example in Case 28, while the judge had named the two children, aged 7 and 11 years, as witnesses to one occasion of violence perpetrated by the father, on other occasions the focus was on the adults and their responses, such as being ‘alarmed’ and ‘intimidated’.

Case 28

<table>
<thead>
<tr>
<th>Mother</th>
<th>Judge</th>
<th>Find that the incident of 13th September 1998 at XX [location] involving Mr Q [mother’s partner], the wife and the husband...When the husband arrived at a school function there, I [judge] find there was a threatening scene made by the husband who vented his anger against Mr Q [mother’s partner]. [Paragraph 82] [emphasis added]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mother</td>
<td>She pulled W [child] into the car. Mr Q [mother’s partner] reversed his car out of the driveway and the husband commenced to follow them in his car. He [father] acknowledges at times that he followed them closely, but I [judge] find that this pursuit alarmed both the wife and Mr Q [mother’s partner]. [Paragraph 85] [emphasis added]</td>
</tr>
</tbody>
</table>

Children as witnesses to domestic violence from the past

A recurring theme that emerged from the judgments analysed was that where children were recognised by the judges as having been exposed to what was named or described as violent incidents, these exposures were downplayed as they had occurred in the past. In a small number of judgments there were exceptions where judges referred to a more recent ‘incident’, and in three judgments (Cases 36, 37 and 40) there were numerous references by the judges to named and described ongoing violent acts. However, this did not always over-ride the tendency to focus on violence as belonging in the past. For example, in Case 37 there were a number of extensive, detailed descriptions made by the judge of an ongoing range of violent behaviours perpetrated by the father. Despite this, when the judge addressed the relevant sections of ‘section 68F(2)’ of the Reform Act, the ‘issue’ of
‘family violence’ was constructed by the judge as being ‘prior to separation’ and, therefore, was ‘not a current concern’.

Case 37

(i) Any family violence involving the child or a member of the child's family;

This was an issue prior to separation but fortunately is not a current concern. [Paragraph 462] [emphasis added]

The tendency to downplay or disregard the effects of past violence on children appeared to contribute to judicial uncertainty about domestic violence as an issue to be considered in relation to the best interests of the child. This was apparent in what was said, as well as what was not said about the significance of children’s exposure to domestic violence and the factors that were given weight in the final determinations of the judges. For example, in Case 35 the judge was uncertain about the relevance of a history of what had been described but not named, as years of violence by the father in relation to two children’s (aged 8 and 13 years) ‘views’, ‘their perceptions of violence’, and to one child’s ‘condition’ of ‘depression’. The judge referred to a prior judge’s description of the father’s violence that continued post-separation as being ‘domineering’, and ‘outrageous and bizarre’ behaviours. This was accepted by the judge as ‘fact’ along with other behaviours by the father that were described by the judge as ‘restricting’ the social relationships of all the family members, and that indicated financial control, denigration of the mother and emotional abuse of the children. Despite this accepted history of violence the following quotation illustrates the judicial uncertainty about past violence as a ‘significant matter’ to be considered in the determination of the children’s best interests.

Case 35

Family violence is not necessarily now a significant matter but the history may still affect N [child] and M [child] and their perceptions of violence may well form part of the explanation for their views. [Paragraph 204] [emphasis added]

Children as witnesses to ‘conflict’

As Jaffe, Lemon and Poisson (2003) point out, many cases where domestic violence is an issue are entrenched in protracted legal proceedings in family law jurisdictions and this
adds to the complexity of these cases. The findings of this study do not question that all the judgments analysed involved parental ‘conflict’ over a dispute before the Court. However, the findings draw attention to the dominance of the discourse on ‘conflict’ used by the judges that masked the issue of domestic violence to which the children had been exposed.

In all of the twenty judgments analysed, at some stage the judges referred to the commonly held perception, discussed in Chapter 2, that children of separation and divorce are vulnerable to, and are adversely affected by being ‘caught in the middle of conflict’ between the parents. In the judgments analysed it was unclear in many instances, whether or not the judges had differentiated ‘conflict’ from ‘violence’, whether the judges were ambivalent about the issue, or deliberately avoided naming the violence. What did emerge as a dominant theme was that children’s experiences and reactions were primarily constructed by psychologists and judges as being caught in the middle of ‘conflict’ between the parents. In many instances it appeared that behaviours consistent with broad definitions of domestic violence were named by the judges as ‘conflict’. This demonstrated how violence is normalised through the operation of discursive social and institutional systems.

Also the discourses on the children as witnesses to and affected by ‘conflict’ failed to consider what Jaffe, Lemon and Poisson (2003) have referred to as the importance of making the connection between the various experiences children from violent families can have that can generate signs of children being in conflict. For example, in Case 28 the judge accepted the psychologist’s opinion that the two children aged 11 and 7 years, who had been exposed to the father’s physical violence and ‘threats to kill’ the mother, were ‘unhappy’ and that one child was ‘suicidal’ because of their awareness of the ‘conflict’ between the parents.

**Case 28**

*Her [psychologist] concern is the exposure of the children to continuing conflict between the parties which is emotionally damaging for them.* [Paragraph 137] [emphasis added]

Where children were discursively constructed as having been witnesses to ‘conflict’, not ‘violence’, this changed the reality of what children had been exposed to. For example, in Case 27 the judge acknowledged a history of ‘physical violence’ and ‘denigration’ that was
mutualised by the judge as being between the parents. The mother had separated from the father because of his violence. The children aged 7 and 5 years had, according to the mother, witnessed the father’s denigration of the mother and ‘threats on her life’. Allegations were made by the mother that one child was ‘hiding’ from the father, that the other child had become aggressive, and that the father had sexually abused one of the children. The children had undergone multiple assessments and counselling. Despite the accepted history of violence the judge consistently constructed the central problem for the children as one of exposure to ‘conflict’ between the parents. As the following quotation illustrates, this allowed discursive space for minimising the issue of the children’s exposure to domestic violence, for idealising the children’s relationships with both parents and for reconstructing the issue of the children’s exposure to ‘abuse’ as the parents ‘dragging them into the conflict’.

**Case 27**

*Each of these children has a good relationship with their parents, but as has been evidenced from H’s [child] remarks to various therapists, the children are aware of the conflict between their parents and have been drawn into the conflict by the parents making derogatory remarks about the other.* [Paragraph 118] [emphasis added]

*Each of these children has been exposed, from time to time, to abuse by each parent in dragging them into the conflict.* [Paragraph 126] [emphasis added]

The dominant theme that children were witnesses to ‘conflict’ mutualised the responsibility of the parents for what the children had been exposed to, ignored the power imbalance between the perpetrators of violence and the adult and child victims, and masked the potential risks for the children.

### 7.2.2.2 Co-occurrence of child abuse and domestic violence

As discussed in Chapter 3, contemporary research findings highlight the high rate of co-occurrence of domestic violence and child abuse. The risks for child victims can be considerable and need to be identified, particularly in the post-separation context and specifically when considering the merits of father-child contact (McGee 2000).

Of the twenty judgments analysed seventeen judgments had allegations of child abuse or had described behaviours that were consistent with standard definitions of child physical,
psychological and emotional abuse and neglect⁴ (Cases 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38 and 40). In six of these judgments there were allegations or descriptions of multiple forms of child abuse (Cases 22, 23, 26, 28, 34 and 40). The child protection authorities were mentioned as having been involved in eight judgments (Cases 24, 26, 27, 28, 30, 31, 34 and 36). As the following quotation illustrates, statements in the judgments described the symptoms of children that were consistent with children’s responses to child abuse. However, there were no findings of child abuse made by the judges in any of the judgments analysed.

Case 24 Child aged 4 years at the stage of final hearing

...U [child] was still "poohing her pants". She [mother] said that U [child] had been masturbating for about a year but that it had not been "extreme". However, after the wife had moved to X [town], the child "became obsessed with this" [Paragraph 149] [emphasis added]

In four judgments (Cases 22, 23, 37 and 40) there was at least one clear statement made by the judges that made a direct link between named or described acts of domestic violence witnessed by the child and descriptions of violence, usually physical, that was directed towards the child. This indicated that in these judgments the judges were aware of the inter-relationship between direct and indirect forms of violence. Case 37 provided the most graphic descriptions of a range of violent behaviours that were named by the judge as ‘violence’ and ‘abuse’, directed by the father towards the mother and the 11 year old child and the step-siblings prior to and post-separation. As the following quotation illustrates a connection between domestic violence and child abuse was made by the judge.

⁴ Child abuse definitions used by Australian child protection services (Department of Human Services 2002)

*Physical abuse:* when a child “suffers or is likely to suffer significant harm from an injury inflicted…by a parent or caretaker…(such as) bruises, cuts, burns, or fractures”

*Sexual abuse:* when “a person uses power or authority over a child to involve the child in sexual activity…(such as) fondling of the child’s genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or other object or exposure of a child to pornography”

*Emotional abuse:* when “a child’s parent…repeatedly rejects the child or uses threats to frighten the child…(such as) name calling, put downs, continual coolness…to the extent that it significantly damages the child’s physical, social, intellectual or emotional development”

*Neglect:* a “failure to provide the child with the basic necessities of life, such as food, clothing, medical attention, or supervision to the extent that the child’s health and development is, or is likely to be significantly impaired"
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Case 37

I [judge] find that prior to separation the father would abuse her [mother] both verbally and physically in the sense of pushing and shoving. He was also aggressive with the children particularly the two boys, and he both verbally and physically abused them. [Paragraph 260] [emphasis added]

The judge quoting the social worker’s opinion that was accepted by the judge

...he [father] "remains rigidly determined to act out his anger through F [child]." [Paragraph 415] [emphasis added]

An awareness or understanding of the co-occurrence of domestic violence and child abuse was not reflected in the discourses on violence in the majority of judgments analysed, nor was there an explicit recognition of the heightened risks for adverse outcomes for the child victims. In the majority of judgments where allegations of child abuse had been made, child abuse and domestic violence were constructed as separate issues. Children’s exposure to domestic violence was marginalised by the judges who devoted a lot of the text of the judgments to focusing on the available medical and ‘scientific’ evidence about whether or not child abuse had occurred.

Intersecting dominant discourses defining child victims of abuse as unreliable

In the judgments analysed where domestic violence and child abuse were named or described as issues the dominant discourses on children as being incompetent and unreliable, discussed in Chapter 6, were identified in particular when children disclosed their alleged experiences of child abuse.

The discursive interaction between discourses on childhood incompetence and a number of other dominant discourses is illustrated in an analysis of the statements from the eight judgments where the child protection authorities had been involved. Disourses on children’s unreliability when making allegations of their own abuse interacted with other powerful narratives that together over-rode any concerns about the children being at risk from the alleged abuse. The powerful narratives made by the judges and supported by psychologists included: a lack of substantiating ‘scientific’ evidence about the child abuse allegations (Cases 24, 26, 27, 28, 30, 31, 34 and 36); ‘inept’ child abuse investigatory processes conducted by ‘inexperienced’ professionals (Cases 24, 26 and 30); and the
recommendations of psychologists, at some stage in proceedings, that children need ongoing or increased contact with both parents, primarily with their fathers (Cases 24, 26, 27, 28, 30, 31 and 34). For example, in Case 34 the medical evidence that the 6 year old child had been cut and extensively burnt with a cigarette was accepted by the judge, but the judge was ‘not able to make a positive finding’ about who had committed the child abuse. The child’s consistent allegation that the mother had perpetrated the abuse was rejected by the judge, due to the child’s ‘age’ and ‘insufficient convincing evidence’, as well as the opinion of a ‘well qualified’, ‘experienced’ psychologist who supported giving the child ‘opportunity for regular contact’ with the mother.

Case 34

The uncontested evidence of Dr C [medical practitioner] indicated that U [child] had numerous unexplained scars on his body which were in part consistent with the story that U [child] gave to the authorities, that he had been cut and burnt or otherwise hurt by his mother. At times however U’s [child] statements could be considered inconclusive because of their context and his age. [Paragraph 481] [emphasis added]

There is however insufficient convincing evidence to make a finding that the mother has abused U [child]. [Paragraph 508] [emphasis added]

The hierarchy of evidence credibility

In the cases where the child protection authorities had been involved, judges required medical evidence and the opinion of an ‘experienced’ psychologist to substantiate any findings that child abuse had occurred. Underlying assumptions about the credibility of objective ‘scientific’ practice was evident. This was particularly evident in the judgments where judicial disapproval was stated about the quality of the child protection counsellors and their practices (Cases 24, 26 and 30). Judges thereby discursively positioned the child protection counsellors, who undertook ‘unsatisfactory’ investigatory processes, at the lowest level in the hierarchy of evidence credibility, along with the ‘incompetent’ children. Due to this discursive positioning, child protection professionals’ attempts to challenge the dominant discourse on children’s incompetence to make reliable disclosures of child abuse failed to gain acceptance by the judges. For example, in Case 30 the father had a history of hard drug and alcohol abuse, had been physically violent towards the mother during and after pregnancy, and had been charged by the police for sexual assault. The charges were later dismissed. The 4 year old child had displayed mixed reactions to the father in
interactions observed by a social scientist and the child had made inconsistent allegations
of the father’s child abuse. The child protection counsellors accepted that the child was at
risk. The judge relied on medical evidence to dismiss the allegations of child sexual abuse.
Weight was also given by the judge to the opinion of a psychologist who supported father-
child contact. The psychologist stated the following:

Case 30

Indeed, if the allegations of abuse are true, it is even more important that K [child] has an
opportunity to experience positive connection with her father, because this will inevitably assist
her in her emotional recovery. [Paragraph 319] [emphasis added]

In this case the child protection counsellors were depicted by the psychologist and the
judge, who named them as ‘culprits’, as colluding with the mother in having ‘reinforced’
and ‘influenced’ the child’s belief that sexual abuse had occurred. As the following
quotation illustrates, these constructions appeared to rely on theories of victimology used
by psychiatrists (Schultz 1975) that are outmoded and construct child victims of violence
as unreliable, open to suggestion and as being negatively affected, not by the trauma of
violence, but by the reactions of others.

Case 30 Psychologist’s statement

…her [child] mother’s view and distress about the issue would inevitably influence her [child] to
believe that she was indeed abused. [Paragraph 315] [emphasis added]

… I [judge] am satisfied that the child has had it reinforced in her mind by every body connected
with her, including the mother, C [stepfather], Mrs J [maternal grandmother], L [child protection
counsellor] and M [child protection counsellor] that she has been sexually abused by the father.
[Paragraph 347] [emphasis added]

The major culprits in the dilemma which has arisen are Ms L [child protection counsellor] and Mr
M [child protection counsellor]. [Paragraph 353] [emphasis added]

7.2.3 The effects of domestic violence on children

Children’s problems referred to by the judges included an extensive range of behavioural,
emotional, psychological and relational problems, often identified by psychologists,
psychiatrists and social workers who provided evidence to the Court. In eleven of the
judgments analysed (Cases 22, 24, 26, 27, 28, 30, 31, 35, 36, 37 and 40) the children were
involved in ‘therapeutic’ processes including counselling, therapy and/or medication.
While the descriptions of children’s problems appeared to be consistent with contemporary research findings on the adjustment difficulties that children may experience as a result of their exposure to domestic violence, the dominant judicial statements about children’s problems did not reflect an awareness or understanding of this. There appeared to be a lack of knowledge that children’s exposure to domestic violence significantly increases the development of a range of long and short-term problems, including clinical disorders (Grych et al 2000; Streeck-Fischer & van der Kolk 2000). Judges’ statements indicated that children’s exposure to domestic violence, and their individual capacities and vulnerabilities in relation to that exposure, had not been the central focus of investigation by the professionals involved in the decision-making process.

Table 7.2 illustrates by case number the range of children’s problems and symptoms described in each judgment, the ages of the children at the stage of the final hearing before the Court, and provides examples of the types of described violence present in the children’s family life. The listed types of violence (to which children may have been exposed) refer to what was alleged by either parent or confirmed by the judge as perpetrated by either parent, usually the father. In most cases there appeared to have been an established history of violence that continued post-separation, with breaches of domestic violence restraining orders not being uncommon. Table 7.2 also includes the different types of alleged child abuse as well what was described, but not alleged, as abuse towards the children.

### Table 7.2: Statements about children’s problems and types of violence by case number

<table>
<thead>
<tr>
<th>Case number</th>
<th>Children’s ages (years)</th>
<th>Statements of children’s problems, behaviours and reactions</th>
<th>Examples of the types of direct and indirect violence referred to in each case</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>7, 10 and 12</td>
<td>‘Fear’, ‘bad behaviour’ at school and home, ‘threat’ to shoot an adult</td>
<td>‘Blow with the open back or side of the hand to the wife’s throat’, ‘pushing’, ‘lack of consent to’</td>
</tr>
</tbody>
</table>
## Chapter 7: The judicial construction of children's exposure to domestic violence

<table>
<thead>
<tr>
<th>Case number</th>
<th>Children's ages (years)</th>
<th>Statements of children's problems, behaviours and reactions</th>
<th>Examples of the types of direct and indirect violence referred to in each case</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
<td>11</td>
<td>'Fear', 'apprehension', 'cowered', 'problems at school', 'boisterous and disruptive behaviour towards other children', 'staring blankly into space', 'deep scars' [psychological]</td>
<td>'Anger', 'assault'- 'drag her [wife] from the car', 'forced…to the floor…injured her ribs', 'dragged her by the right ankle…upstairs', 'strange sexual practices', assault, verbal assault, property damage, 'dictatorial', 'ruled the household with an iron fist', Allegation of child physical, psychological and emotional abuse</td>
</tr>
<tr>
<td>24</td>
<td>2 and 4</td>
<td>'Fear', 'poohing her pants', 'commenced the habit of defecating in the house and smearing faeces over herself, the walls and the furniture in the house', 'obsessed with this' [masturbation], 'howling', 'disturbed behaviour', 'disturbed sleep', 'uncontrollable behaviour', 'difficulties concentrating', 'aggressive behaviour', 'tantrums', [child] 'did not wish to separate from the wife'</td>
<td>'Pushed and shoved', 'rape, sexual humiliation and violence', 'verbally abused' Allegations of child physical and sexual abuse, 'hit her [child] harder than he [father] should’ 'he [father] punched my [child] tummy with his do-do'</td>
</tr>
<tr>
<td>25</td>
<td>3</td>
<td>'The child would not separate from the wife'</td>
<td>'abused her' [wife], 'causing damage to the house', 'I [husband] will slit your [wife] throat', 'assaulting and raping the wife’s friend.'</td>
</tr>
<tr>
<td>26</td>
<td>7 and 9</td>
<td>'Fear', 'anxiety', 'stress', 'depressive condition', 'condition required continuation of antidepressant medication', 'nightmares', 'an adjustment reaction with impulsive moods', 'insecurity', 'sad', sexualized behaviour, 'difficulty with his behaviour at home', 'regular detentions at school'</td>
<td>'The father has been convicted for breaches of the restraining order and property damage', 'serious assault charges', threats/harassment, stalking, ‘she [wife] moved more than 15 times in order to avoid the father’, ‘damaged a wall by punching it…and by head butting’ Allegation of child physical and sexual abuse</td>
</tr>
<tr>
<td>27</td>
<td>5 and 7</td>
<td>'had been violent to his sister and to other girls at his school’, 'confused and uncertain'</td>
<td>Threats to kill, ‘denigration’, ‘each party, on occasions, was physically violent towards the other’, Allegation of child physical and sexual abuse</td>
</tr>
</tbody>
</table>
### Chapter 7: The judicial construction of children’s exposure to domestic violence

<table>
<thead>
<tr>
<th>Case number</th>
<th>Children’s ages (years)</th>
<th>Statements of children’s problems, behaviours and reactions</th>
<th>Examples of the types of direct and indirect violence referred to in each case</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>4</td>
<td>No comments in made judgment about the child’s adjustment or development</td>
<td>‘Became abusive and aggressive whilst under the influence of alcohol’, ‘threatened violence’, verbal abuse Allegation of child neglect</td>
</tr>
<tr>
<td>30</td>
<td>4</td>
<td>Emotional problems, anxiety, anger ‘hysterical crying at times when the father changed her nappy’ ‘I [child] want to shoot him [father]’… ‘smash him up’</td>
<td>‘several incidents of physical violence’ during pregnancy, harassment, verbal abuse, ‘armed with a hockey stick… forced his [stepfather] way inside [husband’s home]. There was a struggle and the police attended’ Allegation of child sexual abuse</td>
</tr>
<tr>
<td>31</td>
<td>7</td>
<td>‘Has had difficulties at the …school, both academically and in relating to other children’</td>
<td>Physical assault, ‘intimidation’, Allegation of child sexual abuse</td>
</tr>
<tr>
<td>32</td>
<td>7</td>
<td>‘Feared to go willingly to his father’, ‘high levels of distress’, ‘anger and hostility’, ‘difficulties’, ‘emotional tension’</td>
<td>Physical ‘assault’, ‘denigrating the other’ Allegation of child emotional abuse</td>
</tr>
<tr>
<td>35</td>
<td>8, 14 and 16</td>
<td>‘Depression’, ‘anxiety’, social isolation</td>
<td>Physical assault, social control ‘prisoner in her own home’, financial control, ‘domineering’, denigration Allegation of child physical abuse, ‘restricted from making friendships’</td>
</tr>
</tbody>
</table>
### 7.2.3.1 The adverse effects on children from exposure to domestic violence acknowledged

In nine of the judgments analysed (Cases 21, 22, 23, 26, 34, 35, 36, 37 and 40) the judges referred, on at least one occasion, to a connection between children’s exposure to domestic violence and the adverse effects on the children. In eight of these judgments (Cases 21, 22, 23, 26, 34, 35, 37 and 40) a statement about children having ‘fear’ of the perpetrator of violence was made by psychologists, psychiatrists or social workers, and acknowledged by the judges.

### 7.2.3.2 The adverse effects on children from exposure to domestic violence minimised

In the majority of the judgments analysed the dominant statements used by psychologists, psychiatrists, social workers and judges to acknowledge the adverse effect on children from exposure to domestic violence were made by brief statements that referred to or implied

<table>
<thead>
<tr>
<th>Case number</th>
<th>Children’s ages (years)</th>
<th>Statements of children’s problems, behaviours and reactions</th>
<th>Examples of the types of direct and indirect violence referred to in each case</th>
</tr>
</thead>
<tbody>
<tr>
<td>37</td>
<td>11</td>
<td>‘Could not sleep’, repressed emotions, ‘in need of medication and counselling’, ‘terrified’</td>
<td>Physical assault, physical ‘aggression’, ‘interrogation’, denial of home invasion, ‘a bully’, ‘overtly antagonistic’, property damage, threats, ‘the father’s constant presence...has bedeviled the mother’ Allegation of child physical and emotional abuse</td>
</tr>
</tbody>
</table>
that the adverse effects on children were short-term and were in response to separate ‘incidents’ of violence, usually of direct or indirect physical aggression. Other statements made by the judges also minimised the adverse effects on the children. The dominant minimising statements included: a child feeling frightened ‘at times’; feeling ‘some apprehension’; and having ‘some recall’ of the violence that ‘may’ have ‘contributed to’ the child’s ‘attitude’. These statements downplayed, or depicted judicial uncertainty about children’s exposure to domestic violence and its connectedness to the children’s problems. These statements minimised or denied children’s experiences of domestic violence as the basis of their wishes for no contact with the violent parent and constructed uncertainty about the presence of ‘possible’ future ‘risks’ to children and what the ‘risks’ might be for the children having contact with the violent parent.

