

**MOVING FORWARDS OR BACK TO THE FUTURE?  
AN ANALYSIS OF CASE LAW ON FAMILY VIOLENCE UNDER  
THE *FAMILY LAW ACT 1975* (CTH)**

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‘Why didn’t you ever go to school, Joe, when you were as little as me?’

‘Well, Pip,’ said Joe, taking up the poker, and settling himself to his usual occupation when he was thoughtful, of slowly raking the fire between the lower bars: ‘I’ll tell you. My father, Pip, he were given to drink, and when he were overtook with drink, he hammered away at my mother most onmerciful. It were a’most the only hammering he did, indeed, ’cepting at myself. And he hammered at me with a wigour only to be equalled by the wigour with which he didn’t hammer at his anwil. You’re a-listening and understanding, Pip?’

‘Yes, Joe.’

‘Consequence, my mother and me we ran away from my father several times; and then my mother she’d go out to work, and she’d say, “Joe,” she’d say, “now please God, you shall have some schooling, child,” and she’d put me to school. But my father were that good in his heart that he could’t abear to be without us. So, he’d come with a most tremenjous crowd and make such a row at the doors of the houses where we was, that they used to be obligated to have no more to do with us and to give us up to him. And then he took us home and hammered us. Which, you see, Pip,’ said Joe, pausing in his meditative raking of the fire, and looking at me, ‘were a drawback on my learning.’<sup>1</sup>

## I INTRODUCTION

English law traditionally reinforced and perpetuated the inferior and submissive position of women and condoned the use of violence. The philosopher and jurist Sir Francis Bacon, wrote that ‘the husband hath by law power and dominion over his wife, and may keep her by force, within the bounds of duty, and may beat her, but not in a cruel or violent manner’.<sup>2</sup> In *Commentaries on the Laws of England* in 1765, jurist Sir William Blackstone wrote:

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1 Charles Dickens, *Great Expectations* (Chapman & Hall, 1861) 42.

2 Cited in *Re Cochrane* (1840) 8 Dowl 630, 633 (Coleridge J).

The husband also [by the old law] might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or his children; for whom the master or parent is also liable in some cases to answer.<sup>3</sup>

It was not until 1891 in *R v Jackson*<sup>4</sup> that the notion of the husband's right to restrain his wife's freedom by physical chastisement was challenged, although cases over the next 70 years suggested that there were still some circumstances of misconduct which would entitle a husband to lawfully physically restrain his wife. For example in *Meacher v Meacher*,<sup>5</sup> the trial judge held that such restraint was lawful if a wife refused to obey her husband's orders not to visit her relatives, and in *McKenzie v McKenzie*,<sup>6</sup> it was held that it was not cruel for a husband to punish his wife as he would punish a naughty child.

Domestic violence and family violence 'only appeared in the social science literature in the late 1950s ... and did not receive public attention until the early 1970s.'<sup>7</sup> Soon after, the law began to respond to family violence by intervening in family relationships and providing protection for victims primarily of child abuse, and to a lesser extent women abused by their husbands.

We know that family violence is common and widespread in Australia. Children and adults are more likely to be emotionally abused or neglected, physically assaulted, raped or even killed in their own homes by another family member than anywhere else or by anyone else. We also know that family violence is a gendered phenomenon with the vast majority of perpetrators/offenders being men and the vast majority of victims/survivors being women.<sup>8</sup>

Family violence covers a broad range of behaviour among family members including physical abuse, sexual abuse, emotional and psychological abuse, economic abuse, threats and damage to property as well as more subtle forms of

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3 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765–69, 1966 ed) vol 1, 432.

4 [1891] 1 QB 671.

5 [1946] P 216.

6 *The Times* (London), 5 June 1959 cited in M D A Freeman, *Violence in the Home* (Saxon House, 1979) 178. For a full history of early cases, see M D A Freeman, 'Le Vice Anglais? – Wife-Battering in English and American Law' (1977–8) 11 *Family Law Quarterly* 199.

7 Michael Benjamin and Susan Adler, 'Wife Abuse: Implications for Socio-Legal Policy and Practice' (1980) 3 *Canadian Journal of Family Law* 339, 340.

8 This article is based on the presumption that family violence is indeed gendered. The statistics and data in support are overwhelming. For example, a comparative international study found that 34% of 6000 Australian women reported violence from a past or current partner. See Jenny Mouzos and Toni Makkai, 'Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey' (Report, Australian Institute of Criminology, 2005). Again, an Access Economics report found that 1.7 million people in Australia have experienced domestic violence at some time in their lives. Eight seven per cent of the victims were women and 98% of the perpetrators were men: see Access Economics, *The Cost of Domestic Violence to the Australian Economy: Parts 1 and 2* (Report, Office of the Status of Women, 2004). See also, 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).

control, power imbalance and deprivation. Children may be direct/primary victims or indirect/secondary victims.

In this article, I examine cases under the *Family Law Act 1975* (Cth) ('FLA') involving violence between intimate adult family members rather than violence directly perpetrated against children. I consider the relevance of such violence in the consideration of 'best interests' in parenting orders and whether it constitutes a form of child abuse. I focus on the outcomes and decisions made. I analyse the cases on the understanding that children who witness or are exposed to family violence are at a higher risk of dysfunction and poor adaptation in all aspects of their emotional, behavioural, social, cognitive, educational and even physical development than those children who are not so exposed.<sup>9</sup> Some cases involve allegations and findings of both partner violence *and* direct abuse of children, as often these forms of abuse overlap or occur at the same time or act as triggers for more violence directed at another family member.

It is acknowledged that the distinction between adult family violence and child abuse is artificial as the abuse is often interconnected or one form of abuse conceals or absorbs the occurrence of other abuse. As Lesley Laing notes: 'This abuse was intertwined – children were exposed to violence against their mothers; mothers were exposed to violence against their children; and many forms of abuse were directed simultaneously to both women and children'.<sup>10</sup> Various studies suggest that between 30 per cent and 70 per cent of the children of abused children will be simultaneously abused with their mothers.<sup>11</sup> In any event, it is uncontroverted that in all these scenarios, children may endure long-term trauma, delayed development and sometimes irreparable harm.<sup>12</sup> It is clear therefore that being directly or indirectly exposed to parental violence or high-level conflict is a form of child abuse.

Child abuse and family violence are closely linked and are common causes of parental separation. Two-thirds of separated couples in Australia refer to domestic violence as the cause of separation and one-third refer to severe domestic violence.<sup>13</sup> However, the mere fact of separation does not mean that the

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9 Seem eg, see Jerome Kolbo, Eleanor Blakely and David Engelman, 'Children Who Witness Domestic Violence: A Review of Empirical Literature' (1996) 11 *Journal of Interpersonal Violence* 281.

