

**‘CONDEMN THE FAULT & NOT THE ACTOR?’
FAMILY VIOLENCE: HOW THE FAMILY COURT OF
AUSTRALIA CAN DEAL WITH THE FAULT AND THE
PERPETRATORS**

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I INTRODUCTION

The title of this article, ‘Condemn the Fault & Not the Actor?’¹ Family Violence: How the Family Court of Australia Can Deal with the Fault and the Perpetrators’, is a thesis which, ostensibly, suggests that we should hate the sin and not the sinner. Sin or fault in the context of family law disputes, it is suggested, is the occurrence of family violence² or abuse³ within the family unit and the failure by all concerned to provide a ‘mechanism’, be it legal or otherwise, to protect victims, most frequently women, and definitely children, from its occurrence. Although obviously others, including the perpetrator, have responsibility in relation to violence and its consequences, this article deals with the responsibility of the Family Court of Australia (‘the Family Court’). It is the

* Deputy Chief Justice of the Family Court of Australia. The assistance of Chris McDermott, Senior Legal Associate to Deputy Chief Justice Faulks, Family Court of Australia, in the preparation of this article is gratefully acknowledged. I am also grateful to the insights of Kristen Murray, Senior Legal Research Adviser to Chief Justice Bryant, Family Court of Australia. This article is based on a keynote address delivered at the conference *Responding to Family Violence: National Perspectives – Local Initiatives* (Canberra, 6 May 2010).

1 William Shakespeare, *Measure for Measure*, Act II, Scene II. ‘Angelo: Condemn the fault and not the actor of it? Why, every fault’s condemn’d ere it be done: Mine were the very cipher of a function, To fine the faults whose fine stands in record, And let go by the actor. Isabella: O just but severe law!’

2 *Family Law Act 1975* (Cth) (‘FLA’) s 4 (definition of ‘family violence’):

‘Family violence’ means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety. Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

3 *FLA* s 4 (definition of ‘abuse’):

‘Abuse’ in relation to a child, means: (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

Family Court which is from time to time demonised as the sinner in this occasion of sin.

The Family Court has an important role to play in the determination of *legal* disputes involving parenting matters that may involve allegations of family violence and abuse. The word '*legal*' is emphasised as there is an obvious practical requirement in an adversarial and non-inquisitorial justice system that any allegation raised is assessed in light of relevant civil law evidentiary standards. While the Family Court has certainly endorsed less adversarial processes with the introduction of the Less Adversarial Trial,⁴ a judge must operate on the basis of evidence that can be appropriately tested, particularly where a person is accused of heinous acts. It is a precarious balancing act which leaves the Family Court open to much criticism.

Under the protocol established between the Family Court and the Federal Magistrates Court, the Family Court handles most allegations of sexual abuse of a child and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.⁵

The Family Court is often condemned for not effectively bringing perpetrators of family violence and abuse, particularly men, '*to justice*' in resolving parenting disputes. The meaning of justice within the community in this context is somewhat nebulous. According to the rule of law, the perpetrator of family violence and abuse should be 'condemned' by being appropriately dealt with by the justice system (be it criminal or civil).

The Family Court is frequently hounded by allegations that 'judges are out of touch', 'judges don't do enough', 'judges should save mothers and children' and 'judges need better training about family violence.' The call for better knowledge and training in areas of family violence was discussed in the recent *Family Courts Violence Review* by Professor Richard Chisholm, which recommended that the Family Courts review their procedures in handling cases involving family violence and that knowledge about family violence be considered in appointing officers to the Family Court.⁶ The Chief Justice of the Family Court, Diana Bryant, has articulated the dilemma for the Family Court in its involvement in resolving issues of family violence. The Chief Justice has stated:

Obviously but problematically for courts, successes in detecting indicators of risk remain largely ignored, precisely because tragedy is prevented or avoided. Conversely, the relatively few failures of the Courts to detect such a risk receive disproportionate attention because of the gravity of that which results.

I am a strong believer in continuous improvement and I welcome constructive suggestions as to process reform. Those suggestions however need to be

4 For further discussion of the Less Adversarial Trial see Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia, 2007).

5 Family Court of Australia, *Protocol For the Division of Work Between the Family Court of Australia and the Federal Magistrates Court as at 29/01/2010* (Commonwealth of Australia, 2010).

6 Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009) Recommendations 2.3 and 4.8.

predicated on an understanding of the various procedures and supports the Courts currently have in place.⁷

It is irrefutable that the Family Court should be open to constructive criticism and there should be healthy and rigorous debate within the community about the decisions made by judges. These decisions derive from the legal obligations under the *Family Law Act 1975* (Cth) ('FLA'). It has traditionally been the role of the Attorney-General, as First Law Officer of the Commonwealth, to defend the Family Court against unscrupulous allegations or unjust criticisms. Practically however it remains the task of the Family Court to explain its role to the community (but not its decisions which are all published and speak for themselves).⁸ There are various opinions expressed within the community through different newspapers, letters to politicians, talkback programs and public lectures which frequently include misguided and mistaken ideas about what the Family Court can do to protect the victims of family violence and abuse. The Family Court is no more immune from criticism than any other institution. No one likes criticism, however, the Family Court accepts and where possible acts on objective and constructive suggestions about how to improve processes and responses.