An exception to the use of these minimising statements was found in Case 36. The judge consistently and clearly acknowledged the direct connection between the 6 year old child ‘witnessing’ the mother’s and stepfather’s violence towards the father and the ‘detrimental effect’ this had on the child’s ‘behaviours’. The child was described as experiencing ‘upset and distress’. The judge stated that this was a ‘significant factor’ in determining the child’s ‘best interests’. This case was an exception in that it viewed the situation ‘from the child’s point of view’. However, in this case the same acknowledging discourse, examples of which are quoted below, was not used by the judge in relation to the child’s past exposure to the father’s ‘demanding’, ‘controlling’, ‘demeaning’, and verbally and physically violent behaviours. The judicial focus was on the adverse effects on the child from exposure to the mother’s ‘unacceptable’ violence which was also linked to recurring statements about the mother’s lack of ‘regard for the effect’ on the child. This indicated the role of patriarchal discourse in influencing the judicial constructions of gendered parenting practices and what constituted domestic violence and how these were linked to the judicial understanding of the adverse effects on the child from exposure to violence.

Case 36

Equally as worrying is...that at times U [child] has been copying some of the behaviours such as spitting and he has been repeating some of the abuse. [Paragraph 482] [emphasis added]

U [child] has been upset and distressed at what he has seen and heard on these occasions, and he
has also mimicked certain of the behaviours at school. This is entirely inappropriate and it is extremely concerning from U’s [child] point of view. I [judge] have no doubt that it is solely the responsibility of the mother and Mr I [stepfather] and it must be a significant factor in determining where the best interests of U [child] lie. [Paragraph 525] [emphasis added]

Table 7.3 lists examples of statements made by judges, often informed by psychologists, psychiatrists and social workers, that constructed children’s reactions to described or named direct and indirect violence. The statements that acknowledged the links between children’s exposure to domestic violence and their wellbeing are listed. The statements that minimised this and the statements that depicted uncertainty or skepticism about children being adversely affected by exposure to violence are listed.

Table 7.3: The discursive construction by judges of children’s responses to exposure to named or described direct and/or indirect violence

<table>
<thead>
<tr>
<th>Minimising statements</th>
<th>Uncertain or skeptical statements</th>
<th>Acknowledging statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘at times distressed’</td>
<td>‘no definitive diagnosis on the child’s condition’</td>
<td>‘troubled’</td>
</tr>
<tr>
<td>‘fearful at times’</td>
<td>‘well established “explanation” of the alleged traumatic events’</td>
<td>‘frightened’</td>
</tr>
<tr>
<td>‘some apprehension’</td>
<td>‘too young to have independent recall’</td>
<td>‘terrified’</td>
</tr>
<tr>
<td>‘unpleasant feeling’</td>
<td>‘may have a general recollection’</td>
<td>‘fear’</td>
</tr>
<tr>
<td>‘now settled down’</td>
<td>‘may have wondered why’</td>
<td>‘scared’</td>
</tr>
<tr>
<td>‘quite comfortable’</td>
<td>‘may have some awareness of the tension’</td>
<td>‘distress’</td>
</tr>
<tr>
<td>‘able to cope’</td>
<td>‘may have been in some way affected’</td>
<td>‘highly distressed’</td>
</tr>
<tr>
<td>‘some anxiety’</td>
<td>[child] ‘unclear’</td>
<td>‘great trauma’</td>
</tr>
<tr>
<td>‘upset’</td>
<td>[child] ‘uncertain’</td>
<td>‘hurt’</td>
</tr>
<tr>
<td>‘relative unemotionality’</td>
<td>‘suspect the child was aware’</td>
<td>‘alarmed’</td>
</tr>
<tr>
<td>‘possible adverse effect’</td>
<td>‘no evidence which satisfies’</td>
<td>‘apprehensive’</td>
</tr>
<tr>
<td>‘uncomfortable’</td>
<td>‘may have witnessed’</td>
<td>‘left deep scars’</td>
</tr>
<tr>
<td>‘emotional tension’</td>
<td>‘unlikely to have any recollection of the event’</td>
<td>‘serious impact’</td>
</tr>
<tr>
<td>‘some recall’</td>
<td>‘distorted the glass of some of his memory’</td>
<td>‘extremely upset,</td>
</tr>
<tr>
<td>‘mimicked some behaviours’</td>
<td>[child] ‘unreliable’</td>
<td>‘cowered’</td>
</tr>
<tr>
<td>‘to a degree…had a cumulative effect on the children’s minds’</td>
<td>‘subject to suggestion’</td>
<td>‘nightmares’</td>
</tr>
<tr>
<td>‘less conscious of the conflict’</td>
<td>‘problems of contamination’</td>
<td>‘copying some [violent] behaviours’</td>
</tr>
</tbody>
</table>
7.2.3.3 Counter stories redefine the victimisation of children

*Children continue to be the only people against whom violence is considered to be acceptable.*

Saunders and Goddard (2000, p.124)

According to Graycar and Morgan (2002) within legal systems ‘stock stories’ that reflect the embedded ‘truths’ are supported by ‘counter stories’ to socially construct stereotypes that reinforce the positioning of the disadvantaged. In the judgments analysed, the stock story on the essential need for developing children to have ongoing relationships with both parents, especially their fathers, following family dissolution interplayed with a range of stories that came to the fore and redefined children’s victimisation. The interplay of some counter stories created strong discursive barriers that inhibited linking the problems of the children and their wishes for no contact with their violent fathers to the issue of children’s exposure to domestic violence in the consideration of their best interests. This finding is consistent with family law jurisdictions in other Western countries where the issue of domestic violence is marginalised by other priorities (Jaffe et al 2003).

Analysis of the judgments showed that the constructions of children as ‘unreliable’ witnesses to domestic violence and what was understood to cause ‘harm’ to the children reflected primarily, but not exclusively, the opinions of psychologists, psychiatrists and occasionally social workers whose opinions were privileged by the judges. The emerging counter stories reflected a strong focus on the need to protect children not from ‘violence’, but from other factors including: exposure to interparental ‘conflict’ (Cases 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 38, 39 and 40); the negative influence of mothers who were to blame for risking the ‘emotional welfare’ of the children by being ‘hostile’ or ‘over reactive’ to the father-child contact, or for ‘affecting the memories’ of their children (Cases 22, 23, 24, 28, 29, 30, 31, 32, 34, 36, 38 and 40); and the disruption of the ‘caring’, ‘positive’, ‘loving’ father-child relationships (Cases 25, 26, 27, 28, 30, 31, 32 and 36).

These counter stories supported the stock story that reflected a pro-contact ideology and effectively downplayed the significant adverse effects on children from exposure to domestic violence. For example, in Case 38 the 8 year old child had been exposed to a lengthy history of violent assaults and ‘denigration’ of the mother, perpetrated by the father, that a judge in a prior judgment had described as ‘reprehensible conduct’. In the
judgment analysed the judge accepted the psychologist’s opinion that the child was exposed to ‘emotional pressure’ from the father’s ‘frequent questioning’ of the child. The judge acknowledged that the father’s ‘anger…persists’ and that the father showed an inability to modify his behaviour. However, these discourses competed against strong repetitious counter stories that in this judgment included: the mother’s ‘hostility’ and ‘anxiety’ about father-child contact that had influenced the child and ‘exaggerated’ the child’s ‘distress’; that the father had a ‘happy bonding’ with the child; and that the child’s response of ‘unpleasant feelings’ was a normal reaction to the mutualised conflict ‘of this war between parents’ to which the child was exposed.

**Case 38** Psychologist’s opinion accepted by the judge

*In her report already referred to, Ms Q [psychologist] says:*

> “**M [child]** exists in the cross fire of this war between parents and even if each parent is careful not to denigrate the other to the child (which both accuse the other of doing) it would be impossible to be unaware of the hostile relations between them. **M [child]** is doing now what many children do, she [child] is choosing to withdraw from the unpleasant feeling associated with mixed loyalties. It is too uncomfortable and distressing for the child.” [Paragraphs 169-170] [emphasis added]

Case 23 also provides an example of the intersection of counter stories that redefined the 11 year old child’s acknowledged exposure to the father’s violence. There was a discourse on the child as witness to the father’s entrenched history of ‘autocratic’ and ‘dictatorial’ behaviour where the ‘whole family cowered’ when the father was present. The child’s ‘fear’ of the father was clearly named by a psychiatrist. Vacillating and minimising judicial discourses supported counter stories that included: the child being ‘vulnerable to modelling his mother’s intensity’; the father being ‘consumed with longing to see’ the child and the child having been exposed to a ‘not always violent’ father, and that an older sibling, who was also named as a witness to the father’s violence, was an unreliable witness to domestic violence due to a ‘distorted’ ‘memory’. The risks to the child of being exposed to further violence were minimised by these counter stories. While face to face father-child contact was not ordered by the judge in this case, a future focus on the stock story was evident in the statements about ‘encouraging’ father-child contact when the child ‘is older’ and ‘can cope with his father’s temperament’ and that the child ‘may be persuaded to seek him [father] out’.
Case 23 Psychiatrist’s opinion accepted by the judge

“The tense anxiety of M’s [child] presentation reflects that of his mother...I [psychiatrist] believe that M [child] has been, and remains, vulnerable to modelling his mother’s intensity.” [Paragraph 203] [emphasis added]

Judge’s comments

The question of possible physical harm to M [child] was raised. I [judge] have formed the view that the husband is so consumed with longing to see M [child] that he would be unlikely to harm the child physically in the early days of any contact. [Paragraph 196] [emphasis added]

...perhaps when M [child] becomes older and he feels more able to cope with his father’s temperament, he [child] may be persuaded to seek him [father] out. [Paragraph 198] [emphasis added]

Counter stories on childhood trauma

Another way of illustrating the significant role that counter stories had in downplaying the adverse effects on children from exposure to domestic violence is provided by an analysis of statements made about ‘trauma’ which define what was seen to be damaging and to whom. Despite an emphasis by the judges on ‘scientific’ knowledge, the dominant discourses did not reflect knowledge from the developing field of psychological trauma. This field of knowledge constructs a different way of understanding children’s problems and the effects of what they have been exposed to (Laing 2000b).

In the judgments analysed, none of the children were named as having been diagnosed with the trauma related condition of Post Traumatic Stress Disorder (PTSD) (American Psychiatric Association 2000). Symptoms of this condition include, increased arousal irritability, difficulty concentrating, disorganised or withdrawn behaviour, internalising emotions, depression, anxiety, outbursts of anger, resistance, and “subtle symptoms” that include inappropriate attitudes to the use of violence (Jaffe et al 2003, p.24). Also the social science, medical and judicial descriptions of children’s problems did not reflect an understanding of Perry’s (1994) clinical research on childhood trauma that reveals that such symptoms can indicate impaired neurobiological functioning as a result of a child’s exposure to trauma, including domestic violence.
Chapter 7: The judicial construction of children’s exposure to domestic violence

Table 7.4 provides examples of statements made in the judgments analysed that described a range of children’s problems where symptoms are consistent with some of the criteria for PTSD. The examples are placed under headings that reflect some of the criteria for this disorder.

**Table 7.4 Statements describing children’s problems consistent with PTSD**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td><strong>Aggression and ‘subtle symptoms’ (poor attitude to use of violence)</strong></td>
</tr>
<tr>
<td></td>
<td>Case 33 Child aged 8 years</td>
</tr>
<tr>
<td></td>
<td>S’s [child] teachers report that she has shown some <strong>behavioural difficulties</strong> at school, <strong>with kicking, hitting, teasing and showing no remorse</strong> for her behaviour. [Paragraph 590] [emphasis added]</td>
</tr>
<tr>
<td>2.</td>
<td><strong>Anger and resistance</strong></td>
</tr>
<tr>
<td></td>
<td>Case 32 Child aged 7 years</td>
</tr>
<tr>
<td></td>
<td>Contact handover on the 18th March was worse than on the 24th December with K [child] <strong>screaming at and kicking the father</strong>. [Paragraph 162] [emphasis added]</td>
</tr>
<tr>
<td>3.</td>
<td><strong>Withdrawn</strong></td>
</tr>
<tr>
<td></td>
<td>Case 36 Child aged 6 years</td>
</tr>
<tr>
<td></td>
<td>Ms W [teacher] told me [judge] that U [child] started school in the week commencing the 24th July 2000. Initially he <strong>exhibited anti-social behaviour. He seemed to operate in his own world and he would not interact or cooperate with other children</strong>. [Paragraph 403] [emphasis added]</td>
</tr>
<tr>
<td>4.</td>
<td><strong>Startle response and internalised emotions</strong></td>
</tr>
<tr>
<td></td>
<td>Case 35 Children aged 16, 14 and 8 years</td>
</tr>
<tr>
<td></td>
<td>All three children <strong>looked stunned. They did not move or respond to their father...</strong> N [child] in particular <strong>looked very upset and close to tears</strong>. [Paragraph 131] [emphasis added]</td>
</tr>
<tr>
<td>5.</td>
<td><strong>Helplessness and lack of trust</strong></td>
</tr>
<tr>
<td></td>
<td>Case 37 Child aged 11 years</td>
</tr>
<tr>
<td></td>
<td>The judge’s reference to social worker’s comments</td>
</tr>
<tr>
<td></td>
<td>F [child] is <strong>aware that her relationship with her father is conditional upon her facade of rejecting her mother</strong> however, she finds it increasingly hard to maintain this fabrication. [Paragraph 345] [emphasis added]</td>
</tr>
</tbody>
</table>

Where there was reference to ‘trauma’ in the judgments analysed, the following dominant discourses on ‘trauma’ emerged: an adult focus on the experience of ‘trauma’ (mothers affected – Cases 22, 24, 26, 29, 36 and 37, and fathers affected – Cases 29 and 38);
childhood ‘trauma’ caused by children’s exposure to non-violent issues including a changed parenting arrangement or separation from the mother (Cases 25, 31, 32, 35 and 40); and children’s exposure to parental ‘alienation’ and/or the stress reactions of mothers (Cases 23, 24 and 40).

Exceptions to the dominant construction of ‘trauma’ were found in two judgments (Cases 24 and 40) where in each judgment there was one statement made on childhood ‘trauma’ that referred to the children’s exposure to violence. In Case 24 the child protection counsellor made this connection, but that professional’s opinion was ‘treated with caution’ by the judge. Case 40 provided the only example of a child’s exposure to violence being named and accepted by the judge as giving rise to ‘trauma’. In this case the judge made a number of references to the children’s (aged 11 and 13 years) exposure to ‘22 incidents’ of direct and indirect violence perpetrated by the father. The only named ‘incident’ of violence that was acknowledged by the judge as having ‘caused distress and trauma’ for the adolescent, was of physical violence directed by the father to the 13 year old adolescent.

Case 40

...the husband forcibly removed M’s [child] mobile telephone from him by seizing one of M’s [child] wrists and whilst pinning M [child] to the bed with his own body weight, prised the mobile telephone from M’s [child] grasp. It was an incident which caused distress and trauma to M [child]. [Paragraph 209] [emphasis added]

However, this judgment also contained repeated references to counter stories about childhood ‘trauma’. The psychologists and the judge referred to the children’s ‘trauma’ as related to: any proposed change in the children’s living and schooling arrangements; the ‘implacably hostile’ mother having ‘emotionally abused’ the children by informing them of her suicidal ideation; and the children’s exposure to ‘conflict’ and ‘alienation’ by the mother. The statement on the children having ‘survived’ the ‘trauma experienced over the past four years’, as defined by the counter stories, revealed a strong reliance by the judge on the counter stories to define what the risks were for these children. This minimised the ‘trauma’ in relation to the children’s exposure to the father’s violence.
...the children coping surprisingly well given the trauma experienced over the past four years. Whilst the wife’s emotional abuse of her children has been extreme, they seem to have survived and seem now to be free of the disputation between their parents. [Paragraph 269] [emphasis added]

7.2.4 Categorisation of children exposed to domestic violence

From a poststructuralist perspective an important focus of this discourse analysis was on how the dominant judicial rhetoric reinforced the discursive binaries, such as ‘mature’/‘immature’, ‘normal’/‘abnormal’, that were used by psychologists, psychiatrists and social workers to categorise the children. The categorisations described the children’s behaviours, their problems and their needs by either normalising or problematising the children. Significantly, the discursive binaries did not focus on the creation of a distinct category of difference between children who had been exposed to domestic violence and children who had not been exposed to domestic violence. Normative expectations about the needs of all children were reflected in the numerous statements about the need to modify children’s and the mothers’ behaviours so they could ‘cope’ with father-child contact.

7.2.4.1 Child normalising discourses

As the following sections discuss, an overall finding from the analysis of the judgments was that there was a strong reliance by the judges on the normalising psychological discourse on childhood that redefined children’s exposure to domestic violence. Themes that emerged from the judgments included: young children are not adversely affected by exposure to domestic violence; children’s problems are age related; and that children’s coping abilities can and should be fostered to deal with their ‘difficulties’ in relation to father-child contact.

Young children are immune to domestic violence

The dominant normalising discourse on childhood, which was discussed in Chapter 6, was that children are developing, incompetent beings who have less capacity due to their age and stage of development than adults. This served as a rationalisation to discount the significant negative impact of domestic violence on young children’s development and
wellbeing. The following case example illustrates the presence of a recurring judicial discourse that relied on an out of date assumption about young children not being adversely affected by exposure to domestic violence. In Case 21 the judge acknowledged the father’s ‘propensity to violence’ and on some occasions acknowledged the child’s exposure to the father’s violence. The ‘most serious’ incident was named by the judge as the father covering the mother in lighter fluid and ‘threatened to set it on fire’. The judge dismissed any adverse impact upon the child from exposure to the father’s violence on that occasion as the child ‘was only one year old’ at the time of that ‘incident’. Assumptions about the young child’s lack of memory and lack of ability ‘to appreciate what occurred’ did not take account of the research by Perry (1994), mentioned in Chapter 3, that has shown that infants and young children who have been exposed to violence are likely to develop malignant memories and a fear response that can disregulate their neurobiological systems.

Case 21

…it seems unlikely to me [judge] that he [child] would have been able to appreciate what occurred on this occasion.

It is extremely unlikely that the child, Q [child] has any recollection of that incident as he was only one year old at the time. [Paragraph 139] [emphasis added]

Normalising children’s responses to domestic violence

The reliance on traditional child development theories by psychologists, psychiatrists and social workers provided a ‘scientific’ rationalisation for describing children’s problems as ‘normal’ behaviour and for denying the relevance of children’s exposure to domestic violence. For example, in Case 39 following contact with the father the behaviours of the 2 year old child were named in the judgment as follows: ‘biting’ and ‘pulling the hair’ of the mother and sibling; becoming ‘withdrawn’; ‘difficulty sharing’; ‘difficult to get to eat and sleep’; ‘not play well’; ‘uncooperative’; and ‘unsettled’. These behaviours were depicted by the psychologist as normal age related responses to separation from the mother, due to the child’s ‘dependency’ upon the ‘primary caregiver’. The child’s behaviours were also constructed as being a normal reaction to exposure to ‘conflict’ between the parents. As the following quotation illustrates, this construction supported a judicial discourse on ‘risks’ to the child as being a disruption of the normal age related needs that would affect the child’s
Chapter 7: The judicial construction of children’s exposure to domestic violence

‘emotional and psychological development’. The discourse on ‘risks’ to the child was not linked to the child’s exposure to the father’s ‘abusive’, ‘threatening’ and property damaging behaviours but, instead referred to ‘conflict’ between the parents. The normative discourse on child development supported the stock story on the child’s ‘best interests’ being for the child to have opportunity to ‘develop a good relationship with his father’ that required both parents to ‘improve their attitude towards each other’.

Case 39

Y [child] is disturbed and his behaviour regresses after contact. The separation from his mother appears to have a significant effect upon him. This is consistent with his strong attachment and dependence on his mother. At Y’s [child] age and stage of development his relationship with his primary caregiver is important. Risks should not be taken which might be detrimental to Y's emotional and psychological development at this early age. [Paragraph 184] [emphasis added]

Children are resilient beings

Normative inferences about children’s age related ‘coping’ capacity, the inherent resilience in individual children and the need to foster the development of children’s resilience were part of the discourses relating to children’s exposure to domestic violence that emerged from the judgments analysed. Hughes, Graham-Bermann and Gruber (2002) have explored the issue of resilience and its relevance to children exposed to domestic violence. They have raised concerns about relying on assumptions about the value of children’s resilience in situations of domestic violence. Their concerns include: that a professional’s reliance on resilience as a goal, a process or a characteristic of a child victim of domestic violence is based on generalised knowledge obtained from research into other populations of children who have been exposed to different high risk and stressful environments; and that resilient children do experience distress and questions need to be asked about whether or not children’s adaptation to exposure to domestic violence is a positive outcome, or whether this comes at a cost to the child.

Fostering child resilience

In the majority of judgments in cases where the children were subjected to counselling or therapy (Cases 22, 24, 26, 27, 28, 30, 31, 35, 36, 37 and 40) an aim of the process was to foster resilience in the children by helping them learn to ‘cope’ or ‘deal with’ ‘the
ramifications’ of father-child contact. These aims did not reflect the concerns identified by Hughes et al (2002) stated above. For example, in Case 28 the children, aged 7 and 11 years, had been exposed to their father’s ongoing violence that included ‘threats he had made to kill’ the mother and the children. The 11 year old child’s ‘resilience’ was named as one of the reasons for the psychologist concluding that the child had ‘not been subjected to abuse’. The psychologist recommended ‘an increase in contact’ between the children and the father and that the children attend ‘therapy to assist them to cope’ with ‘the parental conflict’ and to improve the father-child relationships.

<table>
<thead>
<tr>
<th>Case 28 Psychologist’s recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>An interim increase in contact and further evaluation of the children’s perceptions and attitudes with a recommendation that the children attend therapy to assist them to cope with and understand the parental conflict. Ms U [psychologist] believed that this might assist with any problems in the parent/child relationship as reported by the wife. [Paragraph 114] [emphasis added]</td>
</tr>
</tbody>
</table>

As reflected in the above case example, a commonly adopted process for fostering resilience in children was to increase or supervise the father-child contact arrangements. For example, in Case 32 the father had a history of alcohol abuse and had pleaded guilty to assaulting the mother. The 7 year old child’s behaviours at contact handover of ‘screaming and kicking’ and ‘refusing to go with the father’ were portrayed by the psychologist as ‘putting on a show’ to please the mother. The following quotation refers to the psychologist’s recommendation, made at one stage in proceedings, that the judge increase father-child contact as a way of achieving the stated goal of ‘fostering emotional resilience’ in the child.

<table>
<thead>
<tr>
<th>Case 32 Psychologist’s opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Another way of reducing emotional tension is to substantially increase exposure to the anxiety provoking stimulus with the consequence that the person becomes desensitised to the anxiety. I [psychologist] would favour this latter approach. I [psychologist] would suggest therefore that K’s [child] contact with his father be substantially increased...[Paragraph 97] [emphasis added]</td>
</tr>
</tbody>
</table>

In this case, as a result of the judge having accepted the opinion of the psychologist for increased father-child contact to achieve the goal of fostering resilience in the child, the child experienced ‘high levels of distress’. According to Hughes et al (2002) an essential
element in fostering resilience is the presence of a positive emotional atmosphere that enables emotional growth in the child. This would be particularly hard to achieve in cases where stock stories supported by counter stories mask the central issue of the presence of violent relationships.