10 Lesley Laing, 'No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence' (Report, Faculty of Education and Social Work, University of Sydney, 2010) 35–6. For early USA research, see Lee Bowker, Michelle Arbitell and Richard McFerron, 'On the Relationship Between Wife Beating and Child Abuse' in Kertsi Yllö and Michele Bograd (eds), *Feminist Perspectives on Wife Abuse* (Sage Publications, 1988).

11 Thea Brown et al, 'Violence in Families: Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia' (Report, Monash University and Australian Catholic University, 1998) 23.

12 See, eg, Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733, 741; Cathy Humphreys, 'Domestic Violence and Child Protection: Challenging Directions for Practice' (Issues Paper, Australian Domestic and Family Violence Clearinghouse, 2007); Gillinder Bedi and Chris Goddard, 'Intimate Partner Violence: What are the Impacts on Children?' (2007) 42(1) *Australian Psychologist* 66; Michael Flood and Lara Fergus, 'An Assault on Our Future: The Impact of Violence on Young People and Their Relationships' (Report, White Ribbon Foundation, 2008).

13 Thea Brown and Renata Alexander, *Child Abuse and Family Law* (Allen & Unwin, 2007) 20.

abuse and/or violence ceases. Sometimes the level and severity of violence and risk of violence actually escalates.<sup>14</sup> Sometimes the children ‘move from the periphery to the centre of the conflict’.<sup>15</sup> Often family law proceedings ensue when a mother seeks protection for herself and/or for a child from the father/step-father or another household or family member or when a party raises family violence as a relevant consideration in parenting proposals.

A large study in 1998 of children’s cases litigated in the Family Court revealed that half involved adult family violence and/or child abuse allegations.<sup>16</sup> In a subsequent study by the Australian Institute of Family Studies (‘AIFS’), 300 randomly selected files were examined.<sup>17</sup> Over half contained allegations of adult family violence and/or child abuse. The most common forms of alleged spousal violence were physical abuse (actual or threatened), emotional/verbal abuse and property damage. Allegations of child abuse were almost always accompanied by allegations of adult family violence and were mostly made by mothers.

In 2003, the Family Court reported that almost 75 per cent of judicially determined cases involved allegations of family violence.<sup>18</sup> Since the 2006 reforms, it appears that the figures remain that over half of children’s cases in both federal family law courts involve allegations of adult family violence and/or child abuse. The challenge is to see if the Family Court of Australia (‘FCA’) and Federal Magistrates Court (‘FMC’) treat and interpret family violence between adults as a form of child abuse, or a circumstance warranting rebuttal of presumptions and/or imposing certain protective conditions given the now elevated importance of family violence in the *FLA* as amended.

We know that children are often exposed to violence between their parents and caregivers. It is estimated that almost one in four children in Australia have witnessed violence against their mothers or step-mothers.<sup>19</sup> In one study of contact disputes, almost two-thirds of children had witnessed violence against their mothers.<sup>20</sup> Similar findings were made in the AIFS study in 2003.<sup>21</sup> In the

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14 Peter Jaffe et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans’ (2008) 46 *Family Court Review* 500, 501–2.

15 Lesley Laing, ‘Children, Young People and Domestic Violence’ (Issues Paper, Australian Domestic and Family Violence Clearinghouse, 2000) 2.

16 Brown et al, above n 11. The study looked at 200 cases in the Family Court of Australia drawn from the registries in Melbourne and Canberra.

17 Lawrie Moloney et al, ‘Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study’ (Report, Australian Institute of Family Studies, 2007). The study looked at 300 cases filed in 2003 in the Family Court of Australia and the Federal Magistrates Court in the registries in Melbourne, Dandenong (Victoria) and Adelaide. Across the courts and samples, the allegations were most commonly classified by the research team as ‘severe’ and there was an average of four to five allegations in each case.

18 Family Court of Australia, Submission to the Standing Committee on Family and Community Affairs, *Inquiry into Joint Custody Arrangements in the Event of a Family Separation* (September 2003).

19 David Indermaur, ‘Young Australians and Domestic Violence’ (Report, Australian Institute of Criminology, 2001).

20 Miranda Kaye, Julie Stubbs and Julia Tolmie, ‘Domestic Violence and Child Contact Arrangements’ (2003) 17 *Australian Journal of Family Law* 93, 111–3. The actual figure was 62.5%.

21 Moloney et al, above n 17. In many cases requiring judicial determination (68% in the FCA and 48% in the FMC), it was alleged that children heard or saw violence between their parents.

Australian Bureau of Statistics ('ABS') *Personal Safety Survey 2005*, victims reported that children were present in 49 per cent of cases of violence by a current partner and 27 per cent reported that their children witnessed the violence.<sup>22</sup> Police too report a substantial increase in the number of children present at family violence incidents. For example, in Victoria in 1999–2000 there were about 18 600 children aged 16 years and under recorded as present at family violence incidents attended by police. In 2004–05 this had peaked at 27 800 and then declined to 21 800 in 2007–08 (when police attended almost 32 000 family violence incidents).<sup>23</sup> One reason for this decline was the re-classification of children as victims rather than 'only' as witnesses, acknowledging that exposure to adult family violence is a form of child abuse.

There is something of a 'flavour of the month' resonance about family violence in 2009 and 2010. There have already been four different reports and papers released. There is the *Family Courts Violence Review* by Professor Richard Chisholm;<sup>24</sup> the evaluation by the AIFS of the 2006 shared parental responsibility reforms;<sup>25</sup> the report of the Family Law Council ('FLC') *Improving Responses to Family Violence in the Family Law System*;<sup>26</sup> and the *Family Violence: Improving Legal Frameworks* consultation paper jointly prepared by the Australian Law Reform Commission and the NSW Law Reform Commission.<sup>27</sup> Each makes separate recommendations for change to the *FLA* itself as well as to the approach of courts in family violence cases. This paper contributes to that debate as to whether change is necessary or indeed desirable to protect women and children or simply proposed to appease critics.

## II CURRENT LEGISLATION

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('the Act') was passed in May 2006 and commenced operation in July 2006. The Act introduced several new provisions regarding family violence and child abuse into the *FLA*. The definition of 'child abuse' remained the same (as first inserted in 1991) but was moved from the former section 60D(1) to the current section 4(1). The statutory definition focuses on physical and sexual

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22 Australian Bureau of Statistics, *Personal Safety Survey Australia 2005* (2006); see also, Thea Brown et al, 'Implications of the Views and Experiences of Children and Adults from Families Who Separated From 1995 to the Present' (Report, Commonwealth Attorney-General's Department, 2010).

23 Department of Justice (Vic), *Measuring Family Violence in Victoria: Victorian Family Violence Database: Nine Year Trend Analysis (1999–2008)* (2009) vol 4, 37, 70.

24 Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009).

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

26 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* (December 2009).