II WHAT DO WE PRESENTLY KNOW ABOUT FAMILY VIOLENCE?

It is important to examine the context in which proceedings about violence occur. In 2007, the Australian Bureau of Statistics published the results from a survey conducted in 2005, which found:⁹

- in 2005, an estimated 1.3 million women aged 18 years and over had ever experienced partner violence¹⁰ since the age of 15 years;
- the most common location where women were physically assaulted by a man was in their home or another person's home (64 per cent or 125 000);
- partner violence most often occurs in the home. In 2005, the majority (87 per cent or 263 000) of women whose most recent experience of physical assault during the last five years was by a partner said that it took place

7 Chief Justice, Family Court of Australia Diana Bryant, 'Family Violence, Mental Health and Risk Assessment in the Family Law System' (Speech delivered at the Public Lecture Series, Queensland University of Technology, Brisbane, 21 April 2009).

8 The Family Court of Australia publishes its judgments in anonymised format, in compliance with the requirements of the *FLA* s 121.

9 Susan Linacre, 'Women's Experience of Partner Violence' (Australian Social Trends 2007, 7 August 2007)

<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/61292430E027131DCA25732F001CA53A/\\$file/41020_Women's%20experience%20of%20partner%20violence_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/61292430E027131DCA25732F001CA53A/$file/41020_Women's%20experience%20of%20partner%20violence_2007.pdf)>.

10 Defined by the ABS as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault which was perpetrated by a current and/or previous partner, and which occurred since the age of 15 years': *ibid* 1.

in their home, with a further eight per cent reporting that it occurred in someone else's home. A vast majority (93 per cent or 61 100) of women reporting incidents of sexual assault by a partner also said they took place in their home or another person's home;

- some women experience partner violence while they are pregnant. In 2005, 37 per cent (83 500) of women who were pregnant during the relationship with a violent partner had experienced violence while pregnant. A small proportion (16 per cent) said that the violence occurred for the first time while they were pregnant;
- in 2005, 60 per cent (214 000) of women who had experienced partner violence in the last five years had children in their care. Just over two-thirds of these women (68 per cent or 145 000) said that the children had witnessed the violence; and
- violent behaviour is often associated with consumption of alcohol or certain drugs. In 2005, of women whose most recent experience of physical or sexual assault was by a partner, a considerable proportion (50 per cent and 46 per cent respectively) said that their partner's consumption of alcohol or drugs had contributed to the incident.

The *Family Law Rules 2004* (Cth) require that a person file a Notice of Child Abuse or Family Violence if a person makes an allegation of abuse or family violence in child-related proceedings.¹¹ The number of Notices of, or risk of, abuse or family violence filed in the Family Court over the past five years has decreased, from 767 filed in 2004–05 to 441 in 2008–09.¹² However, the proportion of cases raising issues of abuse and family violence has risen between 2004–05 and 2008–09, to 12.5 per cent.¹³ This is in part a statistical rather than a substantive change because the work of the Family Court has become more concentrated in the most complex end of the spectrum of disputes and, at the same time, the Family Court is handling a smaller number of applications overall.

In 2003 the Magellan case management system was rolled out across Family Courts. There were 277 'Magellan' cases pending as at 30 June 2009.¹⁴ 'Magellan' cases are those that involve allegations of serious physical abuse or sexual abuse of a child. The initiative brings together judges, registrars, managers of child-dispute services and client services officer in a committee to maintain relationships with external stakeholders when there are such allegations. Rigorous judicial management and oversight of these matters ensures that the cases involving such allegations are dealt with as expeditiously as possible. In a review of the Magellan initiative in 2007 it was concluded that Magellan cases were finalised in a shorter time period than other cases, and that the success of the initiative lay in 'its ability to assist with what participants saw as the central task of gathering all the necessary information together to ensure a timely

11 *Family Law Rules 2004* (Cth) r 2.04B(1).

12 Family Court of Australia, *Annual Report 2008–09* (2009) 55.

13 *Ibid* 56 and Family Court of Australia 'in-house' reporting data.

14 Family Court of Australia, above n 12, 56.

response.¹⁵ The Family Law Council has similarly lauded the initiative for fostering ‘increased cooperation and information sharing.’¹⁶ Between 2004–05 and 2008–09, the number of ‘Magellan’ cases filed and finalised rose.