**Normalising expectations about what children should cope with**

Little is known about why some children appear to be able to cope with exposure to violence while others show significant problems (Laing 2000b). Untested assumptions are often made that a ‘resilient’ child will be able to sustain resilience at different stages in their lives and under different circumstances (Hughes et al 2002). In the judgments analysed there were questionable normative assumptions about what children should be capable of and what children should be encouraged to deal with. For example, in Case 37 the emphasis on child resilience over-rode concerns about the adverse effects on the 11 year old child from exposure to many episodes of the father’s ‘violence’ which were described in detail in the judgment. These included stalking, home invasion, physical and verbal abuse, forced removal of the child from the mother’s care, ‘appalling conduct’, ‘harassment and obsessive behaviour’ and ‘interrogation’ of the child. The adverse affects on the child were acknowledged by the judge as having started ‘from an early age’ and included ‘nightmares’, ‘fear’, ‘terror’ and ‘distress’. These reactions were understood by the social worker, and accepted by the judge, as the child ‘reacting to her father’s behaviour’ for which, at one stage in proceedings the child required ‘medication and counseling’. Following a modification of the father-child contact arrangement, a competing discourse emerged on child resilience. This was used by the social worker to portray the child as ‘happy and well-adjusted’. The judge described the child as ‘settling down’ and having developed ‘the ability to cope’ with the ‘stress of her father’s demands’ and with the father’s ‘inappropriate attitude and behaviour’. As the following quotation illustrates the judge acknowledged that the father posed an ongoing risk to the child.
The ‘ever present danger’ that the child might not cope was stated by the judge. However, this was over-ridden by a statement made by the judge about ordering a ‘continuation’ of father-child contact as the child was ‘settling down’. The perception of the resilient, ‘settling down’ child minimised concern about the ongoing risks to the child, thereby normalising what the child was expected to cope with.

**7.2.4.2 Discourse on the ‘child as a problem’**

In six judgments (Cases 22, 23, 24, 27, 32 and 40) statements by psychologists, psychiatrists and judges constructed children’s behaviours as being ‘bad’ or non-compliant. These children were described as being overly reactive or manipulative and with too much power. Examples of this discursive construction are provided in Chapter 6 in the discussion on children’s ‘Catch 22’ situations. The ‘child as a problem’ discourse classified the child victims of domestic violence as abnormal children. This reflects the media’s portrayal of children who have been exposed to domestic violence or child abuse where discursive binaries classify the children according to the qualities of cuteness, novelty and vulnerability, or as out of control, evil beings who are a burden and an expense to society (Goddard & Saunders 2001).
The ‘child as a problem’ discourse did not reflect any awareness that children exposed to domestic violence are “war torn children” who commonly have adjustment difficulties including an inability to regulate their emotions, behaviours and mental activity (Jaffe, Lemon & Poisson 2003, p.49). The ‘child as a problem’ discourse also did not reflect understandings that have emerged from contemporary child inclusive research that children exposed to domestic violence commonly have a complex range of negative feelings towards their violent fathers including anger, shame and lack of respect, and can hold clear views on not wanting their father’s presence in their lives (McGee 2000; Mullender et al 2002). The ‘child as a problem’ discourse reflected the opposite to Johnston’s (2004, p.227) view that it is a “healthy response when children…distance themselves from the corrosive effects of a parent who is unreliable, consistently inadequate, or abusive”.

Table 7.5 provides examples of statements made by the judges to describe the non-compliant children and their behaviours. Included are references made by the judges to the opinions of psychologists and psychiatrists that were accepted by the judges. At times emotive language was used to indicate disapproval of the children’s ‘difficult’ behaviours. Such misconstructions of children mask their victimisation.

### Table 7.5 Judges’ statements that define children as the problem

<table>
<thead>
<tr>
<th>Non-compliant behaviours</th>
<th>Acting out behaviours</th>
<th>Atypical age related behaviours</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘defiant’</td>
<td>‘bad tempered’</td>
<td>‘unusual response for a child’</td>
</tr>
<tr>
<td>‘stubborn’</td>
<td>‘unruly’</td>
<td>‘fanciful’</td>
</tr>
<tr>
<td>‘difficult’</td>
<td>‘misconduct’</td>
<td>‘irresponsible’</td>
</tr>
<tr>
<td>‘uncontrollable’</td>
<td>‘hostile’</td>
<td>‘attention seeking’</td>
</tr>
<tr>
<td>‘disrespectful’</td>
<td>‘considerable hostility’</td>
<td>‘self-centered’</td>
</tr>
<tr>
<td>‘resistant’</td>
<td>‘bitterness’</td>
<td>‘sexualised’</td>
</tr>
<tr>
<td>‘refused to say anything’</td>
<td>‘putting on a show’</td>
<td>‘irresponsible school behaviour’</td>
</tr>
<tr>
<td>‘refused to physically budge’</td>
<td>‘glared’</td>
<td>‘enormous power and control’</td>
</tr>
<tr>
<td>‘taciturnity’</td>
<td>‘grizzle’</td>
<td></td>
</tr>
<tr>
<td>‘bad behaviour’</td>
<td>‘petulance’</td>
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<tr>
<td></td>
<td>‘rudeness’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘pursed lips’</td>
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<td></td>
<td>‘aggressive’</td>
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<tr>
<td></td>
<td>‘confronted’</td>
<td></td>
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<tr>
<td></td>
<td>‘troublesome’</td>
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</tbody>
</table>

### 7.2.4.3 Child pathologising discourse

In the judgments analysed, where child victims of domestic violence were brought into the realm of clinical psychology and psychiatry they were subjected to classifications within the range of normal/pathological. This typified Foucault’s (1965) observations of how
powerful the belief in the ‘truth’ of traditional medicine and ‘science’ can be in objectifying and classifying people. In five cases (Cases 26, 30, 35, 37 and 40) a child pathologising discourse constructed children, with or without a ‘definitive diagnosis’, as having a ‘condition’ of being mentally unwell, emotionally fragile, psychologically vulnerable or having an ‘adjustment’ difficulty. According to Law (1999), such constructions categorise, compartmentalise and establish identities of subjects through the language of deficit.

Many of the behaviours and symptoms of the children referred to in Table 7.2, that were described in the judgments analysed such as, experiencing ‘depression’, ‘problems sleeping’ and ‘impulsive moods’, were treated by medication, counselling or therapy and were not named in the judgments as responses to the children’s trauma from exposure to violence. The child pathologising categorisation reframed children’s problems as a ‘condition’ or ‘disorder’ and distanced the issue of children’s experiences of domestic violence from their symptoms. For example, in Case 26 the history of the father’s drug and alcohol abuse, ‘aggression and violence’, that included the father’s conviction for ‘breaches of the restraining order and property damage’ and a criminal conviction for assault with a weapon upon a non-family member, were referred to by the judge. There were allegations against the father of physical and sexual abuse of the 7 and 9 year old children. These allegations were deemed by the judge to be invalid due to a perceived flaw in the child abuse investigatory process. The opinion of a psychologist, accepted by the judge, defined the 9 year old child as being ‘sad’, ‘withdrawn’, ‘tearful’ and ‘anxious’. The psychiatrist, who was providing treatment for the child, made a reference to the child’s ‘memories’ of the ‘father’s behaviour’ and ‘fear pertaining to contact visits’ with the father. However, the medical diagnosis that was accepted by the judge of the child’s ‘adjustment disorder and depression’ pathologised the child, who was constructed as needing ‘medication’ and ‘monitoring’ by the psychiatrist for ‘another 2 years or so’. In the judgment the child was never named as a victim of domestic violence.

Case 26

Dr C [psychiatrist] formed the opinion that K [child] suffered “an adjustment reaction with impulsive moods”. He prescribed medication for mood control and offered ongoing support. [Paragraph 341] [emphasis added]

Dr C [psychiatrist] expressed the view that K’s [child] condition required continuation of
antidepressant medication and he would need to be monitored every 2 or 3 months for approximately another 2 years or so. [Paragraph 347] [emphasis added]

A recurring and dominant theme in the judgments analysed was that the judges privileged the ‘scientific’ discourse of psychology, psychiatry and medicine that was provided by professionals whom the judges described as being ‘experienced’ and ‘well qualified’. This supported a patriarchal ideology where child victims of domestic violence with problems were constructed as disabled, incompetent or difficult ‘others’ who should be passive and receptive to adult imposed management. These statements revealed what Law (1999) has described as the embedded cultural and social practice of disabling children whose lived realities are mediated through these discursive constructions.

7.2.4.4 Children’s victimisation – an ambiguous discursive terrain

An ambiguous discursive terrain emerged from each of the nine judgments where the judges acknowledged the adverse effects on children from exposure to violence. A mixture of the range of discourses referred to in the prior sections of this chapter including counter stories, minimising discourses, child normalising or child problematising/pathologising discourses were present in these judgments. In the majority of these judgments the interplay between the different discourses created a vacillating picture of how the judges constructed the significance of children’s exposure to domestic violence and the effects on the children’s wellbeing. Significantly, this complex discursive field was present in the small number of judgments (Cases 22, 23, 35 and 36) where statements were made, or descriptions indicated the judge’s awareness of the enduring negative effect on children from their exposure to domestic violence. An example of a description that indicated recognition by the judge of a child’s enduring anxiety is illustrated by the following statement about an 11 year old child’s fear of the ‘father’s car approaching’.

Case 23

...when he [child] heard his father’s car approaching, M [child] would run around the house locking the doors. I [judge] find that at times he would ask his mother on a number of occasions to “take him away and find somewhere O [father] couldn’t find them.” [Paragraph 127] [emphasis added]
However, a complex and ambiguous discursive terrain was present in these judgments. For example, in Case 22 minimising discourses, a counter story, child normalising and child problematising discourses were used by the judge. These competed with discourses used by a psychiatrist who acknowledged the enduring serious effects upon the children (aged 7, 10 and 12 years) from their exposure to domestic violence, and accepted the children as competent beings with ‘emotional and cognitive capacity’ to reliably ‘express their own views’. The psychiatrist named the children’s ‘genuine fear’ and ‘distress’ and their ongoing ‘memories from the past’ of their exposure to the father’s violence. The judge also made a number of references to ‘incidents’ that indicated the entrenched pattern of the father’s ‘aggression and violence’ and the ‘fear’ of the children ‘that still already exists’. While there was a focus on the children’s exposure to the father’s violence there were also minimising discourses within the judgment that referred to the father’s ‘violence’ as ‘annoyance’ or ‘unfortunate incidents’ that occurred ‘only on some occasions’. Another minimising discourse used by the judge was that the impact of the father’s violence ‘at times distressed the children’. A discourse on child incompetence used by the judge constructed the children as having ‘some of their own memories’ of the father’s violence and a discourse on ‘the child as a problem’ defined the 12 year old child’s behaviour as ‘misconduct’, ‘bad’, and ‘irresponsible’. A counter story used by the judge and the psychiatrist on the children’s reactions to domestic violence placed a strong focus on the mother’s ‘fear’ of the father and her ‘enlarged fear’ for the children. The children were portrayed as being open to the influence of the mother by being ‘told’ ‘information’ about the father’s violence and from being subject to the ‘contagious emotional effect’ of the mother’s reactions. The following quotations illustrate a complex interplay of a range of discourses that reduced the focus on ‘risks’ to the children from exposure to their father’s ‘abusive force’ and focused attention on ‘their emotional needs’ that would ‘probably be disadvantaged’ by having contact with their father.

**Case 22**

*His [father] annoyance sometimes resulted in his unsuitable physical and verbal discipline of the children. This conduct occurred only on some occasions. In between such incidents, at home and apparently at all times when socially in the presence of other persons, the husband did not exhibit such conduct to the children...In private at home, however, the "short fuse" as it were to his temper control brought about scenes at times that distressed the children as well as the wife. [Paragraph 88] [emphasis added]*

*The children have some of their own memories of such unfortunate incidents, quite apart from*
what the wife may have told them or said in their presence. [Paragraph 215] [emphasis added]

Their [children] emotional needs from the totality of evidence would probably be disadvantaged by personal meetings or telephone contact with the husband. [Paragraph 238] [emphasis added]

7.2.4.5 A contradictory discourse on children’s wellbeing

A discourse on children’s improved wellbeing emerged from each of the seven judgments where, prior to the final stage of hearing before the Court, the children’s face-to-face contact with their violent fathers had stopped (Cases 22, 23, 24, 26, 35 and 40), or where contact was modified to be consistent with the child’s wishes (Case 37). The following section illustrates that the cessation of children’s contact with their violent fathers was clearly associated with their improved wellbeing.

In four judgments (Cases 24, 26, 37 and 40) the changes to the contact arrangements were made during the course of the current proceedings before the Court. In each of these cases, prior to the cessation or reduction of father-child contact there were statements made by psychologists, psychiatrists or social workers about a deterioration in the children’s ‘psychological’ and/or ‘emotional’ ‘functioning’ that included ‘increased emotional disturbance’, ‘anxiety related behaviours’ and/or the child’s ‘need for therapy’. In three of these judgments (Cases 26, 37 and 40) the children’s deterioration in wellbeing was understood as being connected to the contact arrangements that had been ‘encouraged’ and imposed on the children. In Case 24 a discourse on deterioration in the children’s wellbeing was associated directly with a discourse on deterioration in the mother’s wellbeing in relation to father-child contact. In two judgments (Cases 22 and 23) an injunction preventing father-child contact had previously been made and in Case 35 there was no prior order for contact made in prior proceedings. In Case 35, despite the children’s contact with the violent fathers not having taken place for a considerable period, during the observed father-child interaction that was undertaken as part of a report assessment for the Court, the social worker reported that this interaction left the children ‘in a state of shock’.

In all seven judgments there was a discourse on the children as being ‘unchangeable’ in their wishes for no contact and as being consistent about the issues that were adversely affecting them. In each of these judgments, following the cessation of or change in contact arrangements, the psychologists, psychiatrists and social workers used psychological discourse to inform the Court of a range of improvements in the wellbeing of the children.
The children were named as ‘coping’ better and leading more ‘normal’ lives. The discourse on children’s improved wellbeing was also present in the two judgments (Cases 26 and 35) where the children were assessed as needing a continuation of medication and/or counselling. The following case provides an example of the discourse on children’s improved wellbeing that was associated with the cessation of father-child contact. In Case 40 prior to the cessation of father-child contact, the 13 year old adolescent was described by the psychologists as ‘guarded’, ‘serious’, ‘tearful’ and ‘genuinely frightened’ of the father, and that the adolescent’s ‘general demeanour had deteriorated’ over time ‘to a very alarming extent’. Once father-child contact ceased in accordance with the adolescent’s wishes, the adolescent was described by a psychologist as being ‘less angry’, ‘outgoing’, ‘friendly’, ‘relaxed’, ‘communicative’ and ‘considerably happier’.

Case 40 Psychologist’s opinion accepted by the judge

M [child]…rating himself as feeling happy, about 9½/10 (where 10/10 = very happy and 0/10 = not happy) mostly every day. M [child] did not experience any problems in his life at this time…[Paragraphs 650-653] [emphasis added]

The emergence of the discourse on children’s improved wellbeing following the cessation of contact with violent fathers allowed a new discourse to emerge. This discourse was on ‘risks’ to the children’s ‘emotional’, ‘psychological’ or ‘mental’ wellbeing if contact were to be reinstated. The case described above (Case 40) provides an example of this.

Case 40 Psychologist’s statement

I [psychologist] continue to believe that enforcing any contact at this time is likely to be detrimental to Ms’ [child] mental health. [Paragraph 257] [emphasis added]

This discourse on ‘risks’ to the children’s wellbeing was used by psychologists, psychiatrists and social workers. It supported a protectionist discourse used by the judges to define contact as ‘not beneficial’, or ‘could do harm’ to the children. This discourse was used to justify making orders for no father-child contact. Case 35 provides an example of the judge’s statement on why no contact between the father and the three children, aged 16, 14 and 8 years, was ordered.
Case 35

*It* [contact] *is not likely to promote a healthy psychological development for any of the children and there is a risk of substantial psychological harm to all three children.* [Paragraph 210] [emphasis added]

Table 7.6 provides examples of statements that in combination form a discourse on children’s improved wellbeing. These statements were reported to the Court by psychologists, psychiatrists or social workers and accepted by the judges who referred to or quoted their statements. The stated improvements of the children occurred following the cessation or modification of the children’s contact with the violent fathers, as consistent with the wishes of the children. In none of the judgments analysed was the mother-child contact stopped. While a comprehensive range of improvements in the children’s wellbeing was referred to in the judgments there was an absence of information about any changes in children’s sexualised behaviours that were described in two of these judgments (Cases 24 and 26). The status of these symptoms, therefore, remains unknown.

**Table 7.6** Statements about children’s improved wellbeing following cessation/modification of contact with violent fathers as consistent with children’s wishes

<table>
<thead>
<tr>
<th>Social and academic development</th>
<th>Emotional, psychological and behavioural responses</th>
<th>‘Subtle’/normalised behaviours</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘improved social/emotional and behavioural functioning’</td>
<td>‘relaxed’</td>
<td>‘more settled’</td>
</tr>
<tr>
<td>‘settled at school and with their friends’</td>
<td>‘markedly less anxious’</td>
<td>‘peace of mind’</td>
</tr>
<tr>
<td>‘accepted by peers’</td>
<td>‘more able to express their own opinions’</td>
<td>‘more able to state feelings’</td>
</tr>
<tr>
<td>‘excellent social interaction’</td>
<td>‘agitation and apprehension has reduced’</td>
<td>‘fairly self assured’</td>
</tr>
<tr>
<td>‘outstanding school work’</td>
<td>‘stable’</td>
<td>‘developed coping strategies’</td>
</tr>
<tr>
<td>‘achieving well academically’</td>
<td>‘more secure’</td>
<td>‘mature’</td>
</tr>
<tr>
<td>‘did “brilliantly” at school’</td>
<td>‘considerably happier’</td>
<td>‘functioning normally’</td>
</tr>
<tr>
<td>‘communicative’</td>
<td>‘cheerful’</td>
<td>‘managing life’</td>
</tr>
<tr>
<td>‘reported positively on schooling’</td>
<td>‘happy’</td>
<td>‘skilled at verbalising ideas and feelings’</td>
</tr>
<tr>
<td>‘no longer receiving regular detentions at school’</td>
<td>‘substantially improved emotional health and general wellbeing’</td>
<td>‘no unsettled periods’ ‘maintained his equilibrium’</td>
</tr>
<tr>
<td></td>
<td>‘improvement of depressive condition’</td>
<td>‘freed up to move forward’</td>
</tr>
<tr>
<td></td>
<td>‘no longer requiring medication and counselling’</td>
<td>‘happy at home “all of the time”’</td>
</tr>
<tr>
<td></td>
<td>‘less angry’</td>
<td>‘no worries’</td>
</tr>
<tr>
<td></td>
<td>‘friendly’</td>
<td>‘school work, sleep, appetite, mood, and family interaction…progression into a normal state’</td>
</tr>
<tr>
<td></td>
<td>‘co-operative’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘appreciative’</td>
<td></td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Social and academic development</th>
<th>Emotional, psychological and behavioural responses</th>
<th>‘Subtle’/normalised behaviours</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>‘feels free of intrusion’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘feeling safe’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘protected’</td>
<td></td>
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<tr>
<td></td>
<td>‘outgoing’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘nightmares have now settled’</td>
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</table>

The discourse on children’s improved wellbeing following cessation of contact with violent fathers contradicted the stock story on children’s wellbeing being dependent upon ongoing contact with both parents, in particular their need for father presence. This finding is consistent with results from a small number of studies that include Mertin’s (1995) Australian research, and overseas research conducted by Church (1984) and Radford and Sayer (1999), that show that children’s recovery from their exposure to domestic violence is enhanced when children do not have contact with their violent fathers.

The discourse on children’s improved wellbeing also contradicted the dominant normative discourse on childhood incompetence. The changed contact arrangements that were beneficial to the children’s wellbeing were consistent with the stated wishes of the children. These findings support the notion that children are reliable and competent and able to present worthwhile perspectives about their own lived experiences and their own best interests. These findings indicate the importance of including children and respecting their views in decisions that directly affect them.

### 7.3 Chapter summary

This chapter provided a statistical snapshot that shows the significance of the issue of domestic violence in contested contact cases that reach the stage of final hearing in the Adelaide registry. The prime focus of this chapter was on the qualitative findings on how the judges in the judgments analysed constructed the issue of children’s exposure to domestic violence. Tables provide a summary of some significant statements made by the judges. These statements were often informed by the accepted opinions of ‘expert’ psychologists, psychiatrists and social workers.

The findings identified the dominant and competing discourses used by the judges that largely relied on normalising assumptions in the constructions of what children were exposed to, what constituted harm to the children, and what effects exposure to domestic violence had on the children. The analysis demonstrated how judicial reinforcement of the
normalising/problematising discursive binary used by psychologists, psychiatrists and social workers constructed children, their behaviours and problems without reference to the children’s exposure to domestic violence. The construction of the co-occurrence of domestic violence and child abuse as primarily separate issues and the judicial privileging of ‘scientific’ discourse used by ‘experienced’ professionals to dismiss allegations of child abuse were discussed.

The overall findings revealed a complex, ambiguous discursive terrain. Vacillating, minimising and child normalising/problematising discourses and a range counter stories intersected to redefine the victimisation of children. In some judgments the children were named as witnesses to an ‘incident’ of what was named, or described as domestic ‘violence’ and in some cases an adverse affect on the child was recognised. However, the dominant discourses intersected to support the marginalisation or denial of domestic violence as the central issue affecting the children’s wellbeing. A pro father-child contact culture prevailed where mother and child victims of violence were expected cooperate and to cope. In the judgments where there was a cessation of father-child contact there was recognition of marked improvement in the children’s wellbeing. In these judgments a contradictory protectionist discourse then emerged and named the potential harm to children from reinstatement of contact with their violent fathers.

The overall findings show that in most of the judgments analysed, child victims of domestic violence were subject to dominant patriarchal discourses that failed to recognise the significance of their victimisation.
Chapter 8: The role of gendered discourse in the judicial construction of the post-separation family

8.0 Introduction

This chapter addresses the findings on the role of gendered discourse in the judicial construction of children’s best interests in the qualitative analysis of twenty post Reform Act judgments. The findings show that judges relied heavily on an acceptance of traditional gendered family roles and the construction of ‘new fatherhood’ that supported the structure of an idealised post-separation family and the patriarchal regulation of family relationships.

8.1 Patriarchy and the post-separation family

Family dissolution, in particular where there is dispute over parenting arrangements, provides a site within which roles, rights and responsibilities of mothers and fathers compete for prominence. Despite there being a lack of knowledge about what actually happens during contact between fathers and children and which factors influence positive and negative outcomes and levels of care in the general population (Sanson 2004; Smyth 2004b), let alone in cases of domestic violence (Harne 2004), perceptions of children’s needs have evolved within the context of the ‘bi-nuclear’ family. The concept of the ‘bi-nuclear family’ defines children as needing the steadying influence of an ongoing relationship with their fathers and this has become “the central mechanism for the legal regulation of family life” (Neale & Smart 1999, p.40). From a feminist perspective, this has given increased credibility to beliefs promoted by the Fathers’ Rights movements that steadfastly reinforce masculinist values about the roles of mothers in supporting the ‘rights’ of fathers to have ongoing relationships with their children (Smart & Sevenhuijsen 1989; Kaye & Tolmie 1998).

These beliefs were reflected in the findings of this study. A dominant assumption based on generalised research findings was that children want and need ongoing relationships with both parents, and in particular their fathers. Paternal disengagement was seen as the fault of ‘implacably hostile’ mothers and as inherently detrimental to all children’s adjustment (Braver & O’Connell 1998; Harne 2004). These assumptions provided a strong foundation for the discursive construction of the best interests of the children. This contemporary
reconstruction of patriarchy allows fathers to exercise their rights simply because of their paternity rather than having to demonstrate a commitment to parenting their children while mothers continue “to carry the practical and psychological burdens of caring and emotionality in the family” (Sclater & Piper 1999, p.19). This was evident in the judgments analysed where mothers were required to overcome their resistance to father-child contact. Justification for ordering father-child contact did not have to be addressed, but a departure from the pro-contact presumption did require justification by the judges.