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

assault. The case law has, however, expanded child abuse to include other forms of abuse.

Section 4(1) defines ‘abuse’ in relation to a child, as:

- (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 an unequal power in the relationship between the child and the first-mentioned person.

The definition of ‘family violence’ in section 4(1) remains the same except that the notion of reasonableness has been introduced:

*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.

Neither definition directly addresses the issue of children witnessing or being exposed to family violence in their families and households.

The other sections introduced or revamped in 2006 in Part VII of the *FLA* relating to children that are relevant to the discussion of case law below are as follows:

- section 60B lists objects and principles, especially section 60B(1)(a) that a child have meaningful involvement with both parents, and section 60B(1)(b) that a child be protected from harm and from being exposed to family violence;
- section 60CC states how a court determines what is in the ‘best interests’ of a child listing two primary and 13 additional considerations, especially section 60CC(2)(b) (the need to protect a child from harm and from being exposed to family violence), section 60CC(3)(c) (‘friendly parent’) and section 60CC(3)(j) (any family violence involving the child or child’s family);
- section 61DA(2) states that the presumption of equal shared parental responsibility is rebuttable if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family) or has engaged in family violence;
- section 65DAA states that if a parenting order provides for equal shared parental responsibility, then the court must consider the child spending equal time or substantial and significant time with each parent with regard to the best interests of the child and section 60CC considerations; and

- section 117AB states that the court must consider awarding costs where false allegations or statements are knowingly made in the proceedings.

### III CASE LAW

It is important to understand family violence in children's cases from a historical perspective, mapping out both the legislative reforms and the evolution of judicial thinking and interpretation. The *FLA* was silent on the issue of family violence until the major changes introduced in 1996 through the *Family Law Reform Act 1995* (Cth). The relevance of family violence was then reinforced in the 2006 amendments as set out above through inclusion in section 60B as one of the objects and principles, in section 60CC as both a primary and an additional consideration and in section 61DA(2) as a ground for rebuttal of equal shared parental responsibility.

#### A Cases Prior to the 1995 Amendments

Family violence (and child abuse) was ignored or marginalised or quarantined in many reported cases until the first sign of 'enlightenment' in the mid-1990s. Early cases reflected the 'he may be a violent husband but he's a good father' approach. Even where the court found that a husband had been violent towards his wife, this was not deemed relevant to the welfare of the children nor to the suitability of the husband as a potential custodial or access parent. These early decisions included *Heidt*, *Dean*, *Cartwright* and *Chandler*.

In *Heidt*,<sup>28</sup> the wife and other witnesses gave evidence of the husband's violence towards the wife. The case concerned competing custody applications in respect of three young children. Justice Murray granted custody to the wife and access to the husband and refused to grant the wife an injunction for her personal protection. Her Honour noted that 'there is no suggestion that Mr Heidt has ever treated his children with the violence with which he has treated his wife' and 'in assessing his potential as a custodial parent, I have largely disregarded his behaviour as a husband'.<sup>29</sup>

In *Dean*,<sup>30</sup> which was a case involving the wife's application for sole use and exclusive occupancy, there was evidence before the court that the husband had been physically abusive towards his wife and that the wife had had 'associations' with other men. Justice Wood stated that it was difficult to say who was at fault for the breakdown of the marriage as the wife had chosen to lead 'an independent social life' away from the family. His Honour refused to grant either party sole use of the family home and held that it was not intolerable that they continue to live together. In a judgment reminiscent of the value-laden 1870s and not the legislatively-mandated no-fault 1970s, his Honour stated that it would help the

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28 (1976) 11 ALR 594.

29 Ibid 596, 597.

30 (1977) 29 FLR 92.

situation if the wife were to moderate her conduct ‘in pursuit of her own pleasures’ and to behave like a ‘good and conscientious mother’.<sup>31</sup> This in turn would enable the husband to moderate his behaviour.

Similarly in *Cartwright*,<sup>32</sup> the court found that the husband was violent towards his wife, drank alcohol to excess and was generally irresponsible and immature. Even though his abusive conduct was deemed relevant and the wife was awarded custody, the wife was still criticised for working. The court held ‘it would be better if she did not have to work’,<sup>33</sup> implying that it would be better if she stayed home as the ideal full-time mother and homemaker rather than requiring the husband to pay substantial child maintenance and even spousal support.

Again in *Chandler*,<sup>34</sup> Nygh J refused to hear allegations of the husband’s violence perpetrated against the wife. To be even-handed, his Honour refused to hear allegations that the wife had run off with another man as this would lead to applying a double standard. Here, in my view, the trial judge wrongly equated adultery (no longer a matrimonial offence) with family violence (a criminal offence).

For almost two decades, the Family Court viewed family violence as an example of marital misconduct, if that, devoid of any gender considerations and removed from consideration of the welfare or best interests of children. Sandra Berns describes this as ‘judicial insensitivity’ or ‘obtuseness’:

A significant feature of the frequently submerged discourse of the violent marriage is the degree to which the abuse and victimization of women by their partners has been characterized as an issue of ‘marital fault’, one which is concerned primarily, indeed often exclusively, with the relationship between the former husband and wife, rather than as a pattern of family relationships which inevitably has a profound impact upon the welfare of the children. Given the increasing evidence that violent relationships tend to reproduce themselves in succeeding generations, that they become socially normative, this judicial insensitivity, one might say obtuseness, is remarkable.<sup>35</sup>

It was not until the 1990s that the Family Court began recognising that adult family violence was relevant in children’s cases. In cases such as *Merryman*, *Jaeger*, *JG and BG* and *Patsalou*, the court inquired into the nature of the violence and acknowledged the deleterious direct and indirect effects upon children.

In *Merryman*,<sup>36</sup> the trial judge found that the violent husband was dangerous to the wife and children ‘not just in the direct physical sense but also as an inappropriate role model’.<sup>37</sup> In *Patsalou*,<sup>38</sup> the Full Court extended the

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31 Ibid 100.

32 [1977] FLC 90-302.

33 Ibid 76,432 (Asche SJ).

34 (1981) 6 FamLR 736.

35 Sandra Berns, ‘Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions’ (1991) 10 *University of Tasmania Law Review* 233, 240–1.

36 [1994] FLC 92-479.

37 Ibid 81,171 (Mullane J).

38 (1994) 18 FamLR 426.



understanding of family violence beyond physical abuse to include denigration and emotional abuse and found that a violent spouse is a poor role model for children.

In *Jaeger*,<sup>39</sup> the trial judge disallowed evidence of violence in the wife's household perpetrated by her new partner stating that 'I am not interested in whether the home is a peaceful haven ... or a bit rougher than that'.<sup>40</sup> The Full Court however held that violence in a child's household is relevant to a custody hearing even if not directed at the child and upheld the husband's appeal on this and other grounds. Again in *JG and BG*,<sup>41</sup> Chisholm J confirmed that the court must consider all admissible evidence in determining children's issues including the nature of any family violence and its direct and indirect effects upon any children.