Albeit based on a limited review, in final orders cases where parents were ordered to have less than 30 per cent of time with their children, the reason given was because of abuse and/or family violence by the mother in 16 per cent of cases, and because of abuse and/or family violence by the father in 29 per cent of cases.¹⁷ However, there is a statistical skew in these figures. They reflect that there are fewer fathers who have been ordered to have 70 per cent or more of time with their children for reasons entirely different from matters of violence.

III THE ROLE OF THE JUDGE (AND THE COURT): THE LEGISLATIVE PATHWAY

Judges of the Family Court are to some extent unique in that for a person to be appointed to the Family Court Bench he or she must ‘by reason of training, experience and personality ... [be] a suitable person to deal with matters of family law.’¹⁸ Judges also regularly receive information and training about matters bearing upon their roles in determining the (frequently) emotionally charged issues of couples separating.

The role of a Family Court judge in determining legal disputes involving allegations of family violence and abuse is contained in the *FLA*. This legislative pathway specifies a number of important obligations for the Family Court and provides enabling powers to deal with such issues. The Family Court is obliged to ensure that any parenting order it makes is consistent with the best interests of the child as the paramount consideration¹⁹ and consistent with any family violence order²⁰ and does not expose a person to an unacceptable risk of family violence.²¹

In determining the best interests of the child, the Family Court must²² consider the primary consideration of ‘the need to protect a child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.’²³ This consideration might be seen on occasions to be in

15 Daryl J Higgins, *Co-operation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (Australian Institute of Family Studies, 2007) 190.

16 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009) 77.

17 Family Court of Australia, above n 12, 54.

18 *FLA* s 22(2)(b).

19 *FLA* s 60CA.

20 *FLA* s 60CG(1)(a). A ‘family violence order’ means an order (including an interim order) made under a prescribed law of a state or territory to protect a person from family violence: see *Family Law Act* s 4 (definition of ‘family violence order’).

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

22 *FLA* s 60CC(1).

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

conflict with the other primary consideration of ensuring 'the benefit to the child of having a meaningful relationship with both of the child's parents.'²⁴

There are also additional considerations of any family violence involving a child or a member of a child's family²⁵ and any applicable family violence order that is either final or was contested by a person.²⁶

The Family Court is also obliged to undertake an assessment of the evidentiary requirements and the safety needs of parties when a 'Form 4' (Notice of Child Abuse or Family Violence) has been filed.²⁷ Where there are allegations of abuse or family violence the Family Court is obliged to take 'prompt action.'²⁸

Part of the 'prompt action' process is the requirement of the Family Court to consider what orders should be made to obtain the appropriate evidence about an allegation;²⁹ and to protect a child or any of the parties to the proceedings;³⁰ and deal with the issues raised by the allegation as expeditiously as possible.³¹

The *FLA* also provides a mechanism for accounting for the making of parenting orders that are inconsistent with (state/territory) family violence orders (referred to in this article as 'inconsistency orders'). In respect of any inconsistency order made, the Family Court must specify the inconsistency and give a detailed explanation as to how the inconsistency order would operate in practice, including outlining the consequences of failure to comply and the circumstances in which a person may apply for variation or revocation of the inconsistency order.³² The Family Court must also furnish any inconsistency orders to the parties or a person affected by the family violence order, as well as the Registrar of the Family Court that made the family violence order and the relevant Policy Authority and Child Welfare Agency.³³ Ultimately, a family violence order will be invalidated to the extent that it is inconsistent with an inconsistency order of the Family Court.³⁴

24 *FLA* s 60CC(2)(a).

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

26 *FLA* s 60CC(3)(k).

27 *FLA* s 60K(1). Section 67Z(2) of the *FLA* requires that a party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse. Upon such filing, the Registry Manager of the court is obliged as soon as practicable thereafter to notify a prescribed child welfare agency: *FLA* s 67Z(3).

28 *FLA* ss 60K(1), and s 60K(2A).

29 *FLA* s 60K(2)(a)(i).

30 *FLA* s 60K(2)(a)(ii).

31 *FLA* s 60K(2)(c).

32 *FLA* s 68P(2)(b). See also *FLA* s 68P(c).

33 *FLA* s 68P(3).

34 *FLA* s 68Q(1).

This, however, is subject to a power of a state/territory court to ‘revive, vary, discharge or suspend’ a parenting order.³⁵

The Family Court must also consider³⁶ whether a personal protection order should be made for a child or another person who may or may not be a party,³⁷ or whether an injunction should be made restraining a person from entering or remaining in a place of residence, employment or education facility of a child or person.³⁸ Such protection orders can be made by the Family Court on terms and conditions it considers appropriate.³⁹ The Family Court also has extensive powers to deal with contravention of orders⁴⁰ and contempt of court.⁴¹

It should also be noted that parties are required to inform the Family Court of any applicable family violence order in relation to either a child or a member of a child’s family.⁴² Persons who are not parties to proceedings who have such knowledge may also inform the Family Court.⁴³

The suite of powers and obligations demonstrate that there are existing mechanisms for enabling family violence and abuse to be properly taken into account, in proceedings where the Family Court is made aware of allegations of family violence and abuse.