...the creation of what amounts to a presumption in favour of granting it, in effect largely removes the question of contact from the arena of contested fact into the realm of legal principle.

Kaganas (1999, p.104)

The following quotations provide an example of the normative approach used by the judges in the judgments analysed in relation to the issue of contact that was supported by psychological discourse.

**Case 26**

*I [judge] have given specific consideration to the provisions of Section 60B of the Family Law Act which clearly direct the Court to encourage the continuing relationship between parent and child. This policy is, nonetheless, subject to the proviso that the principles apply “except when it is or would be contrary to a child’s best interest”.[Page 30] [emphasis added]*

*[Psychologist] made it clear that in normal circumstances, it is not desirable for there to be loss of the relationship between father and child.* [Paragraph 339] [emphasis added]

Feminists call for vigilance in deconstructing the new model of family life where emerging cultural redefinitions of fathers as equal partners in childrearing aligned with the Reform Act’s principle of ongoing shared parental responsibility, contribute to the acceptance of unspecified assumptions about fathering responsibilities (Williams 1998). The idealised construct of ‘new fatherhood’ has gained prominence and has become a new expression of the hierarchical gendered order of patriarchy (Holtrust, Sevenhuijsen & Verbraken 1989; Sclater & Piper 1999). When one considers this in relation to the forms of hegemonic masculinity in Australian society where violence underpins male authority and power (Bagshaw 2004) this ideology becomes a matter of concern. This is particularly so in cases of domestic violence in separated families where there is uncritical acceptance of the ongoing role of fathers being distanced from assuming responsibilities (Hester & Radford...
Chapter 8: The role of gendered discourse in the judicial construction of the post-separation family

1996; Featherstone & Trinder 1997; Neale & Smart 1999; Rendell, Rathus & Lynch 2000; Jaffe, Lemon & Poisson 2003). From a feminist perspective, gender, power and patriarchy are integral to understanding the operation and perpetuation of domestic violence within society. Patriarchal patterns of family relationships in domestic violence situations in Australia, where males are placed in powerful positions over females and children (Commonwealth of Australia 2001), are reinforced and legitimised by social and legal institutions that tolerate gendered violence (Dobash & Dobash 1990, 1998).

8.2 Dominant discourses on fathers

8.2.1 Discourse on father presence as essential to children’s welfare

Separation and divorce provide a legal forum for the expression of male hegemony (Collier 1999). The dominant discourses on fathers in the judgments analysed reflected the ‘traditional’ construction of fathers as the providers of external active support that involves educational input, discipline and financial support of the children (Collier 1999), as well as the construction of ‘new fatherhood’. The popular and evolving reconstruction of the image of fathers can be seen to be a result of the ‘crisis in masculinity’ that has prompted a redefinition of who men are (Giddens 1992). ‘New fatherhood’ defines fathers as more than disengaged parents and economic providers and as being more involved in physical and emotional child care and in family life (Roche 1999). This reconstruction as portrayed in the media supports the importance of father presence for children’s development into adulthood (Williams 1998) and for addressing the generalised welfare concerns about losses and limitations in children’s lives following family breakdown (Neale & Smart 1999).

In this study the coalescing of the normalising ‘traditional’ constructions of fathers with the construction of ‘new fatherhood’ created a strong discursive domain that defined fathers as ‘good’ and supported concerns expressed by the judges about father absence. Despite the notion of ‘new fatherhood’ involving the surrendering of patriarchal dominance these normative gendered constructions reconstitute a gendered hierarchy (Lupton & Barclay 1997). This powerfully positioned fathers in the family hierarchy post-separation. The essentialising discourse of ‘father presence’, that is reflected in recent social policy changes and legal decisions on children’s wellbeing (Collier 1995), was found to have been a dominant rationale used by the judges in determining the best interests of the child. This discourse was also reflected in the stated opinions of
psychologists and psychiatrists. Judges’ heavy reliance on this generalised rationale indicated its acceptance as a given ‘truth’. A discourse on fathers’ loss of role in the post-separation family and discrimination against fathers by mothers in post-separation parenting arrangements was evident in the judgments analysed. As Kaye, Stubbs and Tolmie (2003) have found, these constructions add to the proliferation of mother-blaming in relation to post-separation parenting disputes. The dominant discourse on fatherhood used by the judges often over-rote or masked the issue of questionable fathering practices of violent men and the consideration of the effects on children from exposure to their father’s violence.

While the Reform Act refers to the gender neutral term of ‘parenting’, in current practices a gender specific notion exists that there is something special about father involvement with a child and, therefore, the father should have an ongoing presence in the child’s life (Collier 1999). Within family law in Australian and the United Kingdom presumptions prevail about fathers’ ‘special’ contributions to children’s social, emotional, and cognitive development (Kaganas & Piper 1999; Williams, Boggess & Carter 2002; Harne 2004). This was reflected in the language used by judges to describe the father-child relationships. These were described in powerful terms as being ‘unique’ and ‘critical’ for the children’s ‘future development’, but without specification. For example, in Case 26 the father had a history of convictions for violence to the mother and other adults and for property damage, and there were allegations of child physical and sexual abuse. Despite the history of violence there were a number of statements in the judgment that defined the children, aged 9 and 7 years, as needing father presence for their ‘future development’. This discourse discounted the 9 year old child’s ‘consistently stated fear’ of the father and the child’s expressed wish for no contact with the father. The ‘benefit’ to the child from the father-child relationship was not defined.

**Case 26**

_I [judge] find that the father has been a significant person in K’s [child] life and that there are aspects of his relationship with his father which would be of benefit to K [child] and K’s [child] future development._ [Paragraph 297] [emphasis added]
8.2.1.1 Discourse on harm to children from father absence

In the judgments analysed the dominant and normative assumptions underpinning the discourse on the importance of father presence for children’s development supported a discourse on harm to the children from father absence. In all of the twenty judgments analysed the judges expressed concerns about the effects of loss of the fathers from the children’s lives. This discourse made transparent how the reliance on generalised normative assumptions simplified the constructions of the ‘best interests’ of the child.

A psychological protectionist discourse, used by psychologists and psychiatrists to inform judges, supported notions of ‘long term’ ‘risk’ or ‘harm’ from the loss of ‘input into children’s development’ from being ‘deprived of’ father-child contact. In the majority of judgments, this presumption overshadowed the construction of children as victims of their father’s violence. This was reflected in intersecting discourses on the positive attributes of fathers and the strong recurring imperatives for mothers and children to overcome their ‘hostility’ or ‘resistance’ and to ‘facilitate’ and ‘co-operate’ with father-child contact.

As the following quotation illustrates, even in cases where father-child contact was not ordered, the generalised presumed ‘harm’ to children from father absence created a strong discursive barrier that had to be successfully overcome to protect children from contact with their violent fathers. For example, in Case 24 the father had been ‘verbally abusive’ and had ‘hit’ the children, aged 2 and 4 years, ‘harder than he should’ and with ‘excessive use of force’. There were allegations against the father of physical and sexual assault and of child sexual abuse that were accepted by the child protection authorities. Despite the ‘anxiety related behaviours’ displayed by the children following contact with the father, the psychologist strongly supported the notion that the children needed contact with their father ‘to assist resolution of emotional issues arising out of the abuse’. Contact was denied to the father because of the mother’s ‘extreme emotional response’ and the failure of the mother’s involvement in ‘therapy’ to modify this reaction. A discourse on possible ‘harm’ to the children from ‘being deprived’ of their father was maintained by the judge throughout the judgment.
Table 8.1 provides examples of statements made by judges, often with reference to the opinions of psychologists and psychiatrists, that supported the common legal presumption that children benefit from having an ongoing relationship with their natural fathers and that there are risks to children from father absence.

**Table 8.1** Statements on children’s need for father presence

<table>
<thead>
<tr>
<th>Benefits to the child from father presence</th>
<th>Risks to the child from father absence</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘future development’</td>
<td>‘may well sustain some harm’</td>
</tr>
<tr>
<td>‘a good provider for the children’</td>
<td>‘not desirable for loss of the relationship’</td>
</tr>
<tr>
<td>‘provide for [child’s] practical day-to-day needs’</td>
<td>‘risks to long term emotional functioning’</td>
</tr>
<tr>
<td>‘critical and essential for future wellbeing’</td>
<td>‘predisposing [child] to behavioural problems’</td>
</tr>
<tr>
<td>‘will benefit’</td>
<td>‘not desirable for loss of relationship’</td>
</tr>
<tr>
<td>‘loving relationship’</td>
<td>‘welfare compromised’</td>
</tr>
<tr>
<td>‘for the greater good’</td>
<td>‘not possible to predict the long term consequences’</td>
</tr>
<tr>
<td>‘nothing more critical’</td>
<td>‘will not assist [child] to become a useful, respected member of society’</td>
</tr>
<tr>
<td>[child] ‘missing him’, ‘wanting him’</td>
<td>‘serious long term risk to the emotional health’</td>
</tr>
<tr>
<td>‘foster the good relationship’</td>
<td>‘increase in anxiety’</td>
</tr>
<tr>
<td>‘emotional recovery’</td>
<td>‘reactions and functioning in the short term’</td>
</tr>
<tr>
<td>‘to form a good, strong relationship’</td>
<td>‘deprived of worthwhile input into [children’s] development’</td>
</tr>
<tr>
<td>‘in need of a father figure’</td>
<td>‘expense of emotional health’</td>
</tr>
<tr>
<td>‘even if allegations of abuse are true …opportunity to experience a positive connection’</td>
<td>‘jeopardise [child’s] future’</td>
</tr>
<tr>
<td>‘happy bonding’</td>
<td>‘carry the presently expressed hatred and pain of that relationship with them into their adolescent and adult years’</td>
</tr>
<tr>
<td>‘mutually beneficial relationship’</td>
<td></td>
</tr>
<tr>
<td>‘adequate discipline and suitable education’</td>
<td></td>
</tr>
<tr>
<td>‘loving relationship’</td>
<td></td>
</tr>
<tr>
<td>‘enrichment of [child’s] life’</td>
<td></td>
</tr>
<tr>
<td>‘develop strong sense of identity, good self esteem and emotional resilience’</td>
<td></td>
</tr>
<tr>
<td>‘irresponsible school behaviour…would benefit from contact with the husband’</td>
<td></td>
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<tr>
<td>‘long term emotional wellbeing’</td>
<td></td>
</tr>
<tr>
<td>‘interest in schooling, sporting and general progress’</td>
<td></td>
</tr>
<tr>
<td>‘relationship with his father is unique and needs to be maintained’</td>
<td></td>
</tr>
<tr>
<td>‘an important role to play in [children’s] future wellbeing and development’</td>
<td></td>
</tr>
<tr>
<td>‘provides an important balance to the children’s lives’</td>
<td></td>
</tr>
<tr>
<td>‘aspects of the relationship which are positive and affirming’</td>
<td></td>
</tr>
<tr>
<td>‘beneficial aspects of his parenting e.g. involvement with the family, past financial provision’</td>
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</tbody>
</table>
8.2.2 Discursive gendered constructions of ‘good’ fathers

In the judgments analysed, fathers as a category were constructed through discourses that emphasised judges’ faith in fathers as being acceptable and necessary parents. The dominant discourses used by judges on the qualities of fathers referred to the father’s rational attitude, stoicism, insight and capacity to change. These qualities are commonly morally linked to stereotypical gendered presumptions about men (Berns 1991). Consistent with Moloney’s (2002) study, in the majority of judgments analysed there was scant reference to and detail about the fathers’ skills as parents. Significantly, nothing was said about what responsibilities the fathers would undertake in meeting the special needs of their child victims of violence. With the exception of a small number of judgments (discussed in a following section on discourses on ‘bad’ fathers), hegemonic masculinity informed the judicial tolerance of violent fathers. These findings are consistent with the findings of research on violent fathers in the United Kingdom that found that these commonly accepted constructions of fathers deny the significant problems identified in the fathering practices of violent men. (Harne 2003).

8.2.2.1 Discourse on fathers’ attitudes

In the majority of judgments analysed, discourses on the ‘appropriate attitude’ of fathers revealed how the gender stereotype of fatherhood set expectations and reinforced beliefs about fathers being ‘good’ or ‘good enough’ parents. In the majority of judgments violent fathers were not named as deviant but as ‘sound’, ‘positive’, ‘caring’, ‘loving’ and ‘devoted’ men who had an ‘appropriate attitude’ to the ‘responsibilities of parenthood’. The focus of judicial discourse on the fathers’ ‘responsible’ attitude, particularly in the face of the mothers’ ‘hostility’, implied the deserving nature of fathers. Fathers were seen as being ‘capable’ and ‘committed’ to ‘meeting the needs’ of their children. What the discourse on the ‘devoted’, ‘committed’ father masked was the exercise of coercion and control in the pursuit of contact and residence, which is common in perpetrators of violence following family dissolution (Graycar 1995; Kaganas & Piper 1999; Rhoades, Graycar & Harrison 2000).
8.2.2.2 Discourse on fathers’ awareness and capacity to change

Traditional views of male parenting roles define and include the father as being an ‘aware’ person (Moloney 2002). Judicial discourses on fathers’ ‘awareness’ related to fathers knowing the practical considerations of parenting, such as the terms and conditions of contact and knowing his own ‘shortcomings’ or ‘inappropriate behaviour’. The discourse on father awareness supported a discourse used by the judges about fathers’ ‘capacity’ to ‘change’, ‘gain better understanding’, ‘modify’ or make a ‘readjustment’ to an ‘unacceptable attitude’ or ‘behaviour’ in the ‘role as parent’. The notion that experience plays a significant role in the construction of modern masculinities (Morgan 1996) appeared to underpin this discourse that was present in eleven judgments (Cases 21, 22, 26, 29, 30, 31, 33, 35, 36, 38 and 40). The discourse on fathers’ capacity to change had a positive future focus that supported notions about the possible evolution, or restoration of father-child relationships. This discourse was present in three judgments where statements were also made by judges about the mental health of the fathers being a significant problem (Cases 31, 35 and 38). As the following quotation from Case 33 illustrates, the discourse on fathers’ awareness minimised the risks to the children from future exposure to domestic violence. In this case the father had pleaded guilty to assaulting the mother and had ‘smacked [children] hard enough to leave red marks’.

Case 33

I [judge] am satisfied that there is some basis for the allegation that the father at one time may have smacked the children too hard. I [judge] accept however, that the father has over a period of time been gaining a better understanding of his role as a parent. I [judge] am satisfied that the children are not at risk of abuse whilst in the care of the father. [Paragraph 296] [emphasis added]

The so-called ‘awareness’ of fathers ‘clearly impressed’ the judges. Many statements were made about fathers’ ‘awareness’, fathers’ good ‘attitude’, fathers having ‘changed’ or as having good ‘intentions’ to make ‘rational’ changes, and judges gave ‘credit’ to the fathers for these qualities. For example, in Case 21 there was a history of serious violence by the father who was charged with ‘endangering life’ after ‘assaulting’ the mother and ‘going to set her on fire, and cause her severe bodily injury’. The judge referred to the father’s ‘realisation that it was his fault’ and to his attendance at ‘counselling’ to ‘help him control his anger’. In the following quotation, the judge focused on the positive attribute of the
father’s ‘modified’ ‘behaviour’ for which the father ‘should get some credit’. This statement trivialised the mother’s concern about the father’s controlling and abusive behaviour that occurred during contact handovers.

Case 21

*The wife said that the husband also demonstrated a lack of insight into the welfare of the children by swearing at and abusing her at handover prior to 16 August 1995. The husband should get some credit for having modified his behaviour since then.* [Paragraph 151] [emphasis added]

8.2.2.3 Discourse on fathers as reasonable, rational and stoic

In the dominant judicial narratives there were links between masculinity and the rhetoric of reason and experience. The masculine qualities of honesty, reasonableness, rationality, and stoicism, rather than parenting competence and its relationship to the perpetration of violence, were seen by the judges in the majority of judgments, as the dominant significant markers of fathers’ capacity to care about and, therefore, to care for their children. These discourses constructed violent fathers as reasonable people for having demonstrated the traditionally defined male attributes of self control and self direction.

Part of the construction of male hegemony within patriarchal systems relies on men learning how to present themselves as reasonable, rational beings (Morgan 1996). In five judgments (Cases 21, 23, 24, 25 and 31) the judges made positive references to fathers’ behaviours during the Court process in exhibiting ‘dignity’, ‘skill’, ‘control’ and being ‘candid’, ‘disarming’ or ‘not shaken’ in the ‘face of rigorous cross examination’. This suggested the significance given by the judges to the demonstration of men being reasonable and rational as a measure of masculinity and fatherhood. This discourse was in strong contrast to statements made about mothers’ Courtroom behaviours that were predominantly described as emotionally ‘over reactive’, ‘exaggerating’ and ‘fabricating’. This reinforced judges’ views about the reasonableness of fathers overall behaviour.

A dominant theme that emerged from the judgments analysed was that fathers’ ‘rational’ approach to developing the ‘capacity’ to manage ‘anger’ was related to the notion of the appropriateness of, and the ‘good’ that would come from, contact with the children. This focus often trivialised fathers’ violent practices and children’s experiences as victims of father violence. The following quotation provides an example of how a father’s rational
behave, as demonstrated by his ability ‘to control his temper’ in the Courtroom, was connected by the judge to the concept of the father as a changed violent man. In this case the seriousness of the father’s history of violence was acknowledged by the judge but the father’s Courtroom behaviour contributed to the judge’s uncertainty about whether or not the children would be exposed to further violence by the father.

Case 21

The husband says that he realized that his violent conduct was unacceptable, and undertook counselling in an attempt to help him learn to control his anger. He was able to control his temper in the face of rigorous cross-examination. [Paragraph 139] [emphasis added]

In eleven judgments (Cases 21, 22, 23, 24, 25, 26, 30, 31, 35, 38 and 40) there were references made by judges to the stoicism of fathers. This was particularly evident in the discourse that gave recognition to fathers having suffered without complaint from their experiences of compromised or lost relationships with their children, from their experience of their children’s ‘problematic’ behaviours, and for having endured the frustrations in persisting with the pursuit of contact in the face of mothers’ ‘hostility’ and ‘resistance’. This supported, in the majority of these judgments, notions of fathers being morally committed ‘to do what is required’ in relation to parenting. For example, in the following case, the 7 year old child presented with ‘problematic sexualised behaviours’ that included ‘masturbating’, ‘placing objects in her vagina’ and ‘camel kissing’ that were constructed by a psychologist, and accepted by the judge as a response to the father’s ‘permissive parenting style’. There were unproven child sexual abuse allegations against the father. A ‘major issue’ identified by the judge was the father ‘recognising’ the need to change his ‘permissive parenting style’. The judicial discourse reflected ‘confidence’ in the ‘devoted’, ‘loving’ father who was perceived by a psychologist and accepted by the judge, to be ‘convincing in his resolve’ in doing ‘what is required of him’ to change his ‘unusual behaviour’. The perceived stoicism of the father was further reflected in the judge’s reference to the father not being ‘resentful’ about the required changes or ‘seeking retribution’. The discourse on the reasonable and stoic father supported a finding by the judge of ‘no unacceptable risk of harm’ to the child in the father’s unsupervised care.
Case 31

The husband gave his evidence in a candid and disarming way. He did not present as bitter over what has happened, or as seeking retribution, or for that matter vindication…all he wanted was to play a part, and a significant part, in K’s [child] life.

I [judge] find him [father] to be a witness of truth. [Paragraph 163] [emphasis added]

In my [judge] view, the husband has come a long way in recognising the needs of K [child] in this regard…I [judge] am confident that he will not only have the capacity but that he will in fact do what is required of him. [Paragraph 741] [emphasis added]

...he has now accepted this and he is committed to changing his attitude, to implementing protective behaviours… [Paragraph 780] [emphasis added]

8.2.3 The discursive binary of the loving father/violent husband

There are potential negative impacts on children from dominant forms of masculinity (Pringle 1998). The presumption that children need an ongoing relationship with their violent fathers fails to take this into account. What emerged from the analysis of gendered assumptions about masculinity and fatherhood within the judicial discourses was a discursive binary that constructed a ‘loving’ father and a violent husband. This was consistently stated in twelve judgments (Cases 21, 25, 27, 29, 30, 31, 33, 34, 36, 38, 39 and 40). In one of these judgments (Case 40) there was also a recurring and competing discourse that made a connection between the violent husband and the violent father and, in turn, connected this as a partial explanation for the deterioration in the father’s relationships with his children.

The dominant ‘loving’ father/violent husband binary allowed the violent behaviour of the husbands to be acknowledged by the judges without over-riding or contaminating the construction of the fathers’ as ‘loving’ towards their children. This contributed to the normalisation and legitimisation of the ongoing presence of the fathers’ violence, or the potential for it in the children’s lives. This binary excluded the consideration of an issue raised by Harne’s (2003) research that children’s exposure to violence can destroy the perpetrator-child relationship. For example, in Case 25 the father had a criminal history of convictions for ‘assault and rape’ and the judge accepted that the father damaged property and threatened to kill the mother. No information was provided in the judgment to support the judge’s statement about a prior ‘appropriate relationship’ between the father and the 3 year old child whom the father was said to ‘genuinely love’. There was an acknowledging
statement made by the judge that the child ‘would be at risk’ of exposure to the father’s future violence towards the mother. However, the dominant discourses supported a separate adult focus on the issue of domestic violence and an unrelated focus on the father-child relationship. The main issues of concern were constructed as being the length of separation of the father from the child and concern that the young child would ‘not remember’ the father who had been imprisoned for some time. The fathering practices were not questioned in the judgment. The following quotations illustrate the dominant binary construction of ‘loving’ father/violent husband that allowed the husband’s violence towards the wife to be seen as a separate issue to that of fathering.

**Case 25**

I [judge] accept the husband's evidence that he genuinely loves his child, and that there was an appropriate relationship between himself and the child before he went to prison. [Paragraph 157] [emphasis added]

The wife said that the husband had behaved aggressively towards her during the marriage and after the separation…the husband said to her as he was leaving the Court: “I will slit your throat when I get out.”…I [judge] accept the wife's evidence. [Paragraph 172] [emphasis added]

The assumption that fathers are naturally loving and nurturing to children can lead to increased risks for children (Pringle 1998). Harne’s (2003) research findings show that the ‘love’ of violent fathers does not focus on the needs of the children but is related to their violent patterns of behaviour where a sense of ownership and control over the children serves fathers’ own self interests and places children at ongoing risk.

### 8.2.4 Discursive gendered construction of ‘bad’ fathers

In five judgments (Cases 22, 23, 26, 35 and 37) the judicial discourses that constructed fathers as having unacceptable attitudes and behaviours over-rode any competing discourses on acceptable fathering qualities. In another five judgments (Cases 21, 34, 36, 39 and 40) there was a discourse used by the judges that acknowledged unacceptable masculine qualities, but this was modified by competing and vacillating discourses that variously described fathers’ ‘sometimes’ inappropriate ‘conduct’ and fathers’ ‘loving’ relationships with the children.
The discourse that defined errant fathers primarily related to attitudes and behaviours that demonstrated a departure from the stereotypical masculine qualities of stoicism, responsible attitude, and being rational, aware and capable of change.

Table 8.2 provides examples of statements used by the judges to describe what did ‘not impress’ the judges in relation to fathers’ ‘inappropriate attitude’ and the ‘responsibilities of parenting’. The statements refer to the fathers’ attitudes and behaviours that impacted on the children’s ‘emotional wellbeing’ and some comments refer to the judges’ perceptions of the fathers’ Courtroom presentations.