These decisions and a burgeoning body of social science literature and research<sup>42</sup> recognised the harmful effects of family violence on children even where children were so-called indirect or secondary victims. In 1990 Australia ratified the *United Nations Convention on the Rights of the Child*.<sup>43</sup> Against this background, as well as developments in case law and social science, the substantial amendments to the *FLA* were enacted in 1995.<sup>44</sup> Amongst other changes, the amended *FLA* included a definition of 'family violence' and required a court determining children's matters to consider the effects of family violence involving a child or a member of the child's family as a relevant 'best interests' factor.

## B Cases After the 1995 Amendments

Research conducted a few years after the reforms came into effect in June 1996 showed that the legislatively raised profile of family violence in children's matters had 'only limited practical effect'.<sup>45</sup> Family violence was 'marginalised' in informing the court's approach to the question of 'best interests'.<sup>46</sup> Only extreme violence supported by firm evidence could be successfully argued in children's cases,<sup>47</sup> and even then 'success' was not guaranteed in decisions

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39 (1994) 18 FamLR 126.

40 Ibid 129 (where the Full Court quotes the trial judge).

41 (1994) 18 FamLR 255.

42 For a useful review of research and literature, see Patrick Parkinson, 'Custody, Access and Domestic Violence' (1995) 9 *Australian Journal of Family Law* 41.

43 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

44 The *Family Law Reform Act 1995* (Cth) came into effect on 11 June 1996.

45 John Dewar and Stephen Parker, *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1976* (Griffith University, 1999) 71. See also Helen Rhoades, Regina Graycar and Margaret Harrison, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?* (University of Sydney and FCA, 1999). The authors found that there was a 'tension' between the 'right of contact' principle and provisions protecting persons from family violence.

46 Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112, 114.

47 Ibid.

concerning terms of residence or contact being denied or restricted. The relevance of violence was overshadowed by a number of failures: both the legislation and the courts promoting a child's right of contact with both parents; failure by the legal profession to particularise domestic violence incidents and subpoena corroborative material; failure by experts such as family report writers to adequately assess risks in violent households; problems with waiting for interim and final hearings; scarce availability of legal aid and poor levels of awareness amongst other key players, such as providers of alternative dispute resolution services.

Two co-existing and fundamentally contradictory judicial approaches underpinned decision-making in this period. In some cases, Family Court judges both at first instance and in the Full Court found that domestic violence is important in children's cases and is relevant to best interests and the formulation of specific parenting orders and conditions. Cases include *Blanch and Blanch and Crawford* ('Blanch'), *A and A*, *M and M*, *T and S*, *T and N* and *D and D*. However, in other cases like *Bartholomew and Kelly* and *Grant and Grant*, the Full Court found that the husband had been seriously violent to the wife yet still granted him shared or sole residence of the children.

In *Blanch*,<sup>48</sup> the Full Court ordered a rehearing of a residence matter concerning three young children where the wife had given detailed evidence of a sustained course of severe domestic violence at the hands of the husband. The Full Court held that domestic violence is an important factor in parenting cases under the then section 68F(2) 'best interests' factors, and the trial judge had given insufficient weight to the domestic violence and to the relevance of such violence to the overall welfare of the children. The Court stated that the trial judge must consider long-term emotional and developmental risks to children flowing from domestic violence, other than just the risk of direct future violence.

In *A and A*,<sup>49</sup> the Full Court held that there would be an unacceptable risk to three young children if they had unsupervised contact with the husband, as the wife gave evidence of serious physical and sexual assaults against her during the marriage and after separation. At first instance, the trial judge had stated that it was not the role of the Family Court 'to investigate criminal activity'<sup>50</sup> and ordered regular supervised and then unsupervised contact. On appeal, the Full Court only allowed the husband supervised full day contact each week with the conclusion that any change in that pattern was unlikely in the predictable future.

In *M and M*,<sup>51</sup> the trial judge found that the father's abusive and aggressive behaviour posed a multi-faceted danger to the children with a risk of injury and fear and a risk that the children will learn from the abusive behaviour and ultimately treat it as acceptable, especially against women.

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48 (1999) 24 FamLR 325.

49 (1998) 22 FamLR 756.

50 Ibid 766 (where the Full Court quotes the trial judge).

51 [2000] FLC 93-006.

Again in *T and S*,<sup>52</sup> the Full Court held that a trial judge had not sufficiently considered how children are affected by the consequences of violence to the victimised parent's parenting capacity. The trial judge did not accept the evidence of a self-represented mother as to domestic violence by her former partner. The judge found her to be erratic, inconsistent, contradictory and prone to exaggerating and so discounted all her evidence of violence. The Full Court allowed the appeal and recognised the serious problems where women have suffered serious family violence and have to present their own cases in court.

The case of *T and N*<sup>53</sup> is a rare example of judicial awareness. The father had been physically violent towards the mother (and allegedly to the older child), causing the mother to relocate to an undisclosed address with the two young children. Both parties were legally represented and proposed unsupervised contact. The child's representative also consented. Justice Moore refused to make consent orders for unsupervised contact and instead made orders limited to supervised contact. Her Honour referred to

the abundance of research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such experiences have for their personality formation. They are terrified and simultaneously come to accept it as an expected part of life; they may learn that violence is acceptable behaviour and an integral part of intimate relationships; or that violence and fear can be used to exert control over family members; they may suffer significant emotional trauma from fear, anxiety, confusion, anger, helplessness and disruption in their lives; they may have higher levels of aggression than children who do not have that exposure; and they may suffer from higher anxiety, more behavioural problems and lower self-esteem than children not exposed to violence. Clinical profiles for children who witness domestic violence include post-traumatic play, diminished ability to regulate affect in the forms of hyper-arousal, numbness, emotional constriction, a low frustration threshold, multiple nightmares and other sleep disturbances, aggressive behaviours, intense and multiple fears, regression in developmental achievements, and disturbances in peer relations ... One could go on to the impact upon their ability to form attachments.<sup>54</sup>

Again in *D and D*,<sup>55</sup> the trial judge found that the father of two girls, then aged 14 and 12 years, refused to accept responsibility for his past violence perpetrated against the wife, some of which was witnessed and experienced by the children. Justice Carmody concluded that their best interests dictated that the father have no communication or contact at all, save for contact initiated by the children. This order also accorded with the children's wishes, the opinion of expert witnesses and the recommendations of the children's separate representative.

By contrast, in the two decisions of *Bartholomew and Kelly*<sup>56</sup> and *Grant and Grant*,<sup>57</sup> the Full Court in each case noted the seriousness of the husband's

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52 (2001) 28 FamLR 342.

53 (2003) 31 FamLR 257.