A judge can also be helped by the significantly valuable resource of a family consultant⁴⁴ and, in the most serious matters where there is such a requirement for it, the submissions and pragmatic suggestions from an independent children’s lawyer.⁴⁵ Family consultants and independent children’s lawyers are crucial to the gaining insight into the issues in dispute between the parties and ensuring practical outcomes which serve the best interests of children.

IV LIMITATIONS ON THE ROLE OF THE FAMILY COURT

There are a number of limitations which affect the Family Court’s ability to make findings about allegations of family violence and abuse. This article focuses on some of the practical and legislative impediments affecting the Family

35 There is potential for conflict between the Family Court and local/state courts with respect to the power to ‘revive, vary, discharge or suspend’ any existing order made under the *FLA*: see *FLA* s 68R(1). To avoid this difficulty, there must be reasonable and efficient information sharing practices in place between the Family Court and the Local/State Courts, and litigants should inform the Local/State Courts themselves about existing orders (and where appropriate, provide a copy of the Reasons for Judgment for those orders). The Family Court is itself moving to provide access to court orders online for appropriate courts or agencies through the Commonwealth Courts Portal.

36 *FLA* s 60K(4).

37 *FLA* s 68B(1)(a)–(b).

38 *FLA* s 68B(1)(c)–(d).

39 *FLA* s 68B(3).

40 See *FLA* ss 70NBA, 70NEB, 70NFB, 112AD.

41 See *FLA* s 112AP.

42 *FLA* s 60CF(1).

43 *FLA* s 60CF(2).

44 *FLA* s 11E.

45 *FLA* s 68L.

Court's ability to deal with such allegations and then discusses the concept of 'unacceptable risk' and evidentiary standards.

A How Parties Present Their Material to the Family Court

Regrettably, the Family Court is sometimes precluded from being able to give proper consideration to issues of violence because of the way in which litigants, whether represented or not, present their material to the Family Court. Generalised assertions such as 's/he was continually violent to me' do not provide an evidentiary basis for doing anything. Similarly, 'I was afraid of him/her because s/he was always violent to me' will not provide, by itself, a basis for an injunction. 'S/he was always hitting me' (which is unlikely *factually* to be true) or 's/he hit me innumerable times' are sometimes put forward on the understandable basis that it is difficult to remember, let alone articulate, the specific occasions of violence when that violence has occurred over a long period. However, such statements are conclusions rather than observations and those that choose or are advised to include them in an affidavit to try to seek the protection of the *FLA* are frequently disappointed. This necessarily and understandably gives rise to resentment. Such disappointment or resentment does not properly take account of the fact that a Court must operate as a Court of law and must not simply accept bald assertions instead of evidence.

B Compelling State or Territory Authorities to Act

The *FLA* provides that State child welfare laws are not affected by the Family Court's jurisdiction. This means that the Family Court has no power to make an order in relation to a child who is under the care, however described, of a person under a State child welfare law, except where the order is expressed to come into effect when the child ceases to be under that care,⁴⁶ or where a State/Territory Child Welfare Officer has provided written consent to the making of such an order.⁴⁷ The Family Court does, however, have the power to make an order for a Child Welfare Authority to provide the Family Court with documents or information specified in an order in relation to child-related proceedings.⁴⁸

This legislative prohibition, coupled with the Family Court's lack of investigatory powers, means that the Family Court is unable to find out the facts of its own motion. This was best described by Chief Justice Bryant in the following statement:⁴⁹

[Australian] family courts are not forensic bodies. They do not have an independent investigatory capacity or role when violence or abuse is alleged ... Family courts are reliant upon other agencies, particularly child welfare departments and police, to undertake investigations into matters that may be relevant to the proceedings before it. And although the Court can make directions as to the filing of material and can issue subpoenas compelling the production of

46 *FLA* s 69ZK(1)(a).

47 *FLA* s 69ZK(1)(b).

48 *FLA* s 69ZW(1).

49 Bryant, above n 7.

documents, it cannot order state agencies to undertake inquiries into particular matters. It is hardly an ideal situation but in the absence of the Commonwealth assuming responsibility for child protection from the states, that will continue to be the reality.

It is a dilemma that was recently recognised by Benjamin J in *Ray and Males*⁵⁰ where his Honour joined the Secretary of the Tasmanian Department of Health and Human Services to proceedings in a children's dispute, effectively over the opposition of the Secretary. His Honour stated:

In these proceedings it is possible if not likely that either one or both of the children the subject of the application will be left in a position where none of the parties to the proceedings or available members of family are suitable to have parental responsibility.