### Table 8.2 Unacceptable qualities of errant fathers

<table>
<thead>
<tr>
<th>Fathers’ lack of awareness and insight</th>
<th>Fathers’ lack of rationality and responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘lacks perceptiveness’</td>
<td>‘not show regret’</td>
</tr>
<tr>
<td>‘unable to recognise’</td>
<td>‘unreasonable’</td>
</tr>
<tr>
<td>‘not consider effect on [child]’</td>
<td>‘inability to concede’</td>
</tr>
<tr>
<td>‘little insight’</td>
<td>‘looked to blame everyone else’</td>
</tr>
<tr>
<td>‘lacks sufficient insight’</td>
<td>‘took no responsibility’</td>
</tr>
<tr>
<td>‘lack of awareness and understanding’</td>
<td>‘aggressive’ and ‘overbearing’ [in Court]</td>
</tr>
<tr>
<td>‘insensitive’</td>
<td>‘minimised responsibility’</td>
</tr>
<tr>
<td>‘inability to perceive’</td>
<td>‘denied responsibility’</td>
</tr>
<tr>
<td>‘could see nothing wrong in the behaviour’</td>
<td>‘inappropriate behaviours’</td>
</tr>
<tr>
<td>‘no insight’</td>
<td>‘portraying himself as exceptionally free of shortcomings’</td>
</tr>
<tr>
<td>‘unable to modify behaviour’</td>
<td>‘his calm did not last’</td>
</tr>
<tr>
<td>‘lacks parenting sensitivity’</td>
<td>‘refuse to recognise’</td>
</tr>
<tr>
<td>‘unwise’</td>
<td>‘emotionalism’</td>
</tr>
<tr>
<td>‘cannot understand’</td>
<td>‘unable to control explosive outbursts of anger’ [in Court]</td>
</tr>
<tr>
<td>‘not given enough thought’</td>
<td>[failed] ‘to acknowledge fault’</td>
</tr>
<tr>
<td>‘cannot acknowledge has any fault at all’</td>
<td>‘shows no sign of ameliorating his behaviour’</td>
</tr>
<tr>
<td></td>
<td>‘over exaggeration’</td>
</tr>
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<td></td>
<td>‘emotion and intensity’</td>
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</table>

In the judgments analysed, these perceived flaws supported shifts in judicial focus away from the prescribed traditional role of fathers as being responsible, safe and constrained protectors of the family, onto fathers as being irresponsible and dangerous people. This significant reconstruction supported a departure from the dominant ideology of the importance of father presence for children’s welfare and development. In each of the judgments where fathers were constructed as unacceptable there was a discourse on the father’s violence that indicated the judge’s acceptance of its seriousness. The terminology used by the judges and the amount of detail on each father’s violence varied between the judgments and in some instances the judges clearly indicated disapproval of the father’s ‘manner’ or ‘attitude’ by using terminology such as ‘dictatorial’, ‘domineering’, or
‘autocratic’. Significantly, in these judgments the discourse on father violence was consistently intertwined with a discourse on fathers’ failure to display the stereotypical masculine qualities that underpinned the classification by the judges of ‘good’ fathers. For example, in Case 28 there were a number of references by the judge to the father’s violent behaviours and the judge provided detailed descriptions of the father’s unacceptable manner, including his behaviour in the Courtroom. As the following quotation illustrates, the discourse on father violence did not stand alone as sufficient reason to portray the father as unacceptable. The father’s lack of insight was also a factor.

Case 28

I [judge] am of the view that the husband through his own temperament is simply unable to see how aggressive and difficult at times his behaviour can be. I [judge] assess him as having no insight into his own behaviour. [Paragraph 194] [emphasis added]

In each of the five judgments where fathers were consistently classified as unacceptable the binary of the ‘loving’ father/violent husband was not present. In four of these judgments no direct father-child contact was ordered (Cases 22, 23, 26 and 35). An important finding emerged that in these judgments the judges acknowledged the adverse effects on children from exposure to named or described father violence. This included statements about the children’s fear of their fathers. The dominant discourse on the adverse effects on the children of an errant father’s ‘attitude’ and ‘behaviour’ focused on their ‘emotional wellbeing’. This revealed a new discursive field where fathers, as well as mothers, were seen as responsible for the children’s emotional welfare. The following two quotations from Case 26 provide an example of a discourse used by the judge that combined the concepts of the father’s lack of ‘insight’ and ‘responsibility’, the father’s ‘violence towards the mother’ and the ‘emotional wellbeing’ of the child.

Case 26

During the trial, the father continued to minimise his responsibility for causing anxiety to K [child] by his questioning and denied any responsibility for K [child] expressing fear of him or anxiety about going on contact with him… I [judge] do not think the father has the appropriate capacity to provide for K’s [child] emotional needs during contact. [Paragraph 364] [emphasis added]
The father’s attitude to the responsibilities of parenthood is concerning; demonstrated by his lack of insight, his violence towards the mother in the past, and his failure to acknowledge K’s anxiety. [Paragraph 368] [emphasis added]

8.2.5 Discourses on the rights and needs of fathers

In a number of the judgments analysed there were discourses used by the judges that implied a concern for what Collier (1999) refers to as fathers being portrayed as victims of the separation process. Statements made by the judges also reflected concern for what Baum (2004) refers to as loss of the culturally defined spousal role as head of the family and the subsequent ‘fuelling’ of fathers’ emotions. One of the discourses used by the judges reflected a focus on fathers’ rights to contact with the child (Cases 27, 28, 29, 37 and 38). Statements made by judges in relation to their support of contact orders in favour of the fathers included: ‘nor is it my intention to deprive the husband of contact’; ‘will enable the husband plenty of opportunity to maintain’ the father-child relationship; and that ‘such an order’ would not be made as it ‘would exclude the husband’ from a parenting role. The following quotation provides an example of the fathers’ rights discourse.

Case 38

I [judge] am of the view that taking into account all the above factors and in particular, the provisions of section 60B that the husband should have the opportunity of overnight contact with M [child]. [Paragraph 244] [emphasis added]

Another discourse used by judges in seven judgments (Cases 22, 23, 30, 35, 37, 39 and 40) reflected their sympathy for fathers who suffered from loss of their family role and relationships. Terms and phrases used by the judges that sympathised with the feelings of the fathers and their perceived disadvantaged situations included: that the fathers were ‘deeply hurt’, ‘suffering much sorrow’ and ‘longing to be a father’; that the judge ‘can appreciate the frustrations’ of the father’s situation that was ‘unfortunate’, ‘regrettable’ or ‘tragic’; and that the outcome of the dispute was an ‘unjust and unfair outcome for the husband’, and there was a need for ‘protection [of the father] from further allegations’ of abuse. The following quotation illustrates judges’ sympathy for fathers. In Case 40 the judge referred to the ‘price’ the father ‘paid’ in the loss of relationships with his 11 and 13 year old children. These children had experienced the father’s direct and indirect violence.
Case 40

This result is a particularly unjust and unfair outcome for the husband. Whilst guilty of some disenfranchising behaviours himself, those behaviours did not deserve to attract the price he has paid. [Paragraph 732] [emphasis added]

The discourse on the rights of fathers and judges’ sympathy for fathers did not fit comfortably with the rhetoric of the best interests principle being a child focused legal standard where children have a right to contact and to safety and to have any expressed wishes considered by the judge. The discourses on fathers’ rights and sympathy for fathers support concerns about the needs and interests of non-resident parents, usually fathers, taking precedence over the rights and welfare of children (Kaye and Tolmie 1998; Counsel and Kelly 2000; Altobelli 2000; Rhoades 2000; Charlesworth et al 2000). The dominant discourses on fathers used by the judges in the judgments analysed also support the perception of Neale and Smart (1999) and Kaganas (1999) that there are distinct undercurrents to the best interests principle in family law jurisdictions of adultist moral, political and emotional agendas that inform the outcomes for children.

8.3 Dominant discourses on mothers

The dominant discourses on mothers used by the judges in the judgments analysed reflected the traditional gendered presumptions about the role and qualities of mothering. These findings are consistent with the studies conducted by Berns (1991) and Moloney (2002). This study adds a perspective on the judicial construction of mothers who were victims of the fathers’ violence and who faced the additional challenge in disputes over contact of protecting their children.

8.3.1 Discourses on ‘good’ mothers

The traditional qualities of ‘good’ mothers include mothers as being compliant, self-sacrificing, loyal to and responsible for family relationships, and as being closely in touch with children’s emotional needs (Berns 1991). In the judgments analysed the dominant judicial discourse on ‘good’ mothers reflected this ‘traditional’ gendered stereotype. This was reflected in the following judicial narratives. In three judgments (Cases 21, 28 and 33) there were statements on mothers being self-sacrificing that included such things as mothers being prepared to ‘give up work’ for the child. In six judgments (Cases 21, 23, 28,
29, 30 and 31) there were statements about mothers being ‘sensitive to the needs of the child’ and that the child ‘derives comfort’ from the mother. In twelve judgments (Cases 21, 23, 26, 29, 32, 33, 35, 36, 37, 38, 39 and 40) there were statements made on mothers being ‘loving’, ‘caring’, ‘deeply attached’ and as having ‘closely bonded’ mother-child relationships where the mothers would ‘tend to the child’. In two judgments (Cases 29 and 36) there were statements about mothers having taken ‘an active role’ in maintaining the father-child relationship by having ‘encouraged’, ‘persisted’ and ‘convinced’ the fathers to see the children. In one judgment (Case 37) the mother’s demeanour in the Courtroom was noted by the judge to be ‘quiet’, ‘pleasant’ and that the mother ‘tried to avoid arguing with the father’.

The following quotation illustrates some of the traditional normatively defined qualities that reflected the judge’s construction of the ‘good’ mother.

**Case 39**

\[ Y \text{ [child] is } \text{only 2, he is closely bonded to his mother...Although there may be some element of resentment and self-interest in her [mother] attitude. I [judge] assess her as a mother who is primarily concerned to reduce the distress and confusion caused to her young child.} \] [Paragraph 148] [emphasis added]

### 8.3.2 Discourses on ‘bad’ mothers

The strongest and most repetitive construction by judges of mothers emerged from the discourses that defined what was not acceptable in the mothers’ ‘attitude’ and ‘behaviour’. There were compelling discourses used by the judges, at times expressed in strong or emotive language, that were critical of mothers’ departures from normatively defined gendered roles and responsibilities. These were underpinned by the psychological theories of child development, socialisation, psychoanalysis and attachment that support concerns about children’s vulnerability and encourage mother-blaming (Allan 2004). The dominant discourses supported the ideology of cooperative ongoing parenting.

In the majority of the judgments analysed, discourses on mothers as unacceptable parents over-rode any competing discourses on ‘good’ mothers that were present within the individual judgments. This enacted what Andrews and Freeman (1997) have described as the reinforcement of stereotypical roles, where traditional expectations of mothers devalue women’s lived experiences, blame women and/or interpret their behaviours as a sign of
weakness, or as their need to endure and suffer through the pain. This seriously disadvantaged and marginalised the voices of the mothers who were victims of violence. The following sections illustrate how this was primarily expressed in the dominant discourses on maternal deficits. These intertwined to form the dominant construction of ‘alienating’ mothers who were perceived to intentionally or unintentionally undermine the father-child relationships, and as a result were assumed to have ‘damaged’ their ‘children’s emotional health’ and compromised their children’s futures.

8.3.2.1 Discourses on ‘alienating’ mothers

The differences between the historically defined rights of fathers and the responsibilities of mothers were evident in the judicial narratives. Strong themes emerged from the judgments analysed that revealed the moral position of judges about mothers being responsible for facilitating the ongoing father-child relationships. A dominant discourse used by the judges emphasised the desirability of parental cooperation. Mothers were primarily, but not exclusively the target of this discourse. Mothers who did not cooperate with father-child contact arrangements and the strategies put in place to ‘encourage’ this were consistently portrayed by judges as ‘alienating’. Such expectations are problematic for mothers who are victims of domestic violence. Legitimate fear raises the rational concern of the victim parent to distance herself and her children from the perpetrator of violence (Jaffe, Lemon & Poisson 2003).

In fifteen judgments (Cases 21, 22, 23, 24, 26, 27, 28, 30, 31, 32, 34, 36, 38, 39 and 40) ‘alienating’ mothers were constructed as ‘implacably hostile’. In fifteen judgments (Cases 22, 23, 24, 25, 28, 29, 30, 32, 33, 35, 36, 37, 38, 39 and 40) mothers were perceived to be ‘alienating’ because of ‘emotional problems’ that defined them as being incompetent or irresponsible. The dominant discourses on ‘alienating’ mothers did not sit well with the rights of children and family members to safety specified in the Reform Act legislation (Section 68F(2)(g),(i)(ii); and (j) FLRA 1995).

Table 8.3 provides examples of statements made by judges, often informed by psychologists and psychiatrists, to describe the mothers’ ‘alienating’ ‘attitudes’ and behaviours in relation to father-child contact. These ‘hostile’ and ‘irresponsible’ attitudes and behaviours were seen to adversely affect the father-child relationships, as well as the ‘emotional wellbeing’ of the children.
Table 8.3  Judges’ statements about ‘alienating’ mothers

<table>
<thead>
<tr>
<th>Mothers’ hostile attitudes</th>
<th>Mothers’ irresponsible attitudes</th>
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</thead>
<tbody>
<tr>
<td>‘actively denigrated the husband’</td>
<td>‘callous disregard for [children’s] wellbeing’</td>
</tr>
<tr>
<td>‘pernicious influence’</td>
<td>‘will not or cannot take responsibility’</td>
</tr>
<tr>
<td>‘hatred’</td>
<td>‘permitted [children] to believe the father to be a “bad man”’</td>
</tr>
<tr>
<td>‘quest for revenge’</td>
<td>‘inability to communicate’ [with the father]</td>
</tr>
<tr>
<td>‘great hostility’</td>
<td>‘doubt…whether she will exercise that capacity’ [to support contact]</td>
</tr>
<tr>
<td>‘poisoned the child’s mind against his father’</td>
<td>‘limited insight into the impact of her behaviour’</td>
</tr>
<tr>
<td>‘relentlessly undermining’</td>
<td>‘severely overprotective’</td>
</tr>
<tr>
<td>‘destroying [father’s] relationship with his children’</td>
<td>‘unreceptive to any views…other than her own’</td>
</tr>
<tr>
<td>‘severe provocation by the wife’</td>
<td>‘extreme psychological distress’</td>
</tr>
<tr>
<td>‘grossly alienating’</td>
<td>‘extreme emotional response’</td>
</tr>
<tr>
<td>‘deliberate and relentless…alienating conduct and strategies’</td>
<td>‘blinded’ to the ‘essential issues’ [for the children’s wellbeing]</td>
</tr>
<tr>
<td>‘destabilising influences’</td>
<td>‘unable to acknowledge any fault’ [for the loss of the father-child relationship]</td>
</tr>
<tr>
<td>‘impute some misbehaviour on the part of the husband’</td>
<td>‘selfish’</td>
</tr>
<tr>
<td>‘tenacious enough…and thereby frustrates the child’s relationship with the father’</td>
<td>‘resentment and self interest in her attitude’</td>
</tr>
<tr>
<td>‘hates the husband’</td>
<td>‘interfering’</td>
</tr>
<tr>
<td>‘implacably opposed to contact’</td>
<td>‘failed to comply with the order’ [for contact]</td>
</tr>
<tr>
<td>‘slur the father’</td>
<td>‘let her opinion of the husband…cloud her judgment’</td>
</tr>
<tr>
<td>‘endeavoured to undermine him’</td>
<td>‘the mother’s expressed concerns…based on a self-interested motivation without logic or reasonable basis’</td>
</tr>
<tr>
<td>‘has set her heart completely against the father, and completely against any contact’</td>
<td>‘her absolute inability to establish and maintain a worthwhile contact relationship between the husband and the two children.’</td>
</tr>
<tr>
<td>‘invariably put a gloss on the information and presented it as indicating that something inappropriate has been happening’</td>
<td></td>
</tr>
<tr>
<td>‘refused to co-operate’</td>
<td></td>
</tr>
<tr>
<td>‘making unilateral alterations to contact arrangements to suit herself’</td>
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</table>

Mothers’ resistance to father-child contact and to adopting a cooperative post-separation parenting arrangement with the fathers was not always connected by the judges to mothers’ victimisation. However, as illustrated in the following quotation, even where statements by judges made this connection this did not always prevent mother-blaming statements about the alienating mother and her self interests from coming to the fore.

Case 29

I [judge] am further satisfied that she [mother] has experienced some disgraceful and disturbing conduct at the hands of the husband whilst he has been drunk…I [judge] believe though that this has led to a situation where she [mother] is significantly and severely over protective of her daughter and unreceptive to any views as to what might be in D’s [child] best interests, other than her own. [Paragraph 148] [emphasis added]

The discourse on the alienating mother largely overlooked the likelihood that victims of domestic violence may appear reactive, anxious or angry in situations where their
memories and fears of the violence are reawakened. As Jaffe, Lemon and Poisson (2003) point out such behaviours must be assessed within the context of their lived experiences of victimisation from exposure to violence.

**Discourse on mothers' victimisation of fathers**

Judges consistently appeared to be sensitive to ensuring the gendered equality between mothers and fathers that is “so crucial to the exercise of judicial power” (Buckley 2001, p.186). This ran the serious route of failing to give adequate weight to the opinions and special needs of the disempowered mother and child victims of domestic violence. In this way the actual and potentially dangerous power imbalance inherent in domestic violence was ignored or minimised by the judges.

In the judgments analysed a consistent and strongly held judicial concern was on the power of the resident parent, usually the mother, to misuse what was perceived to be her power over the contact father. Discourses used by the judges referred to mothers denying children contact to the ‘disadvantaged’ fathers, the mother’s failure in ‘showing goodwill’, mothers deliberating ‘punishing’ the father, and mothers not acknowledging any ‘redeeming feature of the husband’. Women who displayed such assertive, non-cooperative behaviour challenged the gendered stereotype of women as being less assertive than men (Bartley 1996) and challenged the cultural social order where fatherhood is regarded as a “natural state of being” (Williams 1998, p.65).

The following quotations provide an example of the problematising discourse on mothers’ victimisation of fathers. The quotations also illustrate a shaming discourse used by the judges that clearly indicated disapproval of mothers’ treatment of the fathers. Under conventional moral philosophy the disempowering strategy of shaming is a commonly used sexist approach for correcting the person who is out of order (Bartley 1996). Case 40 illustrates how this mother-blaming discourse overshadowed the issue of the father as a violent man. In this case the father had perpetrated many ‘incidents’ of violence that involved the mother and, on some occasions, directly involved the children. A psychologist’s opinion, accepted by the judge, was that the mother ‘sabotaged’ the father-child contact by her ‘provocative’ behaviour of sending a mobile phone with one child on contact. Statements about the mother’s victimisation of the father were made by the psychologist who stated that the mother ‘knew the degree of annoyance’ this would cause.
the father. Such a construction minimised the father’s responsibility for the violent behaviour directed towards the child which made the child ‘extremely frightened’ when the father ‘confiscated’ the phone by ‘wresting’ it ‘from [child’s] grasp’.

Case 40

I [judge] am satisfied on the evidence that the wife has done all within her power to ensure that the husband is punished for his perceived or real short comings, particularly since separation. [Paragraph 413] [emphasis added]

Thereafter, the decline in the relationship between the husband and his children, to the point where he [father] now enjoys no relationship with M [child] at all...is predominantly due to the wife’s grossly alienating and destabilising actions, behaviours and influences [Paragraph 626] [emphasis added]

Other statements made by judges, at times informed by psychologists or psychiatrists, were that mothers ‘exaggerated’ or ‘fabricated’ their concerns about and their responses to the violent fathers or overly ‘blamed’ or ‘inculpated’ the fathers. This discourse was present in fifteen judgments (Cases 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39 and 40). Intersecting discourses that sustained this construction of mothers’ victimisation of fathers included statements that the mothers did not accept responsibility for ‘provoking’ the father’s violence, or for perpetrating their own violence towards the fathers and that fathers needed to be protected from the ‘unjustified allegations’ made by the mothers. These discourses overshadowed statements made by the judges at some point in each judgment, which acknowledged the violence perpetrated by the fathers.

Underlying assumptions in the mother-blaming statements appeared to relate to what Williams (1998) has identified as traditional gendered paternal roles where fathers have ‘natural’ male rights over wives and children and are, therefore, not as accountable for their behaviours as are mothers. For example, in Case 35 the father was named by the judge as ‘domineering’ and ‘obsessive about the wife and children’. There were a number of references to the father’s controlling behaviours that were accepted and described by the judge as ‘bizarre’. This included that the father accused the mother of ‘prostitution’, ‘required’ the mother to be ‘extremely frugal’ and that the family ‘lived very isolated lives’ with the children being ‘restricted’ by the father ‘from making friendships or visiting friends' homes to play’. However, in the same judgments the mother was portrayed by the judge as using ‘exaggeration’ or ‘strong emotive language’ in naming herself as a ‘prisoner
in her own home’. The mother was then accused of ‘perhaps’ having ‘added fuel to the disagreement’.

**Case 35**

*I [judge] assess that on some matters she [mother] was using an exaggeration or use of strong emotive language (for instance that she was a prisoner in her own home...Her use of the emotive language to describe her attitude to the relationship perhaps added fuel to the disagreement between the parties. [Paragraph 268] [emphasis added]*

The strength and number of statements made by judges that blamed mothers for the ‘regrettable’ situations of the fathers helped construct a morality and enhance the value of fathering. These discourses exposed a perception held by the judges that “biological fathers have come to be constructed as the ‘prime victims of the gender order’” (Harne 2003, p.2). Their constructions of mothers as victimising fathers failed to take into account empirical research on the subject of dissatisfied fathers and inequality in divorce that suggests fathers are not powerless victims of mothers but are active agents in the ongoing disputes following separation (Kaganas 1999). Significantly, in these judgments where domestic violence was an issue the discourse on fathers as victims of mothers was a role reversal that could have placed mother and child victims at further risk.

**Discourse on alienating mothers harming children’s wellbeing**

The ‘bad’ mother paradigm was embedded discursively in judges’ statements and was often used by judges as the reason for the children’s problems. Judges strongly disapproved of mothers’ resistance to father-child contact. Consequently, mothers were consistently seen as failing in their ‘capacity as a primary caregiver’ and as compromising the ‘emotional wellbeing’ of the children. In twelve judgments (Cases 22, 23, 24, 29, 30, 32, 34, 35, 36, 38, 39 and 40) there were strong statements made by judges, often supported by the opinions of psychologists and psychiatrists, about mothers’ ‘inappropriate actions’ that would adversely affect their children’s wellbeing. It is this rhetoric that fails to differentiate realistic responses in cases where there is abusive parenting from responses that are alienating (Johnston 2004). This is reflected in Fathers’ Rights activists’ powerful claims about the damaging effects on children of ‘alienating’ mothers (Kaye & Tolmie 1998; Johnston 2004).
One of the discursive constructions focused on the ‘risk’, ‘psychological harm’ and ‘disadvantage’ to the children of being exposed to their mothers’ ‘hostile’ ‘attitude’ to and ‘deprivation’ of what was assumed to be positive father-child relationships. This often overshadowed any statements about ‘risks’ to the children from their exposure to violence perpetrated by their fathers. For example, in Case 40 the judge found that ‘the overwhelming proportion of the responsibility’ for the loss of the father-child relationships ‘falls at the feet of the wife’. It was the mother’s ‘alienating conduct’ that was seen by the judge to ‘punish’ the children by depriving them of contact with the father whom the judge also acknowledged had perpetrated ‘violent or intimidating behaviour on his part’. The mother’s ‘programme of alienation’ was blamed by a psychologist for the possible ‘serious long term risk to the emotional health of the children’ and for the children carrying ‘the presently expressed hatred and pain’ of the father-child relationships ‘into their adolescent and adult years’.