54 Ibid 264-5.

55 [2005] FamCA 356.

56 (Unreported, Full Court of the Family Court of Australia, Finn, Coleman and O'Ryan JJ, 14 August 2001).

physical and sexual violence towards the wife, but nonetheless refused to interfere with the trial judge's discretionary findings as to the relevance of family violence in parenting orders. In the first case, the husband was granted shared residence of two young girls. In the second case, the husband was granted sole residence of a teenage boy, overturning a long status quo in favour of the wife. In both cases, the appellate court upheld the original decision.

In the Federal Magistrates Court, the trend was similarly inconsistent. In *CV & MD & HB*,<sup>58</sup> there was evidence of extreme violence between the parties to each other, often in front of the child who was four years old at the time of trial. The child's aunt and uncle were granted sole parental responsibility and residence of the child. The father was granted supervised daytime contact only and the mother was granted unsupervised overnight time, with the court recognising that exposure to violent relationships can be harmful to a child's long-term development.<sup>59</sup> However in *EMD and FYM*,<sup>60</sup> there was unrefuted evidence of the father's serious violence towards the mother, including a conviction for assault, several police attendances, a state protective order and evidence of the abuse continuing after separation. It was ordered that the children aged nine and seven years live with the father and have overnight contact with the mother, largely because the mother had mental health issues and had a new violent partner whom she was not prepared to leave permanently.

The cases in this period were inconsistent and sent conflicting messages. As Rae Kaspiew observed, extreme or serious violence was sometimes a disqualifying factor in relation to fathers' applications for unsupervised contact or residence but even in those cases, fathers were more often than not granted unsupervised contact.<sup>61</sup> In other cases, the violence was deemed situational or 'contextual' with mothers resisting applications by fathers for more contact or even primary residence. In those cases, women risked being labelled 'unfriendly parents' even if violence and harassment continued post-separation.

Overall, this decade of Australian case law could be described as predictably in favour of abusive partners in terms of the outcomes in parenting orders. As stated by Altobelli FM, '[u]nless there was strong probative evidence about family violence, allegations did not seem to be formally linked to outcomes and in particular, the level of contact was uninfluenced by the allegations.'<sup>62</sup>

It is interesting to note that at the same time that these decisions were handed down in Australia, there was the English Court of Appeal decision of Butler-Sloss P in *Re L (a child) (contact: domestic violence) and other appeals*,<sup>63</sup> which

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57 (Unreported, Full Court of the Family Court of Australia, 21 February 2002).

58 [2003] FMCAfam 266.

59 See also *McCawley and Stewart* [2006] FLC 93-250 where the Federal Magistrate found that there was no direct abuse of the child but there was an unacceptable risk of the child being exposed to violence between the mother and her new partner. On appeal, the single Family Court judge upheld this finding.

60 [2004] FMCAfam 694.

61 Kaspiew, above n 45.

62 Tom Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (2009) 23 *Australian Journal of Family Law* 194, 195.

63 [2000] 4 All ER 609.

reflects the shift in the approach of English courts at the turn of the 21<sup>st</sup> century. President Butler-Sloss urged judges and magistrates to apply

a heightened awareness of the existence of and consequences (some long term) on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child’s carer and failure to protect the child emotionally.<sup>64</sup>

This decision including the psychiatric experts’ court reports relied upon and the United Kingdom *Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence*. This later became the foundation of the FCA’s own *Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged* (*‘Best Practice Principles’*) published in March 2009.<sup>65</sup>

### C Cases After the 2006 Amendments: Back to the Future?

As listed above, the revamped *FLA* now contains numerous provisions relating to family violence and/or child abuse. Case law is developing but is still influenced by pre-2006 decisions. Whereas some of the fears about the ‘friendly parent’ provision,<sup>66</sup> about the ‘reasonableness’ requirement in the definition of family violence,<sup>67</sup> or about ignoring the impact of past family violence on future parenting arrangements<sup>68</sup> have not been demonstrably realised, courts continue to act inconsistently even after the introduction of the optional *Best Practice Principles*. The ‘twin pillars’<sup>69</sup> under the *FLA* of the right of the child to have a meaningful relationship with both parents *and* to be safe and protected from harm remain an inherently contradictory and at times dangerous combination. As Lawrie Moloney describes, ‘when in doubt, courts are more likely to privilege the parent-child relationship over safety of the other parent or safety of the child’.<sup>70</sup> Rebuttal of the presumption of equal shared parental responsibility is reserved for extreme cases. Termination of parental contact remains rare as ‘the

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64 Ibid 616.

65 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged* (2009). These principles are not mandatory but rather provide practical guidance in cases where a notice alleging family violence and/or child abuse is alleged.

66 Kaspiew, above n 45, 136–7.

67 Brown and Alexander, above n 13, 31–2.

68 Zoe Rathus, ‘Shifting the Gaze: Will Past Violence be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?’ (2007) 21 *Australian Journal of Family Law* 58.

69 Case law frequently refers to the provisions in the *FLA* relating to children as resting on ‘twin pillars’. See, eg, *Mazorski and Albright* (2007) 37 *FamLR* 518.

70 Lawrie Moloney, ‘Violence Allegations in Parenting Disputes: Reflections on Court-based Decision Making Before and After the 2006 Australian Family Law Reforms’ (2008) 14 *Journal of Family Studies* 254, 257.

course of last resort'. Restrictions on contact with violent parents (mostly fathers) are more likely but are often temporary, gradually building up to unsupervised equal or substantial and significant time.

For the purpose of this article, I have examined over 100 cases in the Family Court at first instance and in the Full Court as well as in the Federal Magistrates Court.<sup>71</sup> There are only a handful of cases where the court has taken the extreme step of rebutting equal parental responsibility and/or denying or restricting time spent by a child with a violent parent or in a violent household. Some of these cases are detailed below. Given that over half of cases in court involve allegations of family violence and/or child abuse and that most of these are likely to be serious in nature, there is a real possibility that the relevance of family violence is being watered down and that access arrangements are taking priority notwithstanding the 2006 amendments. This begs the question: are the courts going back to the future?

### 1 Cases in 2006

The Full Court decision of *Goode and Goode*<sup>72</sup> is often cited as the authority regarding the relevance of status quo in parenting orders and the approach to be taken by a court in interim hearings. The case also involved family violence. The wife had alleged that her husband had been violent towards her during their cohabitation and during pregnancy. The husband denied the allegations. The trial judge could not make a finding as to whether the allegations were true or not but relied on section 61DA(3) and held that the presumption of equal shared parental responsibility on an interim basis should be rebutted. The Full Court agreed and made further observations about family violence, asserting that the definition of 'family violence' in section 4(1) of the *FLA* is 'broad' and would undoubtedly encompass the conduct complained of by the wife.<sup>73</sup> The appeal was allowed on other grounds.