In those circumstances, if the Secretary was not a party to these proceedings the children or child would be left in impossible situations.⁵¹

The Full Court of the Family Court heard an appeal by the Secretary against Justice Benjamin's decision in January 2010 (the judgment of the Full Court is pending). The Family Court has made it known to the Australian Government that there may be a benefit in providing the Family Court with greater power to require State bodies to intervene and to place children into care where the safety of those children may be compromised because of family violence or abuse.⁵²

V 'UNACCEPTABLE RISK' AND THE EVIDENTIARY STANDARD OF PROOF

Allegations of family violence and abuse in the context of family law litigation need to be established in accordance with two seemingly contradictory constructs. The first is that whether or not family violence or abuse has occurred needs to be made out on the civil evidentiary standard *on the balance of probabilities*,⁵³ not beyond reasonable doubt. There is inherent difficulty in navigating the evidentiary standard of proof. In the decision in *Kings and Murray* I noted that this standard involved 'a consideration of what is more likely to have occurred than not' and that 'if what is sought to be proved might be a criminal action' the Family Court is obliged to apply what has become known as the *Bringinshaw v Bringinshaw* standard of proof.⁵⁴ Justice Dixon in *Bringinshaw v Bringinshaw* commented on the difficulty in making decisions in civil cases:

50 [2009] FamCA 219.

51 Ibid [107]–[108].

52 Carol Nader, 'Call for Family Court Power to Bypass Parents', *The Age* (Melbourne), 25 March 2009, 3.

53 *Evidence Act 1995* (Cth) s 140(1) (emphasis added).

54 [2009] FamCA 565 [8]–[9].

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. ...

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.⁵⁵

The second construct is whether the making of an order by a judge would place a child at an 'unacceptable risk' of harm. The concept of 'unacceptable risk' was originally espoused by the High Court of Australia in *M and M*⁵⁶ in the context of allegations of sexual abuse by a father against a child. Due to the influential nature of this discussion it is worth reproducing it at length:

In considering an allegation of sexual abuse, the Court should not make a positive finding that the allegation is true unless the Court is satisfied according to the civil standard of proof, with due regard to the fact that was mentioned in *Briginshaw v Briginshaw* ...

No doubt there will be some cases in which the Court is able to come to a positive finding that the allegation is well founded. In all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the Court has no hesitation in rejecting the allegations as groundless. Again in the nature of things, there will be very many cases ... in which the Court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the Court should refrain from making a positive finding of sexual abuse has actually taken place, unless it is impelled by the particular circumstances of the case to do so ...

In resolving the wider issue the Court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted, and assess the magnitude of that risk. After all, in deciding what is in the best interests of the child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on [a] child's welfare. The existence and magnitude of the risk of sexual abuse as with other risks of harm to the welfare of the child, is a fundamental matter to be taken into account in deciding issues of custody and access. In access cases, the magnitude of the risk may be less if the order in contemplation is one of supervised contact.

The test is best expressed by saying that a Court will not grant custody or access to a parent if that custody or access would expose the child to an *unacceptable risk of sexual abuse*.⁵⁷

In considering the judgment of the court in *Kings and Murray I* asserted that I did not believe

55 *Briginshaw v Briginshaw* [1938] 60 CLR 336, 361–2 (Dixon J).

56 [1988] 166 CLR 69.

57 *M and M* (1988) 166 CLR 69, 76–8 (per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) (emphasis added).

that their Honours stated that if the Court is unable to be satisfied in those terms, that there is some lesser standard that is unacceptable risk. What their Honours *did say*, in my opinion, is that if there are to be orders made about a child, then the Court must be acutely conscious of the fact that such orders may, in some circumstances, expose a child to an unacceptable risk. This, as a matter of logic, in my opinion, goes very close to being self-contradictory. If the Court has been unable to make a determination about whether or not something has occurred, it seems difficult for the Court to then analyse how it can be said that there can be an unacceptable (or an acceptable) risk that that thing has occurred.⁵⁸

It can be seen that the concept of ‘unacceptable risk’ in relation to making findings and orders for the safety of children has significant limitations and can lead to difficulties in making appropriate findings which are in the best interest of the children. To defer again to my judgment in *Kings and Murray*:

I do not derive any significant assistance from the concept of unacceptable risk. If, as I have suggested, I am unable conclusively to determine on the basis of the evidence before me whether something has happened or not, in my opinion, it seems to me that it is almost impossible for me then to say that there still might be a risk that it something may have happened and that therefore the child should spend no time with her father. Nor could I alternatively conclude that there is *no risk*, because I have not been able to find it and that therefore there should be unqualified time spent between the father and the child.⁵⁹

A How the Family Court Deals with Evidence of Family Violence in Practice: the Full Court of the Family Court in *Amador and Amador*

It is important, however, to understand how the Family Court might deal with allegations of family violence and abuse in practice in addition to understand the legal evidentiary framework. A recent decision of the Full Court of the Family Court (‘the Full Court’), *Amador and Amador* (‘*Amador*’)⁶⁰ illustrates how allegations, evidence and findings of fact dovetail to an outcome by way of judicial determination.