Case 40

*Her [mother] alienating conduct and strategies have been varied, deliberate, relentless and effective...Regrettably the consequence has been to punish the children too by depriving them of their father.* [Paragraph 413] [emphasis added]

Another discursive construction of the risks to children from the ‘attitude’ of ‘alienating’ mothers was based on the perception that the mothers ‘react overly’ or had an ‘extreme emotional response’ that ‘overwhelmed’ them. This supported a discourse that constructed mothers as placing children under ‘emotional pressure’ through ‘transmitting’ ‘concern and distress’ to the children. This was stated as impacting ‘detrimentally upon the children’ and creating ‘the dreadfully distressing emotional trauma’ for the children. For example, in Case 22 the judge accepted that the father had a ‘short fuse’, had a conviction for assault and bodily harm with a weapon on an extended family member, had hit the wife and verbally abused her and had used ‘inappropriate discipline’ on the children. The judge did make a somewhat vague connection between the mother’s ‘erratic behaviour’ and her ‘genuine albeit enlarged fears’ that were not ‘completely uninfluenced by her reaction to her perception of the husband’s domestic aggression’. Within the same judgment the judge accepted the opinion of the mother’s therapist that the mother’s ‘depression, fear and anxiety’ would adversely affect the children’s ‘emotional health’ and the ‘children’s development’.

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In some judgments constructions of mothers’ ‘attitude’ being ‘hostile’, as well as being ‘overly reactive’ supported a mother-blaming discourse that reframed these responses as ‘emotionally abusive’ behaviours. These were stated as ‘risking long term emotional harm’ or ‘psychological harm’ to the children. For example, in Case 38 the history of ‘serious’ violence by the father that was named by a prior judge was reframed, in the judgment analysed as ‘conflict’ between the parents. The psychologist perceived that the ‘bond’ between the father and child would become ‘even closer’ if the mother did ‘not interfere’. As the following quotation illustrates, the judge accepted that the mother’s ‘hostile’ ‘attitude’ and ‘anxiety’ did not assist the child’s ‘welfare’.

While the notion of impaired mothering as a result of mothers’ stress responses to exposure to domestic violence has been well documented in the literature “the contribution of the perpetrator has largely been ignored” (Laing 2000b, p.6). The mother-blaming discourse that focused on the impaired mothering of ‘alienating’ mothers revealed that a mother’s history of exposure to domestic violence was not seen by judges, in the judgments analysed, to be a legitimate reason for mothers to oppose father-child contact.

### 8.3.3 Mothers' ‘Catch 22’ situations

The heavy reliance by the judges in the judgments analysed on the ideology of cooperative, ongoing parenting and traditional concepts of mothering placed mother victims of domestic violence, who were concerned about risks to the children from contact with their violent fathers, in a ‘Catch 22’ situation. Under the dominant pro-contact ideology ‘good’ mothers are to cooperate with fathers and facilitate the ongoing father-child relationships. At the same time ‘good’ mothers have a fundamental duty to protect their children from
harm. In cases where domestic violence is an issue these become competing normative constructions that create a ‘Catch 22’ situation. Statements in the judgments revealed that a failure to adhere to both of these imperatives rendered the mother victims of domestic violence as ‘incompetent’ parents.

In four judgments (Cases 21, 26, 33 and 34) there were narratives used by judges, and supported by psychologists, that clearly demonstrated the mothers’ ‘no win’ situations. In these judgments the mothers had entered into ‘consent’ agreements with the fathers that were deemed by judges not to be in the best interests of the children. For example, statements were made about the mothers’ ‘responsibilities of parenthood’ that ‘have not been beyond reproach’. These statements referred to mothers’ inappropriate, ‘simplistic’, ‘voluntary’ decisions about the children that ‘allowed’ the children to ‘be placed with’ or to spend time with their fathers about whom the mothers had made ‘allegations’ of violence and/or abuse. There were repeated references in the judgments to mothers having ‘full awareness’, ‘knowledge’ of and ‘concerns’ about the violence of the fathers. The mothers were thus constructed as having a ‘poor history’ in protecting the children. The discourse on incompetent mothers failing to protect their children relied on a generalised assumption that the mothers had freely entered into the agreements with the fathers. This failed to consider Australian research findings that mother victims of violence feel pressured in having to agree to children’s contact with the violent fathers, even in cases that are not before the Family Court (Kaye, Stubbs & Tolmie 2003).

The following quotation illustrates a dominant discourse that placed the mother in a ‘Catch 22’ situation. In Case 21 the father’s ‘propensity to violence’ and the seriousness of the violence was acknowledged by the judge. The judge concluded that father was not a fit parent. The mother, whom the judge described as ‘not perfect’, was referred to by the judge as being only ‘slightly more sensitive to the needs of the children’ than was the violent father. There were a number of statements in the judgment that indicated the judge’s disapproval of the mother’s ‘consent’ to the parenting arrangements with the father. What was not stated was a connection between the mother’s ‘consent’ and the power and control exercised by the father over the mother, demonstrated by a serious violent assault on the mother and the father’s repeated unilateral changes to the contact arrangements.
Chapter 8: The role of gendered discourse in the judicial construction of the post-separation family

8.4 The idealised post-separation family

The analysis of dominant gendered discourses presented in this chapter shows how the judges’ reinforcement of the mother/father binary, that intersected with the dominant discourses on childhood, produced and supported the structure of an idealised, patriarchal model of the post-separation family. The dominant discourses used by the judges revealed how the needs of children following family breakdown were intricately linked to the construction of ‘traditional’ motherhood and to ‘traditional’ and ‘new’ fatherhood and how this over-rode the concerns of mother victims about father violence. An unspecified presumption of contact normalised the judicial expectations about ongoing roles and relationships within families post-separation. This was reflected in the recurring theme that parental cooperation was essential to support the entrenched assumption that children need both parents in their lives, even in cases where there is a violent parent.

8.4.1 The regulation of alienating mothers

As Roche (1999) informs, where a parent or child seeks to depart from what is perceived to be the ‘normal’ and ‘successful’ family structure there are coercive interventions that operate (Roche 1999). In the judgments analysed the ‘alienating’ mothers were subjected to regulation by the Court where judges ‘put an onus on’ the mothers ‘to now do the right thing’ in fulfilling their ‘responsibility to make it [contact] work’. A recurring theme was a perception that mothers who departed from the traditional gendered order were failing to separate their own issues and needs from those of their children. In ten judgments (Cases 23, 24, 26, 28, 30, 32, 33, 36, 38 and 40) the power of judicial discourse to regulate and control the mothers was reflected in statements about the importance of mothers receiving counselling or ‘therapeutic assistance’ to ‘overcome’ or ‘resolve’ a range of issues that included: the ‘breakdown of the relationship with the father’; to ‘separate her feelings against the father from the question of contact’; ‘to cope with the provisions of the order’ for contact; and to ‘overcome her fears and concerns’ about the father’s violence and
alleged child abuse. Interventions were either voluntarily entered into by the mothers and encouraged by the Court or were ordered by the Court. Interventions aimed at ‘establishing some form of contact between the husband and the children’. This finding exposed the operation of patriarchy with rigid notions about mothering and the structure of the post-separation family. As the following quotations from Case 32 illustrate, under this ideology a psychiatrist was enlisted to assist the mother overcome her resistance to father-child contact and the mother’s progress was held under judicial scrutiny.

**Case 32**

_Because of my [judge] concern as to her [mother] hostility and before making any final order, I [judge] wanted to ascertain whether the mother could adjust herself to a regular regimen of contact as she said she could._ [Paragraph 69] [emphasis added]

_I [judge] also ordered the mother to obtain a referral for consultation with a psychiatrist in respect of her perceptions and attitudes surrounding the issue of contact between the child and the father and further to permit the Child Representative to seek a report from that psychiatrist if required._ [Paragraph 105] [emphasis added]

By adopting such approaches, the Court can be seen to be actively addressing the socially and politically defined risks to children of the breakdown of family relationships, particularly father absence. Such processes are consistent with the disciplinary power of official discourses (Dreyfus & Rabinow 1982) where legal power reinforces prescriptive normatively defined behaviour (Otto 1999). This normalising process and the technologies employed reinforce the gendered hierarchy. This has potentially dangerous outcomes for mothers and children in cases where domestic violence is an issue.

Proof of serious ongoing impairment to a mother’s parenting capacity had to be provided to and accepted by the Court via ‘expert’ witnesses, who played a significant role in shaping ‘truths’ about the mother’s capacities, before an order for no father-child contact that was based on the mother’s ‘condition’ could be legitimised by the judges. In two judgments (Cases 23 and 24) a mother’s ‘marked distress’ and a mother’s potential to ‘commit suicide’ if contact was ordered were accepted by the judges. Case law was referred to by the judge in Case 24 to justify using the mother’s ‘condition’ as the basis for a decision to deny the father contact with his child.

The following quotation from Case 26 illustrates the sort of pressure the regulation to adhere to the patriarchal structure of the idealised post-separation family placed on
mothers. In Case 26 the psychiatrist treating the mother informed the Court of the clear connection between the mother’s ‘Disorder’ and her exposure to the father’s violence. The judge accepted that the parents’ relationship had been ‘characterised by aggression and violence by the father towards the mother’. While an issue for consideration by the judge was ‘the question of the mother’s health and how it might be affected’ by an order for father-child contact, the judge minimised concerns expressed by the psychiatrist about a ‘relapse’ by the mother should the contact be ordered. This appeared to be based on the judge’s assumption that the mother ‘would be able to adjust and cope’ even though this required the ‘support of appropriate professionals’.

Case 26

She [psychiatrist] has assessed her [mother] as suffering from Post-Traumatic Stress Disorder as a result of the assaults upon her by the father. She concludes: “However, I [psychiatrist] am concerned that should contact be re-established, her condition will relapse, rendering her less able to function as an effective parent to her children”...I [judge] find that although the mother would be concerned and upset by an order for contact, it is likely that she would be able to adjust and cope with such an order with the support of the appropriate professionals. [Paragraph 371] [emphasis added]

8.4.2 The regulation of the responsibilities of parenthood

Judges consistently adopted a moral position in their repeated statements that one of the prime ‘responsibilities of parenthood’ is to ‘foster a good relationship between the child and the other parent’. The dominant construction of ‘conflict’ ‘between’ the parents was seen as the prime issue undermining the children’s future wellbeing. This construction together with the generalised language of ‘parenthood’ provided a foundation for the judges sounding ‘a note of warning’ to parents ‘not to undermine’ the children’s relationship with the other parent. The dominant discourse on ‘conflict’ that overrode the issue of ‘violence’ supported the expectation that both parents should engage in ‘counselling and negotiate compromises, rather than terminating contact’. This reaffirmed the structure of the idealised post-separation family. For example, in Case 39 the father’s ‘abusive and threatening behaviour’ towards the mother was consistently reconstructed as ‘conflict’ and ‘petty antagonisms’ that occurred between the parents. The ‘conflict’ was stated to be characterised by ‘childish sniping’, ‘puerile self absorbed behaviour’ and a ‘failure of the adults’ [both parents] to ‘behave sensibly’. The emotive language used by the judge indicated judicial disapproval of the parents’ departure from their roles within the
idealised post-separation family. The judge stated an imperative for both parents to overcome their ‘immature and self centered’ attitudes, to adopt the ‘right attitude’ and to ‘appreciate each other’s genuine interest’ in the child. As the following quotation illustrates a moral discourse on the idealised post-separated family defined the child’s ‘best interests’.

**Case 39**

*One of the responsibilities of parenthood is to provide a good role model. Another is to encourage and foster a good relationship between the child and the other parent. These responsibilities should be placed much higher than any petty antagonisms which remain on the breakdown of the emotional relationship between the parents.* [Paragraph 199] [emphasis added]

*I [judge] also propose to order counselling, which, if undertaken with the right attitude by all concerned, may assist the mother and father to appreciate each other's genuine interest in Y [child] and what is in the best interests for Y [child].* [Paragraph 205] [emphasis added]

### 8.5 Chapter summary

This chapter discussed the role of patriarchal and gendered discourse in defining the structure of the post-separation family. Hegemonic masculinity informed the judges’ faith in fathers. Traditional gendered constructions of mothering and fathering together with the construction of ‘new fatherhood’ produced and sustained the need of children for the presence of their fathers in their lives. An analysis of dominant discourses revealed a strong reliance by judges on normative, gender-based assumptions that reflected an underlying adultist moral and political agenda supporting the operation of patriarchy.

The binary construction of the loving father/violent husband created an effective barrier to the acknowledgement of the impact of violence on children. It was only in a small number of judgments where fathers departed from the gendered stereotype that their violence was connected to their role as an unacceptable parent and the negative effects of their violence on the children’s wellbeing became a focus of the judges.

The dominant discourses on mothers defined mothers who challenged children’s contact with the violent fathers as being ‘alienating’. The alienating mothers were categorised as being implacably hostile and/or incompetent beings. Strong mother-blaming discourses were repeated throughout the judgments and the regulatory power of the Court was made
visible by a discourse that constructed alienating mothers as having to take responsibility for overcoming their own issues and their resistance to father-child contact.

The interplay between stereotypical gendered discourses produced and sustained an idealised model of the post-separation family where interparental relationships are to be cooperative and children are to have ongoing relationships with both parents. This ideology effectively masked the issue of domestic violence and supported the ongoing powerful position of fathers who had perpetrated domestic violence in the families involved in the contact disputes before the Court.
Chapter 9: Conclusions and recommendations

Each society has its regime of truth, its ‘general policies’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.

Foucault (1980, p.131)

In this concluding chapter I will reflect on the findings of this study which has focused on identifying the dominant, competing and intersecting discourses used by the judges from the Adelaide registry of the Family Court of Australia (FCA) to construct the ‘best interests’ of children who were the subjects of contact disputes where domestic violence was an issue. Revealing the dominant everyday linguistic practices of judges was important as once these are known, they cannot exert their invisible power in the construction of given ‘truths’ (Otto 1999). Prior studies that have researched the judicial constructions of the best interests of the child in Australian family law have not focused the analysis on First Instance judgments where domestic violence is an issue. This investigation has provided new and relevant information for understanding how the issue of domestic violence is addressed in the construction of children’s best interests at the stage of a full defended hearing. A central premise of this research is that the dominant discourses reflected in the culture and context of the Court influence, reinforce and determine the knowledge regimes of ‘truth’ about the nature of domestic violence, and what level and types of violence are acceptable to expose children to in post-separation family relationships.

Despite the limitations to this research, this study has provided important information about why it is crucial for the Court to listen to the lived experiences of children who have been exposed to domestic violence, and to differentiate their needs from children who have not been exposed to violence. The findings have implications for policy and practice within the politicised context of family law in Australia. The findings are consistent with feminist critiques that have challenged gendered biases in the law and the rhetoric that the law is an objective institution founded on the establishment of ‘facts’ (Edwards 1996). The central findings add to the concerns already articulated by feminist researchers and academics on how, since the introduction of the Family Law Reform Act 1995 (the Reform Act) the
marginalisation of the issue of domestic violence in family law in Australia places the imperative on women and children to cooperate with the thriving pro-contact ideology that adds to the potential risks for women and child victims of domestic violence post separation (Rhoades, Graycar & Harrison 2000; Rendell, Rathus & Lynch 2000; Kaye, Stubbs & Tolmie 2003).

In the final sections of this chapter suggestions are made for possible ways to enhance judicial understandings of children’s exposure to domestic violence as being the central issue in the determinations of children’s best interests.

9.1 Overview of the key interpretive findings

Using Foucault’s concept of correlation that a particular discourse has with other discourses within a particular time and place (McHoul & Grace 1993) helped in the identification of the existence of a complex discursive ecosystem. A range of intersecting discourses supported, sustained and competed with each other in the construction of the best interests of the child. In this study a focus on the concept of patriarchy provided a foundation for the interpretation of what the multiplicity of discourses were actively doing in sustaining gendered power relations.

Applying poststructuralist thinking to the analysis led to no final certainty about the judicial construction of the best interests of the child. However, the identification of dominant intersecting discourses provided insight into which principles were given most weight by the judges and enabled illumination of which discourses provided powerful sites for dominance and oppression (Parker 1992). Strongly sanctioned discursive imperatives reflected the politicised domain of Australian family law. The overall findings demonstrated the presence of many signifiers of institutionalised patriarchy.

The power/knowledge relationship (McHoul & Grace 1993) was apparent in the inter-relationship of hegemonic constructions emanating from the social sciences, medicine and the law which were used by professionals whose opinions were privileged by the judges, and that clearly influenced the judicial thinking about the best interests of the child. Patriarchal constructions defined the normative roles and responsibilities of all family members and positioned children and adolescents as inferior beings. The regulatory power of male hegemony was reflected in the judicial narratives where the importance of domestic violence perpetrated by fathers was minimised, interventions were imposed on
mothers and children who resisted father-child contact, and the perpetrator fathers and the children were repositioned as the victims of the ‘alienating’ mothers (Cantwell, Roberts & Young 1999; Kaye & Tolmie 1998). These dominant discourses coalesced to support a reconstructed idealised post-separation family where the ideological imperative for children to have ongoing relationships with both natural parents, particularly their fathers, often over-rove children’s wishes for no contact with their fathers and marginalised their experiences of violence. This regressive thinking revealed a strong resistance to incorporating contemporary feminist knowledge on domestic violence about the potential adverse effects on adult and child victims from exposure to domestic violence.

From the findings of this study it is apparent that in cases where contact was disputed before the Adelaide registry, patriarchal philosophy provided a strong rationale for judicial discrimination against women and child victims of domestic violence. It was also the basis for the ongoing dominance, ownership and control of men over women and children within the post-separation family context.

9.1.1 Significant themes

9.1.1.1 An over-reliance on positivism

The operation of power through the representation of partial perspectives (Ribbens 1989) on the needs and interests of children was clearly evident in the acknowledgement and support of certain ‘truths’ and the marginalisation of other knowledge in the judicial determinations of children’s ‘best interests’. Selective ‘scientific’ knowledge, with its taken for granted assumptions, supplied the judges with an established rationale for the ‘normalising’ social regulation of children and their parents. Judges’ primary reliance on psychological discourses meant they were active instruments in the reinforcement and production of a fairly uniform set of knowledges or ‘truths’ that hide complexity about what constitutes the best interests of the child. Psychological discourse was relied on to explain children’s problems and needs, to predict outcomes for individual children, and to support simplistic generalised solutions. This reflected “the sedimentation of social facts” (Kogan & Brown 1998, p511).

From a feminist perspective the judges’ reliance on selective ‘scientific’ knowledge, which Foucault referred to as the “pseudo-sciences” (Dreyfus & Rabinow 1982, p.160), must be understood as masculinist (Kelly 1985). This powerful method, that creates ‘realities’ and
‘truths’ marginalises and creates prejudice against children and mothers (Scutt 1994). As the following sections highlight, this was apparent in the traditionally held ‘truths’ about the nature and typology of domestic violence, the regulation of the social organisation of the traditional gendered roles of mothers and fathers and their corresponding rights and responsibilities (Kennedy 1996). This reliance on scientific knowledge also positioned children in their ‘proper’ place in the separated family where the expression of their wishes for no contact with their violent fathers was marginalised.

Consistent with Foucault’s thinking, a “system of discursive relations that make possible the formation and transmission of serious speech acts by serious speakers” (Dreyfus & Rabinow 1982, p.68) was apparent from the presence of a hierarchy of evidence credibility that was based on social and legal culture and reinforced by dominant discourses. Judicial discretion facilitated the privileging of the opinions of professionals, primarily psychologists and some psychiatrists and social workers, who supported dominant beliefs about childhood incompetence, relied on generalised knowledge about children’s adjustment to family breakdown and supported the politically sanctioned concept of ongoing, cooperative parenting. The privileged professionals predominantly failed to focus on the children’s exposure to domestic violence as a central issue to the children’s adjustment and wellbeing. Judges’ ‘common sense’ knowledge, based on culturally established norms of what and who were acceptable and believable, made it acceptable for the Court to interpret the needs and interests of children without conducting specialist assessments on individual children’s exposure to domestic violence. This substantiated the reductionist thinking of the Court that the greater social problem is the poor adjustment of children from their exposure to interparental conflict and from father absence.

The failure by social science and legal professionals to focus on children’s exposure to domestic violence as the central consideration in the determinations of children’s ‘best interests’ created a culture where judges could avoid having to make ethical and moral judgments (Hansen 2004) about the complex post-separation family lives of children from families where domestic violence was an issue. In the small number of instances where social science professionals did focus on children’s exposure to domestic violence as being an important issue, there was often inconsistency between these professionals and other social scientists and the judges in their understanding of what constituted harm and risks to children’s emotional and psychological wellbeing. The unhealthy reliance by judges on the
assumptive ‘truths’ of positivism that support the politicised ideal of what constitutes the best interests of the child, formed a powerful barrier to other knowledges crossing the ideological divide.

9.1.1.2 Children ‘seen and not heard’

From the examination of the “networks of meaning and representation, and the corporealities that dominate the scene of writing” (Pether & Threadgold 2000, p.139) it became clear how patriarchal discourses reinforced the positioning of children at the lowest level of influence in the judges’ determinations of what constituted the children’s own best interests. The discursively constructed hierarchy of evidence credibility reaffirmed the historical resistance of adults and institutions to asserting children’s rights (Funder 1996). The vulnerably of oppressed children became clear from the prevalence of adult-centric socio-legal thinking that supported the marginalisation of children.

Reliance on limited and conceptually inadequate psychological theories of child development constructed the homogeneity of children and adolescents as ‘developing beings’ in need of adult management. This created a category of difference and set an imperative to keep childhood separate from adulthood. This classification normalised and generalised children’s needs for ongoing relationships with both parents and defined children’s subject position in separated families. The dominant discourse on childhood incompetence discounted concerns about young children’s exposure to domestic violence. Children’s and adolescents’ own accounts of the existence of compromised parent-child relationships that occurred in the violent families were discounted by the reliance on such normative assumptions (Jaffe, Lemon & Poisson 2003).

On a continuum of the child’s right to protection and the right to participate and to be heard, children were placed in the least powerful positions. What appeared to be superficial interpretations based on a generalised knowledge of childhood, informed the accepted opinions of psychologists, psychiatrists and social workers about what children ‘genuinely’ wanted and needed and what caused children to seek no contact with their fathers. This was also apparent in the judgments where children’s wishes had not been sought by the Court. Where children’s wishes were in competition with their fathers’ needs the children would often lose. On the basis of the construction of childhood incompetence to know what was in their own best interests, children were required by the Court to be involved in
a number of social science intervention processes involving interaction with their violent fathers. This demonstrated a circumscription of children’s ‘rights’ and ‘best interests’.

In the broader society the concept of childhood and the pattern of control over children are changing (Trinder 1997). However, the dominant judicial discourses demonstrated that judges are slow to move away from entrenched patriarchal expectations of children. Competing discourses were present in some judgments that sought to renegotiate normative assumptions about childhood incompetence. In the small number of judgments where these discourses succeeded in redefining the children’s subject position as competent members of their separated families and where their wishes for no contact with their violent fathers were accepted, there was marked improvement in their wellbeing. This demonstrated how important it is in children’s best interests to move beyond the embedded practice of children being ‘seen and not heard’.