In *Nawaqaliwa and Marshall*,<sup>74</sup> Rose J followed the relevant steps under section 60B (objects and principles), section 60CC(2) (primary considerations) and section 60CC(3) (additional considerations). His Honour found that the two children, aged seven and five years, had been exposed to family violence and conflict perpetrated by the husband and so the presumption of equal shared parental responsibility did not apply. For the purpose of the definition of 'family violence', his Honour held that the meaning of 'a reasonable person' is 'a person of ordinary prudence and intelligence who would have the fear or apprehension in the circumstances of the person who is alleged to have it in a particular case'.<sup>75</sup>

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71 Cases can be accessed on each court's website, namely Family Court of Australia <[www.familycourt.gov.au](http://www.familycourt.gov.au)> and Federal Magistrates Court <[www.fmc.gov.au](http://www.fmc.gov.au)>.

72 [2006] 36 FamLR 422.

73 Ibid 450.

74 [2006] FLC 93-296.

75 Ibid 81,024.

In *H and R*,<sup>76</sup> the trial judge found that the father had been extremely violent to the mother and only granted supervised contact to two children aged ten and six years at a contact centre. After nine such visits, the mother and children disappeared for two years. The father then sought to resume contact. The Full Court held that there be no contact whatsoever because the mother was extremely scared of the father (for good reason) and any contact would be detrimental to her parenting capacity and ability to care for the children.

## 2 Cases in 2007

In *Colson and Olds*,<sup>77</sup> the husband had subjected the wife and their three children to extreme violence and abuse throughout the marriage and after separation. The husband had convictions for assaulting the wife (and others) and for breaches of apprehended violence orders. During the course of the FCA hearing itself, he was charged with two counts of contempt of court. He sought unsupervised time with his 13 year old son. Justice Ryan found that ordering the child to spend time with his father whether supervised or unsupervised would expose him to an unacceptable risk of family violence and an inappropriate role model. It would also place pressure on the child's relationship with the mother, his primary caregiver, and undermine the mother's ability to maintain a comparatively settled home environment. The presumption of equal shared parental responsibility did not apply and no contact was granted.

The case of *Murphy and Murphy*<sup>78</sup> provides an excellent review of cases and research about family violence and child abuse. Justice Carmody examines the case law before and after the 2006 amendments. His Honour recognised that it is not always possible to achieve both objects in section 60B of promoting a meaningful relationship between a child and both parents as well as ensuring the child's safety or welfare. His Honour reviewed the social science research here and in the United Kingdom and concludes that 'there is no empirical evidence for the positive effects of contact *per se*'.<sup>79</sup>

This case also looked at section 117AB that mandates a cost order against a party who knowingly makes a false allegation or statement in proceedings. His Honour did not apply this section to the case here but stated in obiter dicta that false denials too, whether made on oath or not, would be a 'statement' within the meaning of the section.<sup>80</sup>

## 3 Cases in 2008

In *Shaw and Shaw*,<sup>81</sup> Altobelli FM ordered that the mother have sole parental responsibility of her two younger children aged nine and eight years and that there be no face-to-face time with the father. His Honour refers to some of the

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76 [2006] FamCA 878.

77 [2007] FamCA 668.

78 [2007] FamCA 795.

79 Ibid [68].

80 Ibid [219].

81 [2008] FMCAfam 1024.

social science literature and finds that different types of violence might indicate the need for different types of parenting arrangements. His Honour lists different types of violence and factors to be considered and the goals to be sought in making parenting orders as providing a context for understanding the legislation and any expert evidence.

In the case of *Sabin and Francis*,<sup>82</sup> there were allegations of violence by the father towards the mother in front of the children then aged 13 and 11 years. The children lived with the mother. She was granted sole parental responsibility and the father was granted unsupervised weekend and holiday time. Federal Magistrate Brown found that ‘parents who use violence to resolve disputes or who inflict force, on the other of a child’s parents, are not appropriate psychological role models for children’.<sup>83</sup> However, her Honour also found that family violence is not ‘homogenous’ as there are different types of family violence and that ‘not all incidents ... will be necessarily damaging to children’.<sup>84</sup>

A different outcome was reached in *Mills and Watson*.<sup>85</sup> The mother had taken the seven year old daughter from Tasmania to Victoria to live because of the father’s violence and controlling behaviour against the mother. The Federal Magistrate found the behaviour was ‘appalling’ and that the mother had genuine fears for her safety and for that of the child. However, his Honour also found that the mother could be fairly criticised under the ‘friendly parent’ provision for frustrating contact between the child and her father and thereby damaging their father-child relationship. His Honour did not order a return to Tasmania but did order equal shared parental responsibility and a regime for contact.

#### 4 Cases in 2009

In *Biss and Biss*,<sup>86</sup> the court found that the father had been violent towards the mother during the relationship but not since separation. Also, the mother made allegations of sexual abuse of one of their children but the court did not find any risk of sexual abuse. Justice O’Reilly ordered that the parties share parental responsibility and time. No order for costs was made.

In the case of *Oakley and Cooper*,<sup>87</sup> the Federal Magistrate made an order for the parents to have equal shared parental responsibility of two boys aged nine and seven years. The children were to live with the mother for nine nights each fortnight and the rest of the time with the father. The father appealed and sought more time with the children. He submitted that the mother only have time with the children on the condition that she ‘get help for her violence’. There was

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82 [2008] FMCAfam 1411.

83 Ibid [160].

84 Ibid [163]. This case reiterates her Honour’s views as expressed in earlier cases of *Clarke and Clarke* [2008] FMCAfam 622; *Grant and Terry* [2008] FMCAfam 694; *Pilcher and Schneider* [2008] FMCAfam 1092.

85 (2009) 39 FamLR 52.

86 [2009] FamCA 1234.

87 [2009] FamCAFC 133. This case was referred to with approval by the Full Court in *Amador and Amador* [2009] FamCAFC 196 which involved relocation and the ‘unacceptable risk’ test. See n 96 below.



evidence that both had used violence against each other, against the children and against other family members and friends. The mother was, however, found to have greater parenting experience and the children had half-siblings in the mother's household. The appeal was dismissed. The Full Court referred to the *Best Practice Principles* and stated that where serious allegations of violence are raised, proceedings should not be unduly truncated and opportunity should be given (especially to the Independent Children's Lawyer) to adduce evidence of appropriate protective and therapeutic programs.

In *Emerich and Emerich*,<sup>88</sup> the Federal Magistrate ordered that the children aged ten and eight years live with the mother and have no face-to-face time with the father. The father had been violent and had shown neither insight nor any desire to change his violent ways. It was decided that even supervised time would cause the children undue stress and pressure with an expectation of building up to unsupervised time.