The matter involved a relocation application by a mother, which was accepted by the Federal Magistrate. At the time of the parties’ separation, the mother alleged domestic violence, including sexual assault, perpetrated by the father – those allegations were substantially denied by the father. The Federal Magistrate granted the mother the opportunity to relocate with the child.

One of the grounds of appeal from the Federal Magistrate’s judgment was that ‘the learned Federal Magistrate erred in accepting the mother’s uncorroborated evidence that domestic violence and sexual assault was perpetrated by the father on the mother.’⁶¹

The Full Court provided a neat and important statement which assists to understand the way that a trial judge might approach consideration of some aspects of the evidence presented by parties where allegations of family violence and abuse are made. Relevantly, the Full Court stated:

58 *Kings and Murray* [2009] FamCA 565 [40].

59 *Ibid* [43].

60 [2009] FamCAFC 196.

61 *Ibid* [78].

To the extent that it is submitted that the mother's allegations of 'horrific domestic violence' could only be accepted if objectively corroborated, we do not find that any such requirement exists. Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. We have not been referred to any authority in support of such a proposition.⁶²

Amador highlights some key factors which legal practitioners may wish to consider when presenting their clients' cases before the Family Court. These are:

- in order for evidence of assault to be accepted by a Court, there is no requirement for victims of domestic violence to demonstrate that they have complained to relevant authorities or participated in medical examinations (albeit this information may assist the Family Court);⁶³
- the Full Court is concerned that trial judges may feel constrained by law in being able to make a positive determination in relation to allegations of violence in parenting cases even where there is satisfactory evidence to the requisite standard that the violence as alleged has occurred.⁶⁴ This may constitute appealable error;
- the decision of the High Court in *M and M* is not authority for the proposition that a trial judge is not required to make positive findings, *inter partes*, about assault and other serious matters of domestic violence;⁶⁵
- a finding of 'unacceptable risk' to a child may occur when no allegation of sexual, physical or psychological abuse of children is established as fact;⁶⁶
- the more serious the allegation the greater degree of certainty in relation to making the finding is required (consistent with the proposition put by Dixon J in *Briginshaw v Briginshaw* discussed above);⁶⁷
- trial judges will, in most circumstances where allegations of serious criminal offences are made, choose to have all the provisions of the

62 Ibid [79].

63 Ibid [81].

64 Ibid [86].

65 Ibid [87].

66 Ibid [89].

67 Ibid [90].

Evidence Act 1995 (Cth) apply to the determination of the issue, as contemplated by division 12A⁶⁸ of the *FLA*;⁶⁹

- a finding by a trial judge in a children's case under the *FLA* that a party has assaulted another party or a person can have significant impact on the determinations the Family Court is required to make in determining the best interests of a child;
- the best interests of a child subject to family law litigation must require that the Family Court determine relevant allegations of violence *where that can be done*;⁷⁰
- the consequence of placing a child under the supervision and/or care of a person who has been violent may be far-reaching and very detrimental to the child's welfare;⁷¹
- the more serious the allegation of violence the more important it will be to the child to investigate and determine the allegation;⁷² and
- there is a distinction as to how positive findings of fact should be made where allegations of abuse are made against a child where parenting orders are sought (where the test to be applied is 'unacceptable risk') and the circumstance in a parenting case where allegations have been made of domestic violence and/or assault by one party upon another. Where such domestic violence and/or assault is alleged, the Family Court must make findings where the evidence enables this to be done.⁷³

The Full Court's decision in *Amador* is an extremely useful guide to the appropriate approach to be taken in relation to family law litigation involving serious allegations of family violence or abuse between parties.⁷⁴

68 *FLA* s 68ZN(1) requires the Court to give effect to the principles contained in s 69ZN. Those principles are: s 69ZN(3) Principle 1: the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings; s 69ZN(4) Principle 2: the court is to actively direct, control and manage the conduct of the proceedings; s 69ZN(5) Principle 3: the proceedings are to be conducted in a way that will safeguard: (a) the child concerned against family violence, child abuse and child neglect; and (b) the parties to the proceedings against family violence; s 69ZN(6) Principle 4: the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties; s 69ZN(7) Principle 5: The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible. Section 69ZT(1) excludes the operation of certain provisions of the *Evidence Act 1995* (Cth), but the Court may apply such provisions where the Court is satisfied that there are exceptional circumstances and taking into account the importance of the evidence, the nature and subject matter of the proceedings, the probative value of the evidence and the powers of the Court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence: *FLA* s 69ZT(3).