9.1.1.3 Reconstruction of children’s exposure to domestic violence

Knowledge based on welfarist principles that defines post-separation family dysfunction constructs the risks to ‘vulnerable’ children of separation as being their exposure to ‘conflict’ and loss of a parent (Sclater & Piper 1999). Uncritical acceptance of this generalised knowledge by the judges redefined the long and short-term risks to children who had been exposed to domestic violence, misconstructed the interparental dynamics associated with violence and avoided the necessity for the perpetrators to take responsibility for their violence. These reconstructions formed a strong foundation for the ordering of father-child contact and for imposing interventions aimed at correcting interparental ‘conflict’. As demonstrated by statements made about the deterioration in children’s wellbeing the imposition of such outcomes posed risks to children in cases where it was domestic violence and not conflict that was the issue.

In the judgments analysed, the reframing of ‘violent’ behaviours as ‘conflict’ was problematic as was the lack of information provided to the Court by the majority of ‘expert’ psychologists, psychiatrists and social workers on the details of each child’s exposure to domestic violence, the risks and the protective factors and how individual children were coping with their exposure to domestic violence. This information was crucial to inform the judges’ understanding of the safety needs and the risks to children’s wellbeing in each individual case. This has been identified by prior research as a practice
oversight in Australian family law where comprehensive, appropriate screening for
domestic violence is absent or fails at various stages of proceedings before the FCA (Kaye
et al 2003). The failure of judges to enact the legislative provision of calling for additional
evidence, or to seek information directly from the child (Australian Law Reform
Commission & Human Rights and Equal Opportunity Commission 1996) about the
important issue of their exposure to domestic violence, suggests that the decision-making
process was simply an instrument of social regulation that reflected the politicised agenda
within the Australian family law jurisdiction.

Where children’s exposure to domestic violence was referred to, it was often done in ways
that are consistent with quantitative research methodologies which rely on recording
objective facts and incidences (Bagshaw & Chung 2000a). After violent incidents were
named and the children’s reactions noted in the judgments, the focus often returned to
children’s exposure to the ‘conflicts between parents’ as the issue of prime concern. Child
abuse and domestic violence were commonly seen as separate issues. The reconstructions
of what children had been exposed to, failed to reflect the complex nature of domestic
violence and created a very different history, future and reality for the children involved. In
a comparatively small number of judgments children’s exposure to domestic violence was
named as such and a connection was made between children’s exposure to violence and
their poor adjustment. In most of these judgments the effects on children of exposure to
domestic violence were downplayed by minimising discourses.

As Graycar and Morgan (2002, p.40) state “naming a problem accurately assists in its
resolution”. The general failure to name children’s exposure to domestic violence and the
recurring failure to distinguish interparental conflict from the systematic, intentional,
coercive nature of domestic violence meant that the complexity and relevance of the
children’s lived experiences of violence were not dealt with in the judicial determinations.
Children’s symptoms and experiences were often normalised. This supported retaining a
focus on the ‘correctness’ of the right to contact principle and the resolution of
interparental ‘conflict’ in the name of children’s ‘best interests’. This revealed a major
problem in judges’ conceptualisations of children’s exposure to domestic violence that
appeared to be significantly influenced by the paradigm of ongoing shared cooperative
parenting.
9.1.1.4 Children as victims of ‘parental alienation’

The unquestioned acceptance of a selective body of knowledge that links entrenched interparental conflict and implacably hostile mothers with poor outcomes for children was evident in the ‘scientific’ discourse on ‘parental alienation’. This informed the imperative to resolve the ‘conflict’ by adopting cooperative, ‘unselfish’ types of parenting models (Maclean & Eekelaar 1997; Neale & Smart 1999). The specific focus on mothering practices and the failure to focus on the accountability of the violent perpetrators together with a failure to recognise children’s problems as related to their exposure to domestic violence created a victim blaming context (Laing 2000b, 2000c). This was evident in repetitive statements about ‘alienating’ mothers who were perceived to victimise their children. Strong mother-blaming discourses were consistent with the unsubstantiated theory of Parental Alienation Syndrome, where mothers are constructed as willful or as unconsciously attempting to alienate the child from the other parent (Jaffe et al 2003). There were strongly held perceptions that mothers’ hostile or over-reactive ‘alienating’ behaviours and their ‘fabricated’ or ‘exaggerated’ concerns about contact, had serious adverse effects on their children’s adjustment and wellbeing.

The dominant construction of children as being incompetent created the notion that children were vulnerable to their mother’s negative influence. Children who reacted to their fathers with fear and distress were reformulated as children responding to the unacceptable alienating behaviours of their mothers. Even in some cases where the fathers’ violence was recognised as having caused difficulties for the children and an order for no father-child contact was made, judges referred to the ‘implacably hostile’ mothers who were seen as being responsible for undermining the quality of the children’s relationship with their fathers.

The acceptance of the discourse on parental alienation revealed a failure to consider that allegations of parental alienation are often a tactical response by parents who have been accused of abuse or violence by the other parent to divert attention away from the issue of domestic violence (Dewar 2002). The construction of children as victims of ‘parental alienation’ had the effect of marginalising the influence of contemporary knowledge on child victims of domestic violence having special needs for physical and emotional safety and security (Jaffe et al 2003) and that their welfare is compromised by contact with the perpetrator of violence (Harne 2004). This construction paved the way for an assumption
that by encouraging or requiring mothers to support the father-child contact the damage to the children’s welfare would be reduced. This was apparent in coercive strategies adopted by the Court that involved mothers and children in a range of interventions aimed at overcoming the ‘parental alienation’ and achieving mothers’ compliance in fostering father-child relationships. At the same time, mothers who had previously entered unworkable consent agreements for contact between the children and their violent fathers, who were later seen by the judges to be unacceptable fathers, were blamed by the judges for failing to protect their children.

The dominant construction of children as being victims of ‘parental alienation’ revealed how risks to children that are outside of the category of popular, uncritically accepted ‘knowledge’ are minimised or denied (Kaganas 1999). These findings demonstrate the need, wherever allegations of violence and alienation co-exist, for a thorough analysis of the issues that account for the child’s estrangement from a parent (Jaffé et al 2003).

### 9.1.1.5 Stigmatisation of child victims of violence

Social and institutional structures that are dominated by patriarchy can “stigmatise and pathologise those who have been victimised” (Laing 2000b, p.22). This was evident in the judges’ problematising and pathologising discourses in relation to children who did not comply with the normative expectations of the pro-contact ideology. Psychological discourses categorised these non-compliant children as incompetent, problem beings and emotive statements signified the judges’ disapproval of the children’s actively resistant behaviours.

The children’s conflicting emotions, their behavioural problems and their resistance to father-child contact were decontextualised. There was an absence of statements about the commonality of these sorts of problems that children who have been exposed to domestic violence experience. Children were not seen as credible witnesses to their own negative experiences of their relationship with their violent parents. Jaffé, Lemon and Poisson (2003) state how important it is in domestic violence cases to place each child’s behaviours and adjustment into the relevant context of exposure to violence, as ‘difficult’ or ‘disturbed’ behaviour may then be recognised as an appropriate response, or even be seen as positive given the trauma that the child has experienced.
Children exposed to violence and abuse can present as ‘alienated’ children who have in common strong reactions to the non-resident parent. However, the basis of their concerns about contact is distinctly different, and in cases of child victims of violence their concerns are not disproportionate to their actual lived experiences (Jaffé et al 2003; Johnston 2004). The reformulation of Parental Alienation Syndrome (PAS) that now focuses on the alienated child portrays children who resist contact with a parent as persistently stating ‘unreasonable’ negative feelings and responses towards a parent (Jaffé et al 2003). In the judgments analysed, interpretations of children’s resistance to contact as being alienating behaviour demonstrated the unquestioned acceptance of the reformulated construction of PAS. This construction did not reflect understanding of children’s negative experiences of their violent fathers’ behaviours and supported the categorisation of these resistant children as ‘difficult’ beings or as children with a ‘disorder’. These labels served as a powerful rationalisation for the dismissal of the children’s wishes for no father-child contact and for the imposition of interventions aimed at normalising the children’s subject position as passive, compliant beings and normalising the father-child contact. From a feminist perspective, the interventions imposed were designed to meet a politicised legal agenda and not the needs of the stigmatised children. The interventions were an active process of regulation founded in patriarchy that involved the disempowerment and “coercion … of the errant child” (Johnston 2004, p.228).

9.1.1.6 Gendered discourse, power and children’s ‘best interests’

Despite the principle of gender neutrality under the Family Law Act 1975 and the FCA’s ongoing efforts to present a neutral position in relation to mothering and fathering (Moloney 2002), gendered discourse that defined the roles and relationships of normative ‘traditional’ family life were central to the constructions of the ‘best interests’ of the child in the judgments analysed. The exercise of powerful social norms marginalised the issue of father violence and its impact on the children and defended violent men by emphasising the role of fathers as being essential to children’s post-separation wellbeing. The fundamental issues were not the emotional, physical and psychological safety of the children, nor the children’s wishes for no father-child contact, but the fathers’ rights in relation to their children, and the mothers’ responsibilities to facilitate those rights.

Parental compliance with traditional gendered roles that shape the conformity of how mothers and fathers need to behave defined what was acceptable and unacceptable
parenting. Gender related blame held mothers accountable for any departure from their stereotyped roles where they were expected to maintain the caring and emotional ties between fathers and children, while at the same time ensuring the protection of the children. The dominant legal discourse used by the judges on ‘alienating’ mothers being ‘implacably hostile’ whenever they failed in their caretaking role and opposed ongoing father-child contact, reflected the opinions of a number of authors about how entrenched this is in family law in Australia and the United Kingdom, and how powerful this discourse is in influencing case law and the beliefs of social science and legal professionals (Smart & Neale 1997; Burgess 1997; Williams 1998; Rendell et al 2000; Kaye et al 2003; Baum 2004; Fletcher, Fairbairn & Pascoe 2004). This dominant discourse reflected the uncritical acceptance of the questionable theory of Parental Alienation Syndrome (PAS) that has gained status within family law jurisdictions (Jaffe et al 2003). This theory, which has not been validated by empirical studies, fails to consider that mothers who have been exposed to domestic violence and can exhibit a range of behaviours consistent with PAS but are seeking to protect their children from possible harm (Jaffe et al 2003).

The dominant discourses on mothers, blamed mothers for the victimisation of fathers. This can be seen as a response to the wider cultural shifts in power relations between men and women (Collier 1999) and the response of the patriarchal institution of the Court, where gender discrimination is supported by the disciplinary power of the law. It was clear that the focus of the judges was on judging the attitude of the mothers towards father-child contact rather than focusing concern upon violent fathers’ parenting capacities and the experiences and special needs of child victims of domestic violence. Prior Australian research has demonstrated this is a common pattern in the FCA’s management of the issue of domestic violence and has raised this as a concerning issue (Rendell et al 2000; Kaye et al 2003).

Fathers who failed to demonstrate stereotypical male qualities attracted strong judicial disapproval and a category of difference emerged of ‘undeserving’ fathers who were also acknowledged as being violent men. These fathers were perceived to have adversely affected their children’s emotional welfare by their unacceptable ‘attitudes’ to the ‘responsibilities of parenting’. Unacceptable fathering appeared to be significantly related to the fathers’ departure from the gendered male stereotype rather than to the nature of the perpetrated violence. In contrast, in the small number of cases where mothers were seen to
be the more violent parent, their violence and their perceived lack of concern for the adverse impact of the violence upon their children was the focus of strong judicial disapproval. Mother violence was upgraded and father violence was downgraded in the construction of the best interests of the child.

9.1.1.7 Violent fathers as deserving parents

A reconstruction of fatherhood and of masculinities has found a focus in the arena of contact disputes where fathers’ contributions to the social order are being reaffirmed as being important in the familial context, even in cases where fathers are the perpetrators of violence. In the judgments analysed, reliance on hegemonic masculinity often constructed violent fathers as deserving and ‘loving’. The construction of a binary of ‘loving’ father/violent husband was a powerful barrier to recognising the husband’s violence as contaminating the father-child relationships. Attention to the intent of the perpetration of violence, the complex context and interpersonal dynamics within which the violence occurred, and the significance of power and gender were ignored. Instead there was a focus on the moral intent of the fathers to take responsibility for their violence and to make rational changes.

Where fathers appeared to fulfill the expectations of being capable of, or having the commitment to changing their ‘attitudes’, this influenced the judges’ views of them as acceptable, deserving fathers. The judges’ sympathy for the deserving fathers’ ‘unfortunate’ situations being the ‘victims’ of implacably hostile mothers was a denial that perpetrators of domestic violence “by their very nature, excel at misrepresenting themselves”, particularly in family court contexts where judges are open to accepting fathers’ undertakings to change (Jaffe et al 2003, p.16). There was silence on the topic of how fathers care ‘for’ their children. This accommodated a rights discourse (Williams 1998) that was clearly referred to in some judgments as the right and need of the fathers to have contact with their children. The patriarchal position of violent fathers within the post-separation family was reaffirmed allowing fathers to dissociate from the responsibilities of parenting.
9.1.1.8 The idealised reconstituted family

The principle of the Reform Act legislation of cooperative, ongoing parenting in partnership with the right of the child to contact, formed a winning team in the discursive contest to form the foundation for the judicial determinations of children’s ‘best interests’. These powerful constructs are based on conservative values and focus attention on traditional family structures and the significance of father presence for children’s future wellbeing and development. This study demonstrated that the use of judicial discretionary power in privileging the traditional concept of family has reinforced a normative model of an ‘acceptable’ post-separation family. This has taken precedence over the special needs of children who have been exposed to domestic violence.

Dominant normative assumptions about children’s needs for their natural fathers supported the normalised notion of ‘loving’ father-child post-separation relationships and marginalised the concept of ‘troubled’ father-child relationships. The prime focus was on reinstating the role of the fathers in the lives of their children and achieving the cooperation of the mothers to do this in spite of a history of domestic violence. These “reformulated relationships of domination” (Williams 1998, p.92) are consistent with the reconstruction of post-separation families in the United Kingdom where there is an imperative for children to have an ongoing relationship with both parents, regardless of the situation (Sclater & Piper 1999). The heavy reliance on the orthodoxy of an idealised post-separation family constructed by politics, social welfare and the state, has created an illusion that all children’s needs are met under this paradigm. The findings from this study show that in judges’ attempts to be consistent with this paradigm children’s interests were compromised. This was demonstrated by the tensions that were created from the deterioration in some children’s wellbeing following attempts by the Court to reinstate or increase their contact with their violent fathers. The consistent pattern of children’s improved wellbeing that occurred following the cessation of contact with their violent fathers also revealed that compliance with the dominant paradigm was not in those children’s best interests.

An idealised reconstituted post-separation family is a dangerous paradigm for families where children have been exposed to domestic violence. The misuse of power and the revictimisation of adult and child victims by the violent ex-partner, and the high rates of ongoing litigation over parenting disputes can place adult and child victims at further risk.
(Jaffe et al 2003). As reflected in the dominant judicial discourses that emerged from the judgments analysed, the failure to differentiate families where violence is an issue from families where violence is not an issue has supported a culture within the Court which excuses fathers for their violent behaviours, blames mothers for their departure from normative gendered role expectations and ignores the special needs of child victims of violence. As cases involving domestic violence are core business of the FCA (Brown et al 1998) it is essential for judges to move beyond a generalised planning agenda that is circumscribed by dominant patriarchal beliefs about an idealised reconstituted family.

9.2 Possible ways to centralise considerations of domestic violence

The extent and seriousness of domestic violence is not abating (Troeth 2000) and as this study has demonstrated the FCA needs active encouragement to clearly conceptualise the problem of children’s exposure to domestic violence (Family Violence Committee 2003). Government support is required to assist the FCA to develop a range of effective strategies to better identify cases where domestic violence is an issue and to manage these cases separately from cases where violence is not an issue. From a poststructuralist perspective there is no ‘right’ way to proceed, nor is there a single solution to resolving this complex problem.

My considered thoughts on the findings of this study have led to some suggestions for adopting a multi-dimensional approach in an attempt to counterbalance the power of the dominant ‘truths’ that inform the legal presumptions under the current legislation. The dominant ‘truths’ inappropriately regulate the subjectivities and rights of children and misconstrue their needs in cases where domestic violence is an issue. The suggestions include: expanding the knowledge base that informs judges and other ‘experts’ in the Court setting and introducing continuing education in the area of domestic violence and its effects on children as a requirement for these professionals; the introduction of legislative change that provides clear requirement to focus on and prioritise the protection of children and their caregivers; and implementation of a case management strategy which differentiates the management of cases where domestic violence is an issue and enhances the status of children.
However, without a cultural shift in society and the political arena which prioritises the goal of achieving physical, psychological and emotional safety for adult and child victims of domestic violence from separated families and requires perpetrators of domestic violence to account for their violent behaviours, the jurisdiction of family law in Australia will find it difficult to make any major changes. Protective strategies introduced under the law need the support of social reforms to protect women and child victims of domestic violence following family dissolution.

9.2.1 The development and transmission of knowledges

The findings of this study show that in the best interests of the child, the law needs to more accurately represent and specify the risks to children from their exposure to domestic violence as an important factor in the determination of contact disputes (Jaffe et al 2003). To enculturate more socially aware values and beliefs that are essential for meeting the needs of children from separated families with a domestic violence background, a central focus needs to be on changing the discursive regime relied on by social scientists and judges within the Australian family law jurisdiction.

Achieving this change is not a simple process within the ideological context of a conservative socio-legal and political realm that supports the operation of patriarchy. The ‘technologies’ of power (Dreyfus & Rabinow 1982) determine which discourses are acceptable at given points in history (McHoul & Grace 1993). These form the ‘stock stories’ in family law and, through the power of discourse, peoples’ conformity is regulated (Slembrouck 2002). As the law relies on tradition and precedent and changes slowly (Pether & Threadgold 2000), transformative discourses about the special needs of separated children who have been exposed to domestic violence are not easily accommodated into the discursive regimes that judges can readily access in making their judicial determinations (Cantwell et al 1999).

To achieve a reformulation of how the best interests of children who have been exposed to domestic violence are constructed within the FCA there needs to be greater awareness among legal and social science professionals involved in the decision-making process within family law, about how the needs of children from separated families are constructed through the knowledge-power relationship (McHoul & Grace 1993). This awareness is necessary to challenge the simplistic policy direction of Australian family law which is based on selective knowledge. Institutions, including the FCA and powerful groups within
Chapter 9: Conclusions and recommendations

society, need to accept new knowledges and recent insights on children’s exposure to domestic violence and incorporate these into the development of different policies and practices (Hunter 2002). This requires challenging the dominant discourses.

The ‘technologies’ of power in the jurisdiction of family law also need to support the expansion of what is able to be known through the development of research in specific areas where there are notable gaps in information (referred to Section 9.2.1.2), and to support the transmission of a broad range of relevant knowledge to legal and social science professionals. From adopting these strategies, alternative understandings to the accepted authoritative knowledge may gain acceptance (Danaher, Schirato & Webb 2000). From this, new official discourses may emerge and influence policy and practice in the law’s regulation of the post-separation parenting arrangements that impact on the lives of children who have been exposed to domestic violence.

9.2.1.1 A broad educational spectrum

The adult-focused court processes of evidence and cross examination that rely heavily on the establishment of ‘truth’, pose specific challenges in finding ways of motivating and supporting legal and social science professionals to move beyond the restrictive knowledge of positivist ‘scientific’ ‘truths’ to better understand the lived realities of women and child victims of domestic violence. It is important that ongoing opportunities are created for all legal and social science professionals in the family law jurisdiction to remain up-to-date with the emerging knowledges that are relevant for making determinations in cases where children are potentially at further risk from exposure to violence. From a poststructuralist perspective the solution is not simply to instate specialised training and education programs for professionals. All professionals involved in the decision-making process need to develop clear insights into their professional development needs, their own beliefs and values and the limitations to the dominant knowledge from research that underpins the common sense understandings that inform their practice (Cook & Bessant 1997; Bagshaw 1998).

A key site for the expansion of professional practitioners’ knowledge is the feminist epistemology that continues to make crucial contributions to the development of inclusive thinking about the contexts, complexity, causes and risks inherent in domestic violence relationships. Understanding the contributions of feminist knowledge is critical for
challenging the embedded legal, cultural and political discourses which limit definitional understandings of domestic violence and for recognising the patterned, repetitive nature of coercion and control (Bagshaw 2003). Drawing attention to the power differential between the perpetrator and victim would inform the Court of the need to recognise and name domestic violence as ‘violence’ not ‘conflict’. This would help raise awareness about the need to scrutinise and understand the full extent and implications of domestic violence in each individual case and would contribute to the process of ensuring that violence in all its forms becomes unacceptable to judges in their determinations of children’s best interests. Also the feminist conceptualisation of children exposed to domestic violence as being prime victims of abuse (Higgins & McCabe 1998) who are likely to be adversely affected from their experience of violence, needs to be incorporated into the knowledge base of legal and social science professionals within the family law jurisdiction. Valuing the perspectives of adult and child victims as a central consideration is also a significant contribution that feminist knowledge provides (Bograd 1990). Imparting knowledge on the sociology of childhood is particularly informative for changing the status of children as a silenced group in the social order of the court system. This is essential for professionals in the family law arena to understand in order to facilitate children’s participation in determinations of their own best interests (Campbell 2004).

The different fields of enquiry into childhood, children from separation and divorce, children’s exposure to domestic violence and child abuse (Tomison 2000; Kelly 2000) coalesce in the area of family law. To address the problems legal and social science professionals have in conceptualising the different types of violence that children from separated families can experience and the adverse effects this can have on their wellbeing, the contemporary knowledges need to be integrated to develop a broad interdisciplinary knowledge base (Saunders 2003). This is important for the development of an alternative discourse on what constitutes harm and risk to children who have been exposed to different forms of violence. An integrated cross-disciplinary knowledge needs to be conveyed in a coherent and comprehensive way to all professionals who have influence in the determinations of the best interests of the child.

By receiving a comprehensive ongoing multidisciplinary education program, legal and social science professionals would be better informed to reinforce appropriate knowledges through the use of discourse within the powerful institution of the FCA. As the dominant
knowledge is challenged and changes, some of the marginalised discourses on the special needs of child victims of domestic violence may gain prominence. Competing discourses may incorporate power as they come to the fore (McHoul & Grace 1993).

9.2.1.2 Future research

Amidst the uncertainty of social change in Australian society there has been an increasing political focus on family life and the law plays a significant role in the regulation of the structure of the post-separation family. However, the ideology of a reconstituted family has evolved within what has been identified by Smyth (2004a) as a vacuum of understanding about how mothers and fathers actually operate in terms of their post-separation shared responsibilities and decision-making in relation to their children. This shows how established knowledge from limited research becomes incorporated into legal principles and acts like law (King 1997). It is, therefore, important to address the significant gaps in research.

Within the field of separation and divorce there is an extensive range of factors that requires further research. To assist making informed decisions in contested contact disputes where domestic violence is an issue, there needs to be an established national research agenda that addresses current issues, as well as the predicted issues which are relevant for policy development and legislative reform. A national research agenda needs to develop a policy on facilitating collaboration between researchers and practitioners in the field, as well as enhancing the existing partnerships between government, courts, service providers and researchers (Dewar 2002).

A national research agenda needs to prioritise areas that have already been identified by authors as needing further investigation. Some of these include: the different types and patterns of violence and/or abuse to which children are exposed during and following separation and divorce (Featherstone & Trinder 1997); the range of complex variables, including the co-occurrence of different forms of direct and indirect violence, and the patterns of interaction that affect the adjustment of children from separation (Jaffe, Poisson & Cunningham 2002; Jaffe et al 2003); children’s resilience in domestic violence situations (Hughes, Graham-Bermann & Gruber 2002); the impact on the long-term welfare of the children of different levels of litigation and various parenting arrangements in violent and non-violent families (Jaffe et al 2002); children’s perspectives on and
experiences of parenting practices of violent parents (Eisikovits & Winstok 2002); and children’s individual coping mechanisms in response to exposure to domestic violence (Jaffe et al 2002).