In the case of *Cabelka and Waite*,<sup>89</sup> the Federal Magistrate granted shared parental responsibility of two children aged 14 and nine years to the mother and the maternal grandmother. The grandmother was granted primary care and the mother had the children for four nights each fortnight. The wife was in an extremely violent marriage to another man but minimised its effects. Federal Magistrate Kelly refers to social science literature about the devastating effect on children of witnessing family violence between adults and the significant emotional and developmental problems as they grow up.

The case of *Maluka*<sup>90</sup> involved allegations of serious violence by the husband against the wife during the relationship and after separation. The allegations were so serious that the wife sought to be allowed to go into permanent hiding, including clearing Tasmania and changing the identity of herself and the two children aged seven and five years. Justice Benjamin referred to the *Best Practice Principles* and gave a copy to each of the party's legal representatives during the 10 day hearing. His Honour found that the husband repeatedly used violence, dishonesty, oppression, fear, aggression and abuse. He refused to accept responsibility for his behaviour, did not acknowledge the ill effects of abuse on the wife and children and saw no need to change. His Honour ordered that the wife have sole responsibility for the children; that she be permitted to change their surnames without notice to the husband; that she be permitted to relocate to any place in Australia without notice to the husband and that the husband have no contact whatsoever with the children.

The case of *Wood and Wood*<sup>91</sup> involved a father seeking time with two children aged five and four years after not seeing them for over two years. In previous property proceedings, he had denied family violence towards the mother. In these proceedings, he admitted abusive and threatening behaviour. He was also diagnosed with a mental illness. The mother was diagnosed with post-

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88 [2009] FMCAfam 74.

89 [2009] FMCAfam 525.

90 [2009] FamCA 647.

91 [2009] FMCAfam 788.

traumatic stress disorder mostly due to the father's abuse during the relationship and since separation. She had extreme anxiety about the children's welfare and safety in his care, even if supervised. The mother was granted sole parental responsibility. The father was ordered to attend counselling in order for the possibility of supervised time to be considered. Federal Magistrate Kelly recognised that the impact of family violence 'extends beyond actual physical assault by one spouse upon the other ... children are also affected by the domestic environment where one spouse lives in a state of apprehension about the other parent's moods and aggression'.<sup>92</sup>

The case of *Gladman and Tucker*<sup>93</sup> involved a five day trial about a five year old child. There was clear evidence that the father had committed physical violence, and psychological abuse of the mother. The mother was granted sole parental responsibility. The father was granted two hours per fortnight in a contact centre. Federal Magistrate Willis found that the father's conduct and lack of insight had had a profound effect on the child and on the mother's capacity as primary caregiver.

## 5 Cases in 2010

The trial judge in *Many and Quebec*<sup>94</sup> awarded sole parental responsibility of a 10 year old boy to the mother. There was to be no face-to-face contact with the father. There was evidence of a history of domestic violence by the father against the mother witnessed by the child including a conviction for assault. The child had real memories of the violence. He was struggling at school and was genuinely afraid of the father. An expert gave evidence that there was a far greater risk of emotional or psychological damage if the child sees the father than if he does not. His Honour stated that 'it is a very serious step for a court to prevent a child from having any face to face time or direct communication with a parent. This is one of those rare cases where it is in the child's best interests that there is no such time and no such communication'.<sup>95</sup>

In *Temple and Doborovic*,<sup>96</sup> the mother alleged that the father had been violent towards her and the children and showed a predisposition to violence. The trial judge found that the incidents, though proven, were isolated and did not display a pattern of behaviour and posed no risk to a seven year old child. His Honour ordered equal shared parental responsibility.

## 6 Other Cases

There have been several other cases on family violence including child abuse decided in both the FCA and FMC. Most are by judges or federal magistrates at first instance. They involve consideration of the rebuttal of equal shared parental

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92 Ibid [146].

93 [2009] FMCAfam 1098.

94 [2010] FamCA 444.

95 Ibid [182].

96 [2010] FamCA 338.

responsibility; unsupervised or supervised time or no time at all between children and an abusive parent; the relationship between family violence and child abuse and the ‘unacceptable risk’ test.<sup>97</sup> None of these cases take the law any further. Each is determined on its facts. The general approach of the courts is clear. Although recognising the deleterious effects of exposing children to adult family violence, such violence is of limited relevance in children’s matters except in cases of extreme physical abuse where the abuse is particularised and there is strong corroborating evidence. This mirrors the approach adopted before the 2006 amendments.

#### IV SECTION 117AB COSTS ORDERS

There have been a few cases about costs under section 117AB of the *FLA*. This was a controversial section introduced in the 2006 amendments to the *FLA*. It provides that a court must order that a party pay some or all of the costs of another party to proceedings ‘if the court is satisfied that a party to proceedings made a false allegation or statement in the proceedings.

In *Sharma and Sharma (No 2)*,<sup>98</sup> costs were awarded against the wife for making false statements about child abuse; in *Conway and Clivery*,<sup>99</sup> costs were awarded against the mother for denying physical abuse of the child; in *Hogan and Halvorson*,<sup>100</sup> costs were awarded against the mother for knowingly making a false statement that the child was injured in the father’s care; in *Charles and Charles*,<sup>101</sup> false statements were made but no order for costs was made and in *Claringbold and James (Costs)*,<sup>102</sup> costs were awarded against the wife for making false statements of domestic violence against her husband.

In *Moose and Moose*,<sup>103</sup> the Full Court pointed out the distinction between false allegations and a failure to make a finding of abuse. In *Wang and Dennison (No 2)*,<sup>104</sup> the court found that the mother had ‘purposefully conditioned the children to believe that they had been abused by the father, when they had not, and to have done so in order to cut the father out of the lives of the children’.<sup>105</sup> No order for costs was made.

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97 This test was formulated by the High Court of Australia in *M and M; B and B* (1988) 166 CLR 69. 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. Subsequent cases have expanded this test to apply to other forms of abuse such as physical and emotional/psychological abuse. The standard of proof is the *Briginshaw* standard (as formulated by the High Court in *Briginshaw* (1938) 60 CLR 336) and now codified in s 140 of the *Evidence Act 1995* (Cth). See also Renata Alexander, ‘Family Law Changes: Privatising Family Violence’ (2006) *Domestic Violence and Incest Resource Centre Quarterly* 6, 9.

98 [2007] FamCA 425.

99 [2007] FamCA 1306.

100 [2007] FMCAfam 1131.

101 [2007] FamCA 276.

102 [2008] FamCA 57.

103 [2008] FamCAFC 108.

104 [2009] FamCA 1251.

105 *Ibid* [3].

It was predicted that this provision would deter women from reporting violence given the difficulties of proof and corroboration.<sup>106</sup> This may not have eventuated as the standard of proof has been held to be the higher civil standard pursuant to section 140 of the *Evidence Act 1995* (Cth).<sup>107</sup> Current case law at first instance suggests that the party must be shown to have deliberately misled the court rather than just making the allegation or denial recklessly or without belief.<sup>108</sup> This is a significant hurdle and may explain the relatively few orders for costs made.