69 *Amador* [2009] FamCAFC 196, [93].

70 *Ibid* [95].

71 *Ibid*.

72 *Ibid*.

73 *Ibid* [96].

74 *Ibid* [78]–[97].

VI INITIATIVES OF THE FAMILY COURT AND OTHER IMPORTANT CONSIDERATIONS

There are other non-legislative initiatives of the Family Court which should be mentioned in the context of a discussion about family violence and abuse.

A Best Practice Principles

The Family Court has promulgated a document entitled *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged* ('Best Practice Principles'). These guidelines were launched by Chief Justice Bryant, and the Commonwealth Attorney-General Robert McClelland on 6 March 2009.

The Best Practice Principles identify how proceedings might best be conducted in court, and what matters might usefully be taken into account when determining issues in dispute where family violence is an issue. They are essentially a check list for the trial judge.⁷⁵

Usefully for litigants, legal practitioners and judicial officers, the Best Practice Principles provide guidelines on:

- the matters to be considered in parenting disputes where family violence or abuse, or risk of family violence or abuse, is alleged;
- the matters to be considered in making orders directing the preparation of a family report or appointing a Court expert to report;
- the matters to be considered in making interim parenting orders pending a final hearing;
- the matters to be considered at the final hearing;
- the matters to be considered where findings of family violence or abuse, or an unacceptable risk of family violence or abuse, have been made;
- the matters to be considered where the Family Court orders that a child spend time with a parent against whom findings of family violence or abuse have been made where spending time with the parent in accordance with the suggested orders would constitute an unacceptable risk;
- the matters to be considered where the Family Court has been asked to make a consent order;
- the standards the Family Court aims to achieve with respect to Court events;

75 '...The [Best Practice Principles] are relevant to situations where abuse is alleged to have occurred regardless of whether a notice under s 60K has been filed. Section F of the principles sets out a number of matters which may be considered where the Court orders that a child should spend time with a parent against whom findings have been made that allegations of family violence or abuse are proven.': *Oakley and Cooper* [2009] FamCAFC 133 [60].

- the information judges should avail themselves of in relation to local facilities; and
- the information to be included in Reasons for Judgment about issues of family violence or abuse.

The Best Practice Principles also include a ‘pro-forma’ order that can be adapted by judicial officers for making orders about supervised time between a parent and a child.

Importantly, the Best Practice Principles direct the attention of litigants, including self-represented litigants, as to how a case where family violence is alleged and is relevant to proceedings should be formulated and articulated. It also enables judicial officers to engage in a critical and constructive analysis of the relevant matters that might usefully be taken into account in determining the best interests of children and the need to protect parties from family violence. The Best Practice Principles are not prescriptive and a failure to take them into account by a judicial officer will not necessarily render a judgment open to appeal.⁷⁶

B Family Violence Committee

The Family Court and the Federal Magistrates Court have established a Family Violence Committee to guide the development and implementation of the Family Court’s Family Violence Strategy. One of the major activities of the Family Violence Committee is undertaking a review of the Family Violence Strategy and extending its ambit to include the Federal Magistrates Court.

Sub-committees have been formed under the Family Violence Committee to consider the three reports that were released by the Attorney-General on 28 January 2010 involving the operation of the family law system and how the Family Law Courts deal with cases involving family violence. They are: the *Evaluation of the 2006 Family Law Reforms* by the Australian Institute of Family Studies, the *Family Courts Violence Review* by Professor Richard Chisholm and the report *Improving Responses to Family Violence in the Family Law System* by the Family Law Council. Furthermore the Australian Law Reform Commission is currently reviewing the operation of state and territory family violence and child protection provisions in both the *FLA* and other Commonwealth, state and territory laws.⁷⁷

76 Professor Chisholm recommended that the use and benefit of the Best Practice Principles be reviewed by the Family Courts review to determine how they could become more influential; see Chisholm, above n 7, 17.

77 See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9 (2010).

VII IMPROVEMENTS? THE FUTURE OF CONFIDENTIALITY IN MEDIATION

While the Family Court *responds* to allegations, there are ways in which the system might be improved through *proactive measures* by other agencies within the family law system. One of these is the way in which family mediation is conducted.

Chief Justice Bryant has suggested that it may be appropriate for mediation to be revamped to enable confidentiality to be set aside where a mediator believes there to be a risk to a child's or parent's safety, including where there are issues of family violence or mental health and drug and alcohol use alleged.⁷⁸ Such information should be available to judicial officers to determine the necessary factors about parenting disputes. Obviously, there are arguments for or against this proposition. The primary counterpoint is that parties will be less willing to meaningfully engage in mediation if there is a risk that their 'dirty laundry' might be aired. It is a matter which requires careful and analytical consideration by each agency within the family law justice system, but should not be dismissed outright.