Within the context of evolving transformative meanings of ‘fathering’ the dominant rhetoric of contemporary fatherhood rests on limited knowledge from research on the general population that has been generalised and assumed to apply to all fathers. Due to conceptual and methodological problems in fatherhood research, the available findings should only be understood as providing “broad empirical brushstrokes” (Smyth 2004a, p.106). The discretionary role of fathers in the lives of their children, the gender neutral presumptions of the Reform Act legislation and the growing numbers of contact disputes where there is domestic violence, all indicate how important it is to know more about positive fathering that is beneficial to children in the ‘normal’ population of separated families, and how this differs from fathering practices in cases of domestic violence and/or child abuse. To date the quality of father-child time in violent and non-violent relationships has not been adequately researched (Fletcher and Willoughby 2002). One of the most significant under-researched areas that needs to be urgently addressed is the fathering practices of violent men (Harne 2004). Understanding how children’s relationships with their violent fathers interact and influence children’s long and short-term wellbeing and adjustment is vital for determining the best interests of separated children from domestic violence situations.

Undertaking research in these specific areas would produce new knowledge to form the basis for the development of policies that define the currently unspecified concept of acceptable post-separation fathering ‘responsibility’. Without this information the risk continues that violent fathers will be able to successfully argue for an ongoing place in the lives of their children without professionals knowing how their fathering practices impact upon children’s wellbeing. Until more comprehensive knowledge from research emerges and professionals are more able to understand the factors that impact upon the wellbeing of children from separated families with a domestic violence history, a conservative approach needs to be adopted by professionals involved in the determinations of the children’s best interests. This approach should focus on ensuring the safety and security of all children who have been exposed to violence (Williams, Boggess & Carter 2002).
9.2.2 Legislative change

The Reform Act legislation fails to provide guidance about how to reconcile the competing principles of child protection in cases of domestic violence and the child’s right to contact with both parents (Jaffe et al 2003). Within a highly discretionary Court where patriarchal ideology prevails it is questionable that the child’s right to safety will ever compete successfully with the powerful principle of ongoing cooperative parenting and with the child’s ‘right’ to contact. To create an imperative for prioritising the child’s right to safety legislative change is needed.

A number of Western countries including New Zealand, Ireland and some States in the United States of America have challenged the operation of patriarchy and the underlying assumptions about the idealised reconstituted family by adopting a rebuttable presumption of no contact in all cases where domestic violence is alleged (Jaffe et al 2003). The aims of these legislative changes are to specifically bring the issue of exposure to violence and any risk factors to the fore before any orders for contact between children and the alleged perpetrator of domestic violence are made (Chetwin et al 1999; Jaffe et al 2003; Family Violence Committee 2003; Harne 2004). Under these legislative changes, processes that focus on and investigate the issue of domestic violence have been implemented to ensure that courts have sufficient information when addressing each case. For example, under New Zealand’s 1995 amendments to the Guardianship Act, the opinions of the children and the other parent are sought in regard to post-separation parenting arrangements (Section 16B(5) New Zealand Guardianship Act 1995) (Chetwin et al 1999).

Legislative change designed to protect the victims of domestic violence in any parenting orders that are made needs to be urgently introduced into family law in Australia. The evident pro-contact ideology, founded on subjective perceptions and the rights of non-resident parents, impacts negatively on children from domestic violence families (Kaye et al 2003). The return to a fault perspective, where proof of no harm to the child is required by the court, is necessary to clearly focus attention on the safety of the child and the behaviour and accountability of the perpetrator of violence. This would assist in changing the expectations of violent parents about their ‘right’ to contact and to address the currently “unprotected rights” of the child (Rayner 1997, p.6) to safety. This recommended legislative change alone will not provide a complete solution for children from domestic violence families whose cases come before the FCA. The process of implementation and
interpretation of legislative change is as important as the introduction of the legislation (Jaffe et al. 2003). This is illustrated by the findings of a review of New Zealand’s legislation of a rebuttable presumption of no contact in cases where violence is an issue. The review shows that the introduction of this legislation did not lead to its application in all parenting orders where domestic violence was an issue (Grant 2005). However, the review did show positive outcomes in the recognition by the New Zealand judges that the misuse of power and control and psychological and emotional abuse are all violent behaviours and that domestic violence is a serious issue (Grant 2005).

The changed awareness of the New Zealand judges about what constitutes domestic violence suggests that the introduction of such legislative change in Australia would provide a site within a ‘technology of power’ (Foucault 1972) for the evolution of new dominant discourses on what constitutes the best interests of children where domestic violence is an issue. This is particularly important to implement at this point in history, as the proposed *Family Law Amendment (Shared Parental Responsibility) Bill 2005* further reinforces the generalised assumption that children will benefit from having ‘meaningful’ involvement with both parents. The proposed amendments seek to require that allegations of domestic violence are able to be substantiated, that fear of violence must be ‘reasonable’, and sanctions are to be imposed if allegations are found to be false. These proposed amendments are likely to increase the difficulties in centralising the issue of children’s exposure to domestic violence in the determinations of children’s best interests.

Smart and Neale (1999) have suggested another legislative change that addresses the paramount principle. The principle of the ‘best interests’ of the child may need to be replaced by one that is based on the ‘quality’ of existing relationships. Under the current paramount principle, problems arise in the interpretation of what constitutes the ‘best interests’ of children and, as the findings of this study show, this is problematic in cases where domestic violence is an issue. In the interests of these children it is time to move away from a focus on the structure of the idealised post-separation family and to concentrate specifically on the qualities of parent-child relationships (Smart 2002). Contemporary research supports the significance of the quality of the parent-child post-separation relationships for the adjustment of children (Kelly 1993; Smart 2002; Byas 2003).
9.2.3 A differentiated case management pathway

In this thesis, evidence has been provided that the Australian family law system poorly manages cases of domestic violence. The Pathways Report of the Family Law Pathways Advisory Group (2001) recommended reform in the practice of managing domestic violence cases in this jurisdiction. Cases where domestic violence is an issue are complex and emotionally charged for the clients and the professionals involved. It is important to address the multiple, prolonged and undifferentiated processes related to the legal pathway that many children and their caregivers endure in cases where domestic violence is an issue. The quantitative findings from this research revealed significant rates of repeated litigation and lengthy trials in contested contact cases, pre and post Reform Act, where domestic violence was an issue that reached the stage of final hearing in the Adelaide registry. This indicates that such cases do not resolve easily and need proper case management. The research of Brown et al (1998) from the study on child abuse cases before the FCA support this finding. Should a rebuttable presumption of no contact in domestic violence cases be introduced there may be further demands for appropriate case management of these cases. New Zealand’s experience was that following the implementation of such legislation there was an increase in litigation by the contact applicants contesting the initial order for no contact (Grant 2005).

The FCA’s failure to keep a statistical record of cases where domestic violence is an issue clearly shows that at a national level the management of these cases is not differentiated from cases where domestic violence is not an issue (Shea Hart 2004). The outdated data collection technology employed by the FCA has not been able to support research into the profile of client populations of the Court (Cooke & Buring 2002). This is a serious oversight, as the current legal paradigm lacks the ability to recognise and adequately manage the special problems that emerge from parenting disputes in these cases. The FCA needs to introduce a system for keeping reliable statistics on this population so that adequate planning can be made and resources can be dedicated to streamline management of these cases. Keeping a statistical record can also help challenge the myth that early intervention and comprehensive case management programs are not cost-effective. An evaluation of Project Magellan revealed a reduction in the number of court events and this demonstrates the value from a systems perspective of having clearly defined case management pathways for cases where child abuse is an issue (Dewar 2002).
The need for early identification and differentiated specialist case management that includes a range of strategies for managing cases involving domestic violence that come before the court is an ongoing issue of importance for the FCA and the Federal Magistrates Courts (Dewar 2002). An important aim of a streamlined case management process is to address the complexities of domestic violence and parenting issues in dispute in a holistic way (Jaffe et al 2003). An increase in legal aid funding would be required to ensure the adult and child victims of domestic violence are able to complete the litigation pathway with legal representation. The systemic factor of a decline in free legal services (Hunter 2002) needs to be rectified specifically for the victims of domestic violence. Lawyers from legal aid services are integral to the early detection of domestic violence as an issue relevant to the determination of parenting disputes and for initiating the streaming of individual cases into the differentiated case management pathway. There also needs to be an increase in the number of State funded supervised contact centres to accommodate the cases where, following thorough assessment, it is deemed appropriate for contact to occur in a structured supervised environment.

Case management needs to include a focus on the issue of the co-occurrence of domestic violence and child abuse as there are significant numbers of such cases in the jurisdiction of family law in Australia (Brown 2003). Managing these cases needs to occur within the context of a fully integrated, coordinated, multidisciplinary, interagency approach aimed at the protection of the victims of violence, the adjustment of all family members and the resolution of the disputes before the court. The entrenched boundaries that exist between the issues of domestic violence and child abuse (Layton 2003; Irwin et al 2002) present challenges that need to be overcome. It is not only the FCA but also the States and Territories in Australia that are slow to adopt the understanding that children’s exposure to domestic violence is a child abuse issue (Irwin et al 2002).

In the planning, development, action research and evaluation stages of a suitable case management plan consultation needs to be undertaken that includes children, parents and professionals from the different jurisdictions. Outcomes of Project Magellan and Project Columbus need to be considered in the development of a collaborative, interagency differentiated case management pathway for cases where domestic violence and or child abuse are issues that come before the FCA and the Federal Magistrates Courts.
9.2.3.1 Comprehensive early intervention

Cases involving domestic violence and the co-occurrence of domestic violence and child abuse need to be identified early in the proceedings before the FCA and the Federal Magistrates Courts. Rules need to be established to facilitate this in order to streamline and coordinate the case management between the different court systems. A policy and practice direction needs to be established to ensure that at all stages in the case management process, the physical, emotional and psychological safety of the children and their caregivers are prioritised, with an ongoing focus on the experiences and wishes of the children and the provision of support for them through the times of uncertainty. Properly trained professionals need to provide this service and direct each case to the next appropriate step in the case management process. Professionals involved in the decision-making process have an important role in preventing ‘case drift’ (Brown 2003) and in contributing to the prevention of judicial outcomes that do not address the special needs of children who have been exposed to domestic violence.

The parenting issues in dispute need to be addressed in a timely way with appropriate assessments occurring prior to any decisions, including interim decisions being made by the courts. Unworkable consent agreements that may not have been impartially negotiated and may place a child at risk need to be carefully scrutinised. Depending on the dynamics of each case different dispute resolution processes need to be offered, including child inclusive practice. The litigious nature of a lot of these cases, as demonstrated by the quantitative data from this study, suggests that whenever a case returns to the court the case management approach would need to be provided again.

As part of an early intervention strategy comprehensive assessments of the violence and the evaluation of risk to the children are essential (Jaffe et al 2003). What should be most closely examined by the courts in each individual case is how each child has coped with exposure to violence, and how any child’s wish for contact with a violent parent can be reconciled with a decision that is in the child’s best interests (Jaffe et al 2003). In-depth assessments conducted by social science professionals with specialist assessment skills in this area should be required to specifically focus on a number of factors that include: the risk and protective factors; the parenting capacity of both parents; the history of children’s exposure to violence; the effects of the violence on the adult and child victims; and what factors have led to the children’s wishes for no contact with, or their ambivalent
behaviours towards, the non-resident parent (Sturge & Glasser 2000; Jaffe et al 2003; Johnston 2004). Risk assessments need to include a strong emphasis on the children’s own accounts of their lived experiences. The limitations as well as the strengths inherent in individual practice techniques need to be recognised, especially the limitations of risk assessments in not being able to guarantee the safety of the child (Chetwin et al 1999).

Provision of a child friendly environment is essential. It is the responsibility of the professionals working with children to have a range of skills and approaches to making assessments that facilitate the greatest level of competence in the child to recount the details of their experiences (Taylor 1998; Smart 2001). Information on each child’s experiences of violence is important for the judicial officer’s understanding of each child as a reliable witness to his or her own lived experiences (Feiner 1997). This requires the professionals who conduct the assessments to have specialised training and skill development in the assessment of children of all ages and stages of development and to have up-to-date knowledge on children’s exposure to domestic violence.

Ongoing training and supervision that encourage self-reflexive practice are important components of effective interventions with children who have special needs. Ethical practice requires that professionals protect children from harm. This means being able to see beyond the dominant rhetoric in identifying the needs of each individual child. Concerns about the establishment of disempowering stereotypes of victims of domestic violence (Laing 2000b) can be addressed by reflexive practice where underlying assumptions about children, their behaviours and needs are made transparent. Reflexive practice brings into consideration the complexities of each child’s experiences and encourages a conceptualisation of the “gestalt of harm” (Acoca & Raeder 1999, p.135). This comprehensively defines children’s experiences and takes into consideration children’s own understandings about what is in their own best interests (Mullender et al 2002). Reflexive practice is in contrast to interpreting children’s behaviours from a positivist perspective where the psychological classification and categorisation of children constructs a ‘legitimate’, ‘scientific’ explanation for children’s difficulties according to predetermined restricted criteria (Bancroft & Silverman 2002).
9.2.4 Enhancing the status of child victims of violence in the Family Court of Australia

The cultural context in which we live associates having a right to participate in decisions with participative democracy. Despite children’s right to be heard under the United Nations Convention on the Rights of the Child, within family law in Australia their status in practice is as marginalised ‘others’. Legal systems, including Australian family law, need to adopt processes that treat children as competent beings with participatory rights and access to justice via advocacy and avenues of complaint (Taylor 1998; Smart 2001). Where bureaucratic processes do not support the participatory rights of the child there is a failure to reach outcomes that reflect the needs and interests of children and children inherit the consequences (Bagshaw 1999; Jaffe et al. 2003). As the findings from this study demonstrated, the consequences for marginalised children can be particularly concerning in cases where domestic violence is an issue.

Children’s rights need to be more effectively monitored and supported than other human rights if they are to hold the same importance as adult rights (Rayner 1997). Different approaches to children’s participation in post-separation decision-making have been attempted but not sustained by the FCA, such as judicial consultations with children in chambers (Campbell 2004). For children to effectively participate in decisions made in their own best interests they need to have their legal status of a ‘party to proceedings’ acknowledged and supported rather than being marginalised as a child ‘subject’ of proceedings that, in practice, translates into being an ‘object’ of proceedings (Roche 1999).

Society and the law need to make considerable changes to reach a point of being willing to allow individual children to participate in decision-making and make their own claims. Children’s capacity to participate in decisions that directly affect them is based on the complex interplay of each child’s and each family’s characteristics, the social supports that are available, the capacity of the interviewer to listen to and understand the child, and the practice of the justice system (Kaltenborn 2004). All of these factors are regulated directly, or indirectly, by the macrosystems of society that include the law (Kaltenborn 2004). The legal system needs to provide children with more than just the right to participate. Children need to be consulted about what processes and mechanisms are helpful from their perspectives (Campbell 2004) and those that facilitate the voice of the child being heard need to be introduced. This means providing child friendly services at different stages of
proceedings to facilitate the following: children seeking their own applications for legal representation; making their own applications in relation to post-separation parenting arrangements; becoming mandated or voluntary participants in court ordered dispute resolution processes; providing evidence in court proceedings that directly affect them; and applying for domestic violence restraining orders.

More active promotion of children’s status as active participants in the legal process will help empower children and contribute to changing the patriarchal culture of the court. Only when opportunities are created for children to receive relevant information and to participate during litigation or pre-litigation processes and contribute to decisions that are made in their own ‘best interests’ can children be seen as citizens with the same right to be heard and defended as any other citizen. This is important in making the concerns, needs, interests and rights of children visible (Roche 1999). Improving the status of children is essential in cases where the children are ‘victims’ of domestic violence, are ‘objects’ of a parenting dispute, and are classified as incompetent, problematised ‘others’ in the adult imposed decision-making process said to be in the children’s ‘best interests’.

*After...raising awareness of the impact of domestic violence on children, let us hope that the next era can be one of listening to children more effectively in deciding what to do about it.*

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Bibliography


Bibliography


Appendices

Appendix 2.1

Checklist of factors Section 68F(2) *Family Law Reform Act 1995*

68F(2) The court must consider:

“(a) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s wishes;

(b) the nature of the relationship of the child with each of the child’s parents and with other persons;

(c) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:

   (i)    either his or her parents; or

   (ii)   any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and the responsibilities of parenthood, demonstrated by each of the child’s parents;

(l) any family violence involving the child or a member of the child’s family;

(j) any family violence order that applies to the child or a member of the child’s family;

(k) 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;

(l) any other fact or circumstance that the court thinks is relevant.”
Appendix 2.2

The Family Law Reform Act 1995 object of Section 60B and principles

60B (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children

(2) The principles underlying the object are that, except when it is or would be contrary to the child’s ‘best interests’:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about future parenting of their children
Statistics on children’s exposure to domestic violence in Australia

There are limited statistics on children’s exposure to domestic violence in Australia. Available statistics include the following:

- A recent large retrospective survey of 5,000 Australian teenagers found that one quarter had witnessed physical domestic violence against a mother or stepmother (Indermaur 2001, p.1).

- An archival analysis of records from various relevant agencies undertaken by the South Australian Domestic Violence Unit (1995) showed an estimated reported rate of domestic violence in South Australia to be between 1.5 and 2 incidents per year per 1000 women aged 15 years and over (Tomison 2000, p.3).

- In 1988 the Queensland Domestic Violence Task Force reported eighty eight percent of the 856 respondents in a phone in survey reported having dependent children in the household and in ninety percent of these cases the women reported the children had witnessed domestic violence (Laing 2000b, p.3).

- Police reports from Armadale Western Australia between 1993–1994 showed 176 Family Incident Reports were completed with sixty six point four percent of cases stating children were present at the time of a violent incident, and in twenty five percent of cases the presence of the children was unknown (Laing 2000b, p.3).

- A report of the Australian Women’s Safety Survey showed forty two percent of women in a prior violent relationship experienced violence during pregnancy, and for twenty percent of these women this was the first act of violence (Tomison 2000, p.3). This survey also showed that sixty one percent of women who experienced violence had children in their care and that thirty eight percent of the children were believed to have witnessed the domestic violence (Tomison 2000, p.8).

- In Australia between 1997 and 1998, there were 34,663 children from a population of homeless or at risk of homelessness due to a range of circumstances including domestic
violence, who utilised Australia’s Supported Accommodation Assistance Program (SAAP) services, forty six percent of whom were under 5 years of age, and forty three point six percent were aged 5 to 12 years (Irwin, Waugh & Wilkinson 2002, p.21).

- A study conducted by Irwin, Waugh and Wilkinson (2002, pp.54–55) found that thirty three percent of all reports to the New South Wales Department of Community Services included allegations of domestic violence, and children from indigenous communities were over-represented in the number of these referrals made.

- Alternative care placements for children provided by NSW Aboriginal Children’s Service estimated thirty percent of cases involve domestic violence (Laing 2000b, p.3).
## Profile of the final sample of 20 judgments

Cases by Number, Year of Judgment, Judge and Case Features

<table>
<thead>
<tr>
<th>Case number</th>
<th>Year of judgment</th>
<th>Judge (code name)</th>
<th>Ages of children (years)</th>
<th>Resident parent</th>
<th>Domestic Violence Restraining Order</th>
<th>Child protection services</th>
<th>Prior consent agreement</th>
<th>Family report</th>
<th>Contact ordered</th>
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<td>Orange</td>
<td>5, 3</td>
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### Appendix 5.1

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<th>Child protection services</th>
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<th>Family report</th>
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**Notes:**

1. Case numbers range from 21 to 40 as the original plan was to include a pre Reform Act sample that was to be numbered 1-20
2. - Not applicable
3. R/O (Domestic violence restraining order)
4. Involvement of child protection services includes CPU and/or FAYS. This does not represent the proportion of cases where a description of behaviour towards a child by a parent was made that was consistent with standard definitions of child abuse (N=18). The largest category of described abusive behaviours (physical, sexual, emotional or neglect) was multiple types of abuse, mentioned in 8 cases
5. Contact ordered refers to any direct interactive forms of contact
Appendix 5.2

A picture of the steps taken in the two stages of sampling

a) Purposive sampling of First Instance judgments in the Adelaide registry

All First Instance judgments
1991–2001

Judgments on parenting disputes

Judgments on contact disputes

Domestic violence an issue

Domestic violence accepted. Both parents parties to proceedings and determination reached

b) Stratified random sampling of post Reform Act judgments

Post Reform Act judgments – 11th June 1996 to 31st December 2001

Categorised by year of judgment

Random sample from each year proportionate to the total number of judgments per year

20 post Reform Act judgments checked to ensure representative of range of judges
## Appendix 5.3

### NVivo nodes

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<th>Child Nodes</th>
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<td>Too young</td>
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<tr>
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<td>-</td>
</tr>
<tr>
<td></td>
<td>Competent</td>
<td>Accept experience</td>
</tr>
<tr>
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<td>Accept wishes</td>
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<tr>
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<tr>
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</tr>
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<tr>
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<td>Prior cooperation</td>
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## Features of pre and post *Family Law Reform Act 1995* cases from the purposefully selected sample of judgments

**Total number pre Reform Act cases N = 43; post Reform Act cases N = 66**

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<th>Pre Reform Act</th>
<th>Post Reform Act</th>
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<td>Contact ordered</td>
<td>72% (N=31)</td>
<td>74% (N=49)</td>
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<tr>
<td>Father main perpetrator of domestic violence</td>
<td>84% (N=36)</td>
<td>79% (N=52)</td>
</tr>
<tr>
<td>Both parents perpetrators of domestic violence</td>
<td>16% (N=7)</td>
<td>21% (N=14)</td>
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<tr>
<td>Domestic violence Restraining Order</td>
<td>51% (N=22)</td>
<td>53% (N=35)</td>
</tr>
<tr>
<td>Post-separation domestic violence</td>
<td>56% (N=24)</td>
<td>62% (N=41)</td>
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<tr>
<td>Allegations of child abuse</td>
<td>60% (N=26)</td>
<td>73% (N=48)</td>
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<tr>
<td>Father alleged child abuser</td>
<td>88% (N=23)</td>
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<td>Mother alleged child abuser</td>
<td>12% (N=3)</td>
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<tr>
<td>Contact applicant alleged child abuser</td>
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<td>81% (N=39)</td>
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<tr>
<td>Contact ordered in cases of alleged child abuse</td>
<td>65% (N=17)</td>
<td>71% (N=34)</td>
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<td>Repeated litigation over parenting disputes</td>
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<td>53% (N=35)</td>
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<td>Prior contact agreement</td>
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<td>70% (N=46)</td>
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<td>Average number of days per trial</td>
<td>5.7</td>
<td>6.6</td>
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<tr>
<td>Separate Representative appointed</td>
<td>53% (N=23)</td>
<td>70% (N=46)</td>
</tr>
<tr>
<td>Family report(s) provided</td>
<td>70% (N=30)</td>
<td>88% (N=58)</td>
</tr>
<tr>
<td>Child clinical interventions</td>
<td>53% (N=23)</td>
<td>50% (N=33)</td>
</tr>
</tbody>
</table>

### Notes

1. Alleged child abuse refers to allegations made of direct physical, sexual, emotional abuse or neglect, or multiple forms of abuse.

2. Child clinical interventions refers to counselling, therapy, medication, individual assessment, or multiple forms of intervention.