The FLC report<sup>109</sup> recommends clarification of section 117AB as ‘there is no evidence that the section has achieved its purpose in relation to false allegations of family violence’.<sup>110</sup> The Chisholm review<sup>111</sup> recommends repealing section 117AB and amending the general costs provision in section 117 to direct the court to consider whether any person ‘knowingly’ gave false evidence in proceedings.<sup>112</sup>

I do not support either of these recommendations. Section 117AB should be repealed. Together with the ‘friendly parent’ provision, this section remains a potent deterrent to women raising incidents of family violence thereby placing children and their primary caregivers in ongoing dangerous situations.

## V REPORTS AND REVIEWS

Each of the four recent reports makes different contributions to the discourse about family violence. According to the AIFS evaluation published in 2009, the evidence is that post-reform, parenting arrangements where there are safety concerns are taking longer to resolve and are utilising more services. Of concern is the finding that the rate of shared care time arrangements amongst parents with safety concerns was *no* different to that among parents without safety concerns.<sup>113</sup> This is no doubt due to the co-existing but conflicting ‘twin pillar’ philosophies of protecting children from harm yet maintaining a meaningful relationship with the non-custodial parent.

In the review by the FLC in 2009, it is suggested that the practice of vague non-particularised allegations of violence identified in an earlier pre-reform study continues.<sup>114</sup> Legal decision-making was often taking place ‘in the context of widespread factual uncertainty’.<sup>115</sup> The FLC recognises potential reasons for

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106 For example, Alexander, above n 97.

107 The standard of proof is a higher civil standard whereby the court may take into account the nature of the subject matter and the gravity of matters alleged.

108 *Charles and Charles* [2007] FamCA 276 (Cronin J).

109 Family Law Council, above n 26.

110 *Ibid* [8.2.3], Recommendation 11.

111 Chisholm, above n 24.

112 *Ibid* [3.4], Recommendation 3.2.

113 Kaspiew et al, above n 25, 235–6, 253.

114 Family Law Council, above n 26, 34–5.

115 Moloney et al, above n 17, 97.

vague written allegations such as the fear of escalation and conflict; the desire to settle quickly; serving as a lever for settlement or else just the ‘normalisation’ of violence in married life.<sup>116</sup> The FLC recommends further research into this problem as well as establishing formal expert panels to educate practitioners and the courts about the types and effects of family violence.

The Chisholm review published in 2009 is the most controversial as it recommends changes to the legislation and to the approaches undertaken by the courts.<sup>117</sup> Some of the suggestions such as simplification of the legislative pathway are constructive. Other suggestions such as removing the ‘friendly parent’ provision in section 60CC(3)(c) and the costs provision in section 117AB should be adopted.

For the purposes of this article, however, it is worth noting Chisholm’s recommendation that family violence be removed as both a primary and an additional consideration in section 60CC. According to Chisholm, family violence is given ‘undue prominence’ and ‘there seems to be no proper reason to single it out among matters that might threaten a child’s safety – they include, for example, parenting that is compromised because of such things as mental ill-health or substance abuse’.<sup>118</sup>

In my opinion, this is flawed reasoning. First, as stated in the introduction, more than half of all cases litigated involve allegations of family violence and/or child abuse. The number of cases that involve mental illness or drug abuse is comparatively miniscule. Secondly, it is well-established that violence can cause long-lasting and sometimes irreparable harm to all aspects of a child’s future wellbeing and development. To state that family violence is given ‘undue prominence’ is to deny the wealth of social science and medical literature and knowledge that has taken decades to inform decision-makers about the impact and effects of family violence on parenting and children’s futures.<sup>119</sup> Survivors of family violence have been silenced for too long and Chisholm’s recommendation would be retrograde to say the least, reminiscent of early decisions discussed above truly back to the future. Thirdly, compulsory family dispute resolution procedures weed out many cases which either resolve at that stage or soon after through negotiation. Cases that require litigation and possible judicial determination are the worst cases in terms of alternative dispute resolution being unsuccessful or inappropriate and/or involving serious allegations.

Finally, in the consultation paper released in April 2010,<sup>120</sup> the ALRC and the NSWLRC refers to the limited practical effect of family violence allegations on parenting orders. The paper cites three reasons which were raised in earlier reviews. First, a party may not raise allegations of family violence for fear of exacerbating the situation or being regarded as an ‘unfriendly parent’ or risking

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116 Family Law Council, above n 26, 35.

117 Chisholm, above n 24.

118 Ibid 139.

119 For example, the *Best Practice Principles* were only published in March 2009. See Family Court of Australia, above n 65.

120 ALRC and NSWLRC, above n 27.

an adverse costs order. Secondly, there is little supportive evidence to prove allegations of family violence. Reports to police or state protection orders are of limited evidentiary value. Thirdly, judicial officers are traditionally reluctant to end or restrict parental contact except in extreme cases.<sup>121</sup> The ALRC and the NSWLRC paper makes no recommendations in this regard and simply endorses the comments of earlier evaluations.

## VI CONCLUSION

In a paper published in June 2006 on the eve of the introduction of the 2006 amendments,<sup>122</sup> I stated that the system then operating under the *FLA* did not work well to protect those affected by family violence or child abuse. I predicted that the reforms would only make the situation worse.

This article demonstrates that some of the 2006 reforms such as compulsory family dispute resolution; a presumption (albeit rebuttable) of shared parental responsibility; the conflict between protecting children and promoting their right to meaningful involvement with the violent parent; the ‘friendly parent’ provision and the spectre of an adverse costs order all serve to discourage raising and particularising allegations of family violence. As a result, many cases involving vulnerable mothers and children enduring family violence and child abuse are not adequately resolved through alternative dispute resolution methods and/or legal proceedings.

The challenge for practitioners and decision-makers alike is to be informed and educated; to particularise incidents of family violence and to draw on experts as to the dynamics of family violence and child abuse and the effects on caregivers and their children. If that is achieved, courts will be more likely to make careful, sensitive and for the most part protective and appropriate parenting orders.

It is acknowledged that ‘there is a real danger in approaching family violence on a “one size fits all” basis’.<sup>123</sup> However, differentiating between different types of family violence, the context, the frequency, the severity and the pattern of behaviour is a retrograde step. As demonstrated by the analysis above, it has taken over three decades for the family law courts to recognise that family violence between parents is an endemic, pernicious problem which affects parenting capacity and children’s development *and* which requires the making of orders protecting children and their caregivers. That is, the gap between theory and practice has narrowed and there is a real risk of it widening once again.

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121 Ibid 360.

122 See Alexander, above n 97.

123 Altobelli, above n 62, 201.