VIII CONCLUSION

Tragedies are a stark reminder about the vulnerability of women and children in society.

There is a power imbalance where women and children suffer physical and psychological abuse mostly at the hands of men. This is also not to suggest that there is a prevalence of violence among men generally and, in particular, after a family unit has disintegrated post-separation or that men cannot themselves be victims of violence.

The Family Court has a part to play in dealing with allegations of family violence and abuse in the context of family law litigation. The Family Court is but one part of the system. There will always be the 'exquisite dilemma' of resolving such serious matters while ensuring the interests of justice between the parties and the safeguarding of the best interests of the children.

In conclusion, it is illuminating to relate the experience of one woman in the family law justice system in considering how, in light of what the Family Court can and cannot do, the Family Court might play a better role in responding to family violence and abuse:

Think of [Sally]⁷⁹ and the failure of the justice system to believe that her ex-partner of many years, and the father of her children, was abusive to her and their children. Her ex-partner took advantage of his status as an authority figure to argue through the court system that she was an unfit mother because she entered into a relationship with a man who subsequently turned out to have a criminal

78 Nader, above n 52.

79 To remove doubt, the name has been changed from the original text so as to ensure anonymity.

record and was extremely dangerous. Her options were agonising ones: leave the second partner, as the police and Family Court required, and risk having her children and herself killed, or relinquish custody of her youngest children to her first partner in a court process that would make it extremely difficult to contest and still place her and her children at risk of being killed by her second partner. She is safer now but it has taken years and there is still much healing to be achieved, both for herself and by her children.⁸⁰

It is important to examine the processes involved and to see how if at all they might have been improved or at least made more appropriate.

It appears that when Sally left her first partner ('Bill')⁸¹ there were no court proceedings. It is not clear why. The issues around Bill's violence were therefore not the subject of any judicial scrutiny. The dynamics of the post-separation arrangements about the children may have been seriously flawed by what was described as Bill's 'authority figure' status. This highlights the problem or challenge about what we as a society can do when no one brings a situation of violence to the attention of an appropriate authority in an acceptable way.

Sally's choice of her new partner ('Ben')⁸² was obviously a mistake – at least so far as the reporter was concerned. There is no report about Sally's views. Again, without details it is hard to be accurate, but it seems that Bill took proceedings seeking that the children now live with him. If he had proper legal advice, he would have argued that their remaining with their mother would place them in danger or perhaps at unacceptable risk.

How would Bill have been able to observe what happened in Ben and Sally's household? Perhaps the children reported something. In responding, the mother was at the disadvantage that she had not previously complained about Bill's conduct and hence raising it subsequently seems as if it were a recent invention. Without proper or poor advice, she may have responded in terms that 'Bill was always violent to me'. If the relationship was one of dominance by Bill and chronic violence, Sally may now be psychologically incapable of recalling detail accurately or of articulating her recollections. This highlights the challenge for the Family Court.

There are no easy answers to these questions. However, it is important that the issues continue to be agitated. It is also heartening that courts, including the Family Court, are modifying their procedures in response to the challenges posed by the complex problem of family violence and child protection. It is constructive that legislation is changed with the intention of trying to support victims of violence and to protect children.

However, none of these things is enough in itself. Court orders and Acts of Parliament do not by themselves protect anyone. As a society, violence must be condemned and the absolute unacceptability of violence as a solution to conflict or disagreement be inculcated in parents and children. The National Council to

80 Lucy Healey, 'Researching the Gaps: The Needs of Women who have Experienced Long-term Domestic Violence' (Research report, Mornington Peninsula Domestic Violence Service Good Shepherd Youth and Family Service, 2009) 113.

81 Referred to for convenience only.

82 Similarly referred to for convenience only.

Reduce Violence Against Women and their Children has asserted the need for a 'collaborative approach between different levels of government and the wider community' and 'attitudinal change at all levels of government' in order to succeed in reducing violence in the community.⁸³ The education system needs to be strengthened to provide children and young people with alternative models for resolution of conflict. Parents must be educated to provide an example for children and for other parents. All members of the community must be perpetually vigilant to ensure the disempowered and inarticulate receive understanding and support. But it is also critical to ensure that unfounded and untrue allegations, however infrequently they may be made, are not accepted without proper and fair scrutiny.

This will not happen overnight or because an Act of Parliament says it should. It behoves us all to build the society that we want for ourselves and our children from the ground up. 'Condemn the fault' – the sin – but let us not spend our time futilely pointing accusatorial fingers 'at the actor': at each other, at the government, the courts or any other relevant institution. The responsibility belongs to every person in Australia to build a society which facilitates the protection of women, men and most importantly, children.

83 National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) 14, 